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Radhakrishen M Khemaney v Lachabai Murlidhar

[1960] 1 EA 1 (PC)

Division:	Privy Council
Date of judgment:	28 January 1960
Case Number:	1/1959
Before:	Lord Tucker, Lord Denning and Mr LMD de Silva
Sourced by:	LawAfrica
Appeal from:	E.A.C.A. Civil Appeal No. 87 of 1957 on appeal from H.M. Supreme Court of Kenya – Mayers, J.

[1] Appeal – Appellate court ordering retrial – Inadequate material before appellate court to enable it to reach sound conclusion – Whether order for retrial justified – Whether discretion of appellate court exercised judicially – Eastern African Court of Appeal Rules, 1954, *r.* 76 (1).

Editor's Summary

In an action by the respondent on behalf of herself and other dependants of her deceased husband against the appellant under the Fatal Accidents Ordinance, 1946, the respondent was awarded £6,625 as general damages. On cross-appeals the Court of Appeal held that there has been misdirection in assessing damages and that in the evidence there was insufficient material upon which an appellate court could come to a sound decision on damages and ordered a retrial. On appeal against the order for retrial it was argued that the Court of Appeal should have come to the best conclusions possible upon the inadequate material, however unsound those conclusions might be.

Held –

(i) courts of appeal in ordering a new trial should always bear in mind that a new trial provides a party with judicial advice on which he can remedy such defects as existed in his case when originally presented.

(ii) in each case it is for the appellate court, bearing in mind the general undesirability of a new trial, to decide what in the particular circumstances it should do.

(iii) in the circumstances of this case the Court of Appeal had exercised judicially its discretion to order a new trial under r. 76 of the Eastern African Court of Appeal Rules, 1954.

Radhakrishen M. Khemaney v. Lachabai Murlidhar, [1958] E.A. 268 (C.A.) affirmed.

Appeal dismissed.

Cases referred to in judgment:

(1) *Brown v. Dean*, [1910] A.C. 373.

(2) *Grand Trunk Railway Company of Canada v. Jennings* (1888), 13 App. Cas. 800.

Judgment

De Silva: This action was brought in the Supreme Court of Kenya by the respondent who is the widow of one Murlidhar Doulatram Mahbubani on behalf of herself and other dependents of her deceased husband under the Fatal Accidents Ordinance, 1946, of Kenya. She claimed damages on the ground that her husband's death was caused by the appellant's negligence. The appellant admitted the allegation. The Supreme Court awarded her £6,625 as general damages. It dismissed a claim for special damages. There was an appeal and a cross-appeal to the Court of Appeal for Eastern Africa. That court (Corrie, Justice of Appeal with whom Briggs, Vice-President and Forbes, J.A., agreed) ordered a retrial in the following terms:

> "I would therefore order that the judgment and decree of the Supreme Court, so far as it relates to the assessment of the total sum of general damages, be set aside; and that issue be re-tried. The dismissal of the claim for special damages should stand, and also the order for apportionment of general damages in the sense that, that whatever sum is awarded on the re-trial, should be divided in the same proportions and between the same persons as previously ordered."

For reasons which follow their lordships are of opinion that this order should stand. It also made an order as to costs which will be dealt with later.

No question has arisen on this appeal with regard to the dismissal of the claim for special damages and the apportionment of the general damages.

The fatal accident occurred on July 1, 1956, when the deceased was being carried as a passenger in a car owned and driven by the appellant. The deceased was thirty-seven years old at the time and employed as the manager of the Mombasa branch of a firm trading under the name of B. Choitram.

The learned trial judge has traced in detail the progress made by the deceased since he first entered the employ of Choitram in 1945 at their Nairobi branch on a salary of Shs. 4,500/- per year plus 25 per cent. of the profits of another branch of which he was a partner. It is sufficient here to say that he served at various branches and after a series of rises in salary at the time of his death in 1956 he was receiving Shs. 60,000/- a year and the profits from a share of the partnership business of the firm at Dar-es-Salaam estimated by the learned judge to bring him an income of £1,200 a year.

The learned trial judge found upon the evidence that at the time of his death

> "the basic figure expended by the deceased exclusively upon his dependents was in the order of £2,150 per annum."

This finding was affirmed by the Court of Appeal. He then proceeded to assess the present value of the benefit of this allowance by adopting a multiplier of fifteen and arrived at the figure of £32,250. As to

assets he took the view that

> "the only asset from which his dependents are likely to benefit is his interest in the Dar-es-Salaam partnership"

and proceeded to assess the value of that asset thus:

> "In the year 1955 the Dar-es-Salaam partnership earned approximately £6,000. His income from that source in the year 1955 would therefore have been approximately £960. In the year 1956, however, the earnings of that partnership were approximately £9,000 and his income from that source would therefore in that year have been £1,440. Taking these figures, which are the only figures available to me it would therefore appear that his average annual income from the Dar-es-Salaam partnership was round about £1,200. The capital value of this income must in accordance with the principles already set out, be deducted from the capital sum which would otherwise form the basis of the computation of damages. It seems to me not unreasonable to take fifteen years purchase as representative of the capital value of an annual income from this source, the more especially having regard to the wide fluctuation which is shown between the year 1955 and the year 1956. On this basis the basic capital of £32,250 must be reduced to £14,250."

The "principle" referred to in this passage was that in estimating the damage suffered by the respondent a deduction had to be made from the sum of £32,250 (mentioned above)

> "in respect of any benefit accruing to the dependents consequent upon the death of the deceased."

He then deducted a further £1,000 for

> "the benefit which the dependents will receive from having a lump sum rather than an annual income"

and also for certain considerations relating to income tax which he discussed. The learned trial judge then proceeded

> "It remains only to determine the extent to which, if at all a further deduction must be made consequent upon the fact that the deceased was living at a rate greatly in excess of his income",

a fact which had emerged from the evidence. He said quite correctly

> "It seems to me that his extravagance can only be material if and in so far as it may be regarded as affecting the likelihood of his having been able, had he survived, to continue to provide for his dependents, or the scale upon which he would have so continued to provide."

He then said:

> "The plaintiff's brother-in-law in cross-examination said that during the years 1954 and 1955 the deceased's aggregate drawings from the firm were £8,600, an amount very considerably in excess of his earnings, and his profits from the firm, although in the absence of evidence as to the profits made by the Nakuru Branch during those years, it is impossible for me accurately to compute the amount by which the deceased's drawings exceeded his income in those years. Between 1954 and the date of his death his indebtedness to the firm increased by some Shs. 31,000/- and therefore it would seem that his expenditure exceeded his income by somewhere about £1,500 per annum. Apart from the evidence that he 'lived like a lord and spent like a lord', there was no material before me at all to indicate what the deceased had done with these very considerable sums of money, as he had no car and according to his widow did not spend a lot upon drink or clubs, and according to his brother-in-law had neither a bank account nor investments of any description other than his interest in the firm."

With regard to the reference to the "Nakuru Branch" it should be explained that the deceased was entitled to a share of the profits to the end of 1955 of a branch of the business at Nakuru. There was no evidence of the amount made as profits at that branch. Weighing such meagre material as had been placed before him he finally concluded:

> "I therefore assess the appropriate deduction to be made from the capital sum, as already determined, consequent upon the probable effects of the deceased's extravagance upon his future ability to provide for his dependents at 50 per cent. I therefore award as damages in this suit the sum of £6,625."

The Court of Appeal set aside the judgment and ordered a new trial chiefly on two grounds. The first related to the question of extravagance. It will have been noticed that the learned trial judge made a deduction of 50 per cent. for extravagance from a sum arrived at after giving effect to all the other factors found by him to be relevant. With regard to this the Court of Appeal said:

> "I am clear that in adopting this procedure the learned judge misdirected himself; and that the time when he should have taken into account the future effect of the deceased's extravagance was immediately after he had calculated the actual allowance to the dependents at £2,150."

Their lordships agree. The Court of Appeal further observed:

> "At the same time, in view of the evidence that the deceased's income had been rising rapidly, I am not satisfied that the learned judge's assessment of the deduction appropriate to the deceased's extravagance was entirely justifiable, nor am I satisfied that if the learned judge had dealt with the question of the deceased's extravagance at the point at which I have held he should have done, he would have made so great a reduction as 50 per cent. I am therefore of opinion that this matter should go back for further consideration."

Their lordships are of opinion that these observations are of great weight and that the questions involved need careful consideration at the next trial.

On the question of extravagance the Court of Appeal said that it was

> "satisfied that on the evidence the learned judge was entitled to hold that the deceased would have been compelled to make a reduction in his scale of living and that would affect his allowance to his dependents."

Their lordships agree. It is however to be observed that as stated by the learned trial judge (see above) there was no material before him to indicate what the deceased had done with the money overdrawn by him. Counsel for the respondent suggested in the argument before their lordships that at the trial the question of extravagance arose only after she had given evidence and that she had not been asked whether she could throw any light on the question. She may at the second trial give evidence on this point and other evidence may be forthcoming which would help to arrive at a conclusion whether the expenditure was likely to recur or not. The accounts produced indicate that in the first six months of 1956 the deceased did not increase his indebtedness to the firm but actually reduced it by a small amount; but this is only one out of many points which will have to be considered. There was evidence which appears to have impressed the courts in Kenya that "he lived like a lord and spent like a lord". This may have accounted in whole or in part for the "extravagance". If so the question would arise, to be answered with such degree of certainty as the evidence would permit, whether this mode of living would have been persisted in.

A second ground which influenced the Court of Appeal to order a new trial was the manner in which an assessment of the assets possessed by the deceased at the date of his death had been made. It said:

> "I am of opinion that the learned judge erred in treating the share of the partnership separately from the remainder of the deceased's estate, and consider that he should have endeavoured to ascertain the value of the estate as a whole which would pass to the deceased's dependents after discharge of the deceased's liabilities. Certainly he was not justified in assuming that the dependents would continue indefinitely to receive £1,200 a year from the Dar-es-Salaam partnership. This matter also in my opinion must go back to the Supreme Court for further consideration."

It also said:

> "The evidence before the learned judge was not satisfactory, partly because the partnership deed was not produced and partly because the administration of the deceased's estate was not complete."

Their lordships agree. As stated by the learned trial judge "the only figures available" to him for estimating the share of profits derivable from the partnership were the profits for 1955 and 1956. These themselves differed widely. Much more material should be available upon which a better estimate could be made.

The appellant, while arguing before their lordships that the amount of damages awarded should be reduced, contended that in any event the order for a new trial should not be allowed to stand. It was submitted that the order for a new trial was very similar to an order for fresh evidence and that an order for a new trial frequently provided, and would provide in this case, a party with judicial advice on which he could remedy such defects as existed in his case as originally presented. There is much force in the submission and a Court of Appeal should bear it in mind when considering whether an order for a new trial should be made. Another general observation to be borne in mind is the remark made by Lord Loreburn, L.C., dealing with a case in which a rehearing had been ordered. In *Brown v. Dean* (1), [1910] A.C. 373 he said

> "When a litigant has obtained a judgment in a Court of Justice whether it be a County Court or one of the High Courts he is by law entitled not to be deprived of that judgment without very solid grounds."

But their lordships have no reason to think that these considerations were not present in the mind of the Court of Appeal. Rule 76 of the Eastern African Court of Appeal Rules, 1954, is in the following terms:

> "76.(1) Except as hereinafter provided the court shall have power to order that a new trial be had of any cause or matter tried by a superior court in the exercise of its original jurisdiction."

Then follow two sub-rules which have no bearing on the present case.

There is here an unfettered discretion vested in the court which of course must be judicially exercised. In this case both the appellant and the respondent appealed to the Court of Appeal. Neither side wanted the judgment as it stood to be affirmed. The Court of Appeal was convinced that the judgment should not stand but had not the material before it upon which it could itself come to sound conclusions. It was argued that the court should have come to the best conclusions of fact possible upon the inadequate material, however unsound those conclusions might possibly be. Their lordships do not agree. In each case it is for the court, bearing in mind the general undesirability of a new

trial, to decide what in the particular circumstances it should do. There is nothing in this case which convinces their lordships that the discretion of the Court of Appeal has not been judicially exercised.

Upon a review of the case as a whole their lordships are of opinion that the fresh trial which has been ordered should not be limited in any way. Parties should be free to lead whatever evidence they wish to place before the court and to raise all points they desire to make. What has to be found is the present value of the future benefits which the dependents would have received during the lifetime of the deceased if he had not been killed less the value of the benefits the dependents have received as a result of the death which they would not otherwise have received. This case would appear to fall into the category of cases in which, in the words of Lord Watson in *Grand Trunk Railway Company of Canada v. Jennings* (2) (1888), 13 App. Cas. 800 at p. 804:

> "the extent of the loss depends upon data which cannot be ascertained with certainty, and must necessarily be matter of estimate, and, it may be, partly of conjecture."

But in order that conjecture may be reduced to a minimum all available relevant material should be placed before the court of trial including if possible the evidence of an "actuarial nature" referred to by the learned trial judge.

It is unfortunate that a new trial has become necessary through the lack of sufficient material for a sound decision. Their lordships are of opinion that the order as to costs of the first trial should be set aside and that the trial judge at the second trial should make an order not only as to the costs of the trial before him but also of the first trial after considering how the absence of relevant material came to arise.

For the reasons which they have given their lordships will humbly advise Her Majesty that the appeal be dismissed subject to a variation in the orders for costs. The order as to the costs of the hearing before the Court of Appeal will stand. The order for costs of the hearing before the Supreme Court of Kenya will be set aside and a fresh order will be made with regard to those costs by the next court of trial. The appellant must pay the costs of this appeal.

Appeal dismissed.

For the appellant:
Waltons & Co., London
J. T. Molony, Q.C., and *Laughton Scott*

For the respondent:
Knapp-Fishers & Blake & Redden, London
B. J. M. MacKenna, Q.C., J. G. Le Quesne and *J. K. Winayak*

Khatijabai Jiwa Hasham v Zenab D/O Chandu Nanji
[1960] 1 EA 7 (PC)

Division: Privy Council

Date of judgment: 19 January 1960

Case Number: 29/1957

Before:	Lord Tucker, Lord Denning and Mr LMD De Silva
Sourced by:	LawAfrica
Appeal from	E.A.C.A. Civil Appeal No. 21 of 1956 on appeal from H.M. Supreme Court of Kenya – Harley, Ag. J.

[1] Contract – Anticipatory breach – Whether ground for ordering specific performance.

Editor's Summary

A contract for the sale of certain premises by the appellant to the deceased husband of the respondent provided for completion of the transaction within six months. The contract was repudiated by the appellant almost as soon as she had signed it and an action for specific performance was begun by the respondent's husband before the date fixed for completion in which an order for specific performance of the contract was made and subsequently affirmed on appeal. On further appeal it was contended inter alia that the action was instituted prematurely, that there was no concluded contract between the parties, that the contract was based on mistake, that on the facts a defence of 'non est factum' had been established and that the case was not one in which a court should in the exercise of its discretion order specific performance.

Held –

(i) the action for specific performance was not instituted prematurely and the fallacy of the submission that it was so consisted in equating the right to sue for specific performance with a cause of action at law.

(ii) the submission that there was no concluded contract between the parties had neither been pleaded nor argued in the courts below nor referred to in the appellant's case and could not now be entertained or considered as relevant to the exercise of discretion in ordering specific performance.

(iii) the appellant had not made out a case for interfering with the findings of fact by the trial judge and the Court of Appeal, and on those findings her claim for rescission on the ground of mistake could not succeed.

(iv) the defence of non est factum was not open to the appellant since no false statement by anyone, other than that relied upon in support of the allegation of fraud, was alleged or proved and the alleged misrepresentation by the respondent had been rejected.

(v) the discretion exercised by the trial judge and approved by the Court of Appeal in ordering specific performance of the contract was properly exercised.

Appeal dismissed.

Cases referred to in judgment:

(1) *Leeds Industrial Co-operative Society Ltd. v. Slack*, [1924] A.C. 851.

(2) *Roberto v. Bumb* (1943), 2 D.L.R. 613.

(3) *Roy v. Kloepfer Wholesale Hardware and Automotive Co. Ltd*. (1951), 3 D.L.R. 122.

(4) *Marks v. Lilley*, [1959] 1 W.L.R. 749; [1959] 2 All E.R. 647.

Judgment

Lord Tucker: This is an appeal from a judgment of the Court of Appeal for Eastern Africa of March 15, 1957, affirming the judgment of the Supreme Court of Kenya dated January 13, 1956, whereby specific performance by the appellant of a contract in writing dated February 19, 1954, between the appellant and Haji Gulamhussein Harji for the sale by the appellant of a plot of land in Nairobi was decreed at the suit of the said Harji.

The respondent is the widow and executrix of Harji, since deceased. The parties to the proceedings in the courts in East Africa will be referred to as plaintiff and defendant.

The contract sued upon was for the sale by the defendant of a plot No. 209/58/1 measuring 2.04 acres or thereabouts, together with all the buildings situate on Sclaters Road, Nairobi, in complete vacant possession for the sum of Shs. 100,000/- payable as to Shs. 15,000/- on the execution of the contract and the balance on presentation of documents of title to be executed by both parties within six months from the date of the agreement. This contract was signed by the defendant on February 19, 1954, but was repudiated by her within a few minutes of signature on the ground that she had never agreed to sell the whole two acre plot but only an area of half an acre.

On July 2, 1954, between six and seven weeks before the last day for completion, viz., August 19, the plaintiff issued his plaint.

It was contended on behalf of the defendant that the plaint was issued prematurely on the ground that the plaintiff having elected to affirm the contract (instead of treating the anticipatory breach as putting an end to it so far as the future obligations of either party are concerned), kept it in being for all purposes, and the anticipatory breach by the defendant (which would, if accepted as a breach, have afforded a cause of action for damages) will not avail the plaintiff to support a claim for specific performance. He must wait until there has been a failure to perform the contract within the period fixed thereby, notwithstanding that the defendant has previously intimated her refusal to do so.

No authority for this proposition was cited, but it is true to say that there is no express decision in any English case to the contrary. Their lordships are of opinion that the fallacy of the submission consists in equating the right to sue for specific performance with a cause of action at law. In equity all that is required is to show circumstances which will justify the intervention by a court of equity. The purchaser has an equitable interest in the land and could get an injunction to prevent the vendor disposing of the property. The order for specific performance often falls into two parts. The first can be of a declaratory nature and the second contain consequential directions. The first of the forms in Volume 3 of the Seventh Edition of Seton’s Judgments and Orders at p. 2136 is clearly suitable to a case where the time for performance may not have arrived even at the date of the order, but in such a case in the event of subsequent non-performance the court would not require the issue of a fresh writ before making the consequential directions for performance. The court will not, of course, compel a party to perform his contract before the contract date arrives, and would give relief from any order in the event of an intervening circumstance frustrating the contract. Their lordships cannot accept as conclusive the sentence relied upon by counsel for the defendant at p. 866 in the dissenting speech of Lord Sumner in *Leeds Industrial Co-operative Society Ltd. v. Slack* (1), [1924] A.C. 851 which was a case dealing with recovery of damages in lieu of an injunction, and which did not call for decision of the question now under discussion. On the other hand the view expressed above accords with the decisions in the Canadian

cases of *Roberto v. Bumb* (2) (1943), 2 D.L.R. 613, and *Roy v. Kloepfer Wholesale Hardware and Automotive Co. Ltd*. (3) (1951), 3 D.L.R. 122, affirmed in (1952), 1 D.L.R. 158 and by the Supreme Court in [1952] 2 S.C.R. 465, and with the views expressed in the

American Re-Statement of the Law of Contract Vol. 2 s. 360 as well as in Williston on Contracts Vol. 5 p. 3708 and p. 3709. And in Vol. 2 of the Fourth Edition of Williams on Vendor and Purchaser the following passage occurs at p. 1001:

> "It has been mentioned that, as a rule, either party to a contract to sell land is entitled to sue in equity for specific performance of the agreement. This right is, in general, founded on a breach of the contract, but not in the same manner as the right to sue at law. The court has no jurisdiction to award damages at law except in case of a breach of the contract; while the equitable jurisdiction to order an agreement to be specifically performed is not limited to the cases in which at law damages could be recoverable."

Support for this view is also to be found in the reasoning of Vaisey, J., in *Marks v. Lilley* (4), [1959] 1 W.L.R. 749 at 752 although the actual decision was concerned with a question of costs. Their lordships accordingly agree with the decision of the Supreme Court of Kenya and the Court of Appeal for Eastern Africa in rejecting this contention and holding that there is nothing in the Indian Contract Act to compel acceptance of the contrary view.

The next submission on behalf of the defendant was that in any event there was no concluded contract between the parties because the contractual document relied upon was never signed by the plaintiff or executed by him before the defendant repudiated it. This point was never pleaded, is inconsistent with the action of counsel for the defendant in accepting the burden of proof at the trial and making the opening speech, does not appear to have been argued in the courts below, is not dealt with in any of the judgments and does not appear in the appellant's case or reasons. In these circumstances their lordships cannot entertain it nor can they give effect to it as relevant to the exercise of discretion in ordering specific performance since there may have been circumstances, which have never been investigated, from which it could be inferred that the signature of both parties to the document was not required.

Their lordships will now turn to the defences relied upon at the trial, the success or failure of which depend upon the ascertainment of the facts.

The principal defence was the alleged fraudulent misrepresentation by the plaintiff to the effect that an option to purchase given by the defendant to the plaintiff on February 18, 1954, and the contract in writing dated February 19, 1954, related to a half-acre plot (which she had previously told the plaintiff she was willing to sell) whereas in fact these documents referred to a two-acre plot, and that the said documents written in English, which language she did not understand, were never translated or read over to her in Gujerati. Her case was that at a meeting with the plaintiff in a bazaar in Nairobi early in February, 1954, at which her son Sadru Din was present, she had told the plaintiff that she wished to sell land comprising half an acre with a building on it, being one portion out of four sub-divided plots next to the Mayfair Hotel for Shs. 100,000/-. Sadru Din gave evidence to the like effect. It was proved in evidence that Sadru Din was not in Nairobi at the date in question and the trial judge found he had given false evidence and the defendant had suborned him to commit perjury. These findings are not now disputed. The plaintiff's version of this conversation, which was accepted by the trial judge, was to the effect that the defendant had told him she had land over two acres with a building on it in Sclaters Road which she wished to sell and for which she wanted Shs. 100,000/-. He asked for an option at this price for one week, but she was only willing to give him one for three days. They agreed to meet next day at about 9 a.m. when she would give him the option. The meeting took place and the defendant signed the option which appears at p. 377 of the record. It is headed:

> "Re my house on Slater Road adjoining Mayfair Hotel, Nairobi" and proceeds
>
> "In consideration of Shs. 5/- five I hereby give you option to purchase the above property for Shs. 100,000/- net one hundred thousand. The above property is over 2 two acres and sub-division is completed. The house of above property will be given in vacant possession with all vacant land contain
>
> "This option is good up to 22nd 1954 up to 1 p.m. to you or your nominis."

The defendant's eveidence was that this document was never read over or translated to her. She signed and her signature was witnessed by her cousin, a girl aged about seventeen, called Amina Hasham. Amina gave evidence to the same effect.

The plaintiff's case was that the option was read over to her by him and also by Amina who knew English. The next day February 19, 1954, the agreement sued upon was signed at the office of a Mr. Ishani, an advocate of the Supreme Court, who had prepared the contract on the plaintiff's instructions. The defendant's case was that as a result of a telephone message from a Mr. Sultan she went to his shop where she found the plaintiff and from there, all three of them went to Mr. Ishani's office. Ishani asked her whether the plot belonged to her alone and whether the option was binding on her, to both of which questions she answered yes. Thereupon Ishani wrote something on a piece of paper and sent it out to be typed. Two or three typed papers were brought back and Ishani told her to sign one, which she did. She said she wanted Shs. 25,000/- down in cash, the plaintiff said he would pay Shs. 15,000/- and then went up to Shs. 20,000/-, when Ishani intervened and said Shs. 81,000/- is due to the Diamond Jubilee Trust on mortgage, to which she replied that she would make her own arrangements with the Diamond Jubilee Trust. At this point in the discussion Mr. Sultan remarked, "Oh, two acres are mentioned here", she said she was struck with horror and tore up the document she had signed. Her version was supported by Sultan who was called as a witness for her. Ishani was also called by the defendant to say he never read or explained the document to her. He and Sultan also corroborated her evidence as to the conversation immediately prior to her tearing up the document.

The plaintiff's evidence was to the effect that before the defendant signed the agreement Ishani, who is the defendant's nephew, had read and explained the document to her. He said that the defendant objected to the cash payment of Shs. 10,000 mentioned in the contract before she signed it when Ishani reached that part of the agreement as he read it to her in Gujerati. Ultimately she agreed to Shs. 15,000/- and a cheque for this amount was made out and handed to her. She then signed the agreement. After signing she enquired whether he had re-sold the plot to Hashambhai. On being told that Hashambhai was the sub-purchaser she flew into a rage and tore up the document. On the same day Mr. Akram an advocate wrote on her instructions a letter setting out her version as outlined above of the circumstances in which she had torn up the document and charging the plaintiff with fraud. Also on the same day a letter was written by Mr. Khanna the plaintiff's advocate which contained the following paragraph:

> "After signing the agreement it appears you changed your mind, putting forward the excuse that you were only selling the house and part of the land and not the whole of the 2.04 acres, and tore up the stamped and signed agreement and went away, declining to go through with the completion of the transaction."

This letter is, of course, strong corroboration of the defendant's version of the reason she gave for acting as she did. The plaintiff, however, in his evidence persisted in his version and in the course of his cross-examination gave evidence which was obviously false and from which he ultimately resiled only in reply to a leading question in re-examination when he was re-called more than two months after his previous denials. It is now common ground that his earlier answers on this subject were deliberate falsehoods.

Out of this conflict of evidence and with the plaintiff and defendant both having given what is now admitted to have been false evidence on parts of their cases the trial judge had to be satisfied that the defendant, who had accepted the onus, had made out her case for rescission on the ground of the plaintiff's misrepresentation as to the contents of the documents which she had signed. The judge having seen the witnesses in the box and having had the advantage, denied to an appellate tribunal, of forming an estimate as to their honesty and reliability said in dealing with the events of February 19:

> "I regret to say that I cannot trust any account of what then took place except the account of the plaintiff."

He did not give his reasons for rejecting the evidence of the defendant and her witness but he had found that she had suborned one of her witnesses to commit perjury and must have felt that he could put little reliance on her other witnesses.

The Court of Appeal for Eastern Africa considered that the trial judge had not attached sufficient importance to the untruthful answers given by the plaintiff with regard to the reason given by the defendant for tearing up the agreement on February 19. They accordingly proceeded to re-examine the whole of the evidence in detail and to form their own assessment thereon with the result that they arrived at the same conclusion as the trial judge.

Their lordships have been invited to go through the same process with a view to reaching the conclusion that although fraud had not been proved, none the less the court should have given the defendant relief on the ground of mistake.

There are certain features in the case which have given their lordships some anxiety. The most important of these are the following:

1. In a case of this nature a court will always give great weight to the contemporary documents, and the two letters, one from the defendant's advocate and the other from the plaintiff's, both show – as is now admitted – that the reason given by the defendant for tearing up the document was that which she had given in evidence. Whether or not it was the real reason or only her excuse, of course, remains to be decided.
2. The very unusual fact of a party tearing up a document almost immediately after having signed it.
3. The fact that the defendant would on the evidence admittedly have been out of pocket on the basis of the agreement of February 19, 1954.
4. That the document was written in a language which she could not read.

Their lordships have accordingly reviewed the whole of the evidence in the light of the above considerations and having regard to the pleadings. In this connection reference must be made to para. 11 of the defence. It reads as follows:

> "In the further alternative the agreement sued upon was entered into by mistake in that the terms thereof have been drawn up so as to contravene the intention of the parties by purporting to refer to the whole of the plot 58/1 L.R. 209 as aforesaid, whereas as it should have referred to the said portion of land only."

This is a plea of mistake common to both parties which was not the case made by the defendant. Treating it, however, as a plea of unilateral mistake it could, in the absence of fraud, only afford ground for rescission if the mistake was induced by some innocent misrepresentation made by or on behalf of the plaintiff or by some misleading conduct on his part. In the present case the vital issue was whether the option and agreement were or were not read over and explained to the defendant. If she failed to satisfy the court on this issue there could be no ground for mistake on her part attributable to any conduct on the plaintiff. On the other hand, if she succeeded it is difficult to see how the plaintiff could have escaped a finding of fraud. It is for this reason that their lordships consider that the trial judge was right in saying that the issue of mistake could carry no weight in view of the facts as he found them.

As stated above, their lordships have carefully considered the whole of the evidence with the aid of the detailed examination and analysis thereof by counsel on each side and have arrived at the conclusion that the defendant has not made out a case for interfering with the findings of fact by the trial judge and the Court of Appeal, and that on these findings her claim for rescission on the ground of mistake cannot succeed.

It was also contended for the defendant that on the facts a defence of non est factum had been established. This plea, which means that the document is a nullity, requires proof of a false statement as to the nature as distinct from the contents of the document. This distinction is often a question of degree, but in the present case such defence is not open to the defendant since no false statement by anyone, other than that relied upon in support of the allegation of fraud, was alleged or proved, and the alleged misrepresentation by the plaintiff has been rejected. It accordingly is not necessary to decide whether the difference between the two acres and half an acre in the circumstances of this case would have been a difference as to the nature or contents of the document.

It should be stated that other defences were raised in the pleadings to which it is necessary to make passing reference. One was that the defendant never dealt with the plaintiff as a principal but merely employed him as her agent to find a purchaser. This issue was decided against her and is not now relied upon. A defence of undue influence was abandoned at the trial and a further defence of rescission by mutual consent was not persisted in before the Court of Appeal.

It is necessary, however, to refer to the defence of undue influence which is contained in para. 10 of the defence, because the facts there set out were in substance relied upon before their lordships in support of a submission by counsel for the defendant that the case was not one in which a court should in the exercise of its discretion order specific performance. The particulars to para. 10 of the defence are as follows:

> “The plaintiff in his capacity as an agent for the defendant for the sale of the said portion of land had gained active confidence of the defendant; the defendant is an aged woman unable to read or write in the English language, the land described in the option and agreement of sale is of a value greatly in excess of Shs. 100,000/-, the said consideration is unconscionable and the nature of her acts in signing the said option and agreement of sale was not explained to or understood by the defendant.”

In view of the abandonment of this plea and the findings of the trial judge and the Court of Appeal to the effect that the option and agreement were in fact read and translated to the defendant – a finding for disturbing which no sufficient grounds have been shown – their lordships do not consider that a case has been made out for interfering with the discretion exercised by the

trial judge, and approved by the Court of Appeal, in ordering specific performance of the contract of February 19, 1954.

For these reasons their lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

For the appellant:
Theodore Goddard & Co., London
Sir Frank Soskice, Q.C., and *Alan Campbell*

For the respondent:
Herbert Oppenheimer, Nathan & Vandyk, London
Geoffrey Cross, Q.C., and *Ralph Milner*

The Standard Bank of South Africa Ltd v K B Senkubuge
[1960] 1 EA 13 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	18 March 1960
Case Number:	919/1958
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Execution – Property of judgment-debtor – Sale – Application for order for sale by private treaty instead of by public auction – Whether court empowered to make such order – Civil Procedure Rules, O. 19, *r.* 62 (*U.*) – *Bankruptcy Act*, 1883, *s.* 45 – *Uganda Order-in-Council*, 1902, *s.* 15 (2).

Editor's Summary

A judgment-creditor applied to the court for an order that the debtor's land be sold by private treaty instead of by public auction, on the ground that a greatly enhanced price would be realized by such a sale. Order 19, r. 62 of the Civil Procedure Rules provides that every sale in execution of a decree shall be by public auction in manner prescribed. It was submitted for the creditor that power exists in England by s. 45 of the Bankruptcy Act, 1883, to order a sale by private treaty and that that power could be held to apply in Uganda by virtue of s. 15 (2) of the Uganda Order-in-Council, 1902.

Held – the court in Uganda has no power to order a sale of a judgment-debtor's land by private treaty.

Application dismissed.

Judgment

Sheridan J: This is an application by the judgment-creditor for an order that the judgment-debtor's land be sold by private treaty instead of by public auction, on the ground that a greatly enhanced price would be realised by such a sale. The judgment-debtor was duly served but did not appear. Although the course proposed would be to his advantage it is not possible in his absence to make a consent order.

The Civil Procedure Rules, O. 19, r. 62 provides:

> "62. Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the court or by such other person as the court may appoint in this behalf, and shall be made by public auction in the manner prescribed."

In s. 2 of the Civil Procedure Ordinance "prescribed" means prescribed by rules and "rules" means rules and forms made by the rules committee to regulate the procedure of court. No rules permitting the court to order a sale by private treaty have been made. The power exists in the United Kingdom by the Bankruptcy Act, 1883, s. 145, but I am unable to accede to Mr. Troughton's submission that that power can be held to apply in Uganda by virtue of s. 15 (2) of the Order in Council, 1902. The procedure and practice of the courts in Uganda is now governed by comprehensive local legislation. Nor am I able to apply s. 101 of the Civil Procedure Ordinance which merely saves the inherent powers of the court. The solution would seem to lie with the legislature. The application is dismissed.

Application dismissed.

For the applicant:
Hunter & Greig, Kampala
J. F. G. Troughton

Lamberito Kafuzi and others v Yozefu Ntaama
[1960] 1 EA 14 (HCU)

Division:	HM High Court of Uganda at Mbarara
Date of judgment:	28 January 1960
Case Number:	15/1958
Before:	Bennett J
Sourced by:	LawAfrica

[1] Costs – Reference on taxation – Costs of Crown counsel – African chief sued in private capacity – Crown counsel appearing for chief – Costs awarded to chief – Whether chief entitled to costs for services of Crown counsel – Advocates Ordinance, 1956, *s.* 2, *s.* 3 (1) *and s.* 67 (2) (*U.*) – *Civil Procedure Ordinance* (*Cap.* 6), *s.* 27 (1) (*U.*).

Editor's Summary

In an action by the plaintiffs against the defendant, a Saza chief, sued in his private capacity the defendant was represented by Crown counsel. The suit was dismissed for want of prosecution and the defendant was awarded costs. On taxation it was contended for the plaintiffs that no advocate's costs should be allowed to the defendant as he was represented by Crown counsel. On a reference by the taxing officer to a judge.

Held –

(i) the attorney-general was entitled to provide legal representation for the defendant, and in representing the defendant Crown counsel was acting in the performance of the duties of his office.

(ii) the defendant was entitled to costs in respect of the services of Crown counsel.

(iii) where costs are given to a private litigant who is represented by a law officer or Crown counsel, the court should in exercise of its powers under s. 27 (1) of the Civil Procedure Ordinance specify the amount of costs or how the amount is to be ascertained.

Order accordingly.

Cases referred to in judgment:

(1) *R. v. The Archbishop of Canterbury*, [1903] 1 K.B. 289.

(2) *Chief Nehemia Gotonga v. Stephen Kinyanjui*, [1959] E.A. 1096 (C.A.).

Judgment

Bennett J: This is a reference by the taxing officer under s. 67 (2) of the Advocates Ordinance, 1956, and the question upon which a decision is sought is as follows:

> "Is the attorney-general entitled to remuneration in respect of a successful defence in civil proceedings where the person sued is a member of an African Local Government deemed to be a corporate body by virtue of the African Administration (Incorporation) Ordinance, Cap. 73?"

I may say at once that the fact that the defendant in the instant case was a member or an employee of an African Local Government seems to me to be irrelevant since the defendant was sued in his private capacity.

The matter arose in this way. The defendant was a Saza chief employed by the Ankole Native Administration and, according to the plaint, was chairman of a County Council Committee. The four plaintiffs claimed damages against him on account of the demolition of certain buildings. There was nothing in the plaint to indicate that the buildings were demolished by the defendant in the exercise or purported exercise of his official functions, or that the suit was in respect of a wrong alleged to have been committed by him in his official capacity. In due course the suit was dismissed for want of prosecution. The defendant was represented throughout by Crown counsel. There is no suggestion that, in representing the defendant, Crown counsel was acting otherwise than on the instructions of the attorney-general.

Counsel for the plaintiffs contended before the registrar that since the defendant had in fact incurred no expenses apart from disbursements no advocate's costs should be allowed. Before me he argued that a Saza chief is not an officer of the Government and that the attorney-general was not entitled to represent him in this suit. I agree with the contention that the defendant was not an officer of the Government since the word "Government" is defined in s. 2 of the Interpretation and General Clauses Ordinance, Cap. 1, as meaning "the Government of the Protectorate". The defendant was in fact the servant of the Ankole Native Administration and not of the Protectorate Government. It by no means follows, however, that because the defendant was not a Government servant that the attorney-general was not entitled to represent him in civil proceedings.

In *R. v. The Archbishop of Canterbury* (1), [1903] 1 K.B. 289, it was held by the Court of Appeal in England that the Treasury solicitor is entitled to act by the direction of the Crown for a subject in any matter in which the Crown has an interest. To quote from the judgment of Romer, J.:

> "It appears to me that where the Crown for good and sufficient reasons thinks it is for its interests that the defence of an individual, in an action or proceeding against him, should be undertaken, and the Treasury solicitor is delegated by the Treasury authorities to act as solicitor for that individual, that is within the rights of the Crown, and is within the purview of the ordinary duties of the solicitor."

That decision was followed by the Court of Appeal for Eastern Africa in *Chief Nehemia Gotonga v. Stephen Kinyanjui* (2), [1959] E.A. 1096 (C.A.) in which it was held, on appeal from the Supreme Court of Kenya, that Crown counsel was acting within the scope of his official duties in representing a chief who was sued personally and not as an officer of the Government.

In the instant case there can be no doubt that the Protectorate Government considered that it was in its interests that the defendant should be legally represented and I can see no reason to question that

decision. As was said by Gould, J.A., in *Chief Nehemia Gotonga's* case (2):

> "Similarly in my opinion it is entirely within the administrative discretion

> of the attorney-general to decide whether it is in the interests of the Crown for it to provide legal representation for a particular litigant."

I am, therefore, of opinion that the attorney-general was entitled to provide legal representation for the defendant, and that in representing the defendant Crown counsel was acting in the performance of the duties of his office.

I must now consider whether costs awarded to the defendant should include remuneration for Crown counsel's services. That question is, I think, answered by the decision in *R. v. The Archbishop of Canterbury* (1). In that case, on a rule for mandamus to the defendant, the Treasury solicitor appeared for him by direction of the Crown. The rule was discharged with costs. Objection was taken on taxation that no costs were recoverable by the defendant because they were really incurred on behalf of the Crown, or else that the defendant had appeared by a solicitor, namely the Treasury solicitor, who was not entitled to act for him. Both these contentions were rejected by the Court of Appeal and it was held that the defendant was entitled to recover his costs from the prosecutor.

The definition of "advocate" in s. 2 of the Civil Procedure Ordinance is wide enough to include a law officer or Crown counsel acting in the course of his official duties. Section 27 (1) of that Ordinance confers upon this court a discretion in respect of the costs of and incident to all suits, and full power to determine

> "by whom and out of what property and to what extent such costs are to be paid, and give all necessary directions for the purposes aforesaid."

I agree with the contention of learned Crown counsel that this power includes the power to give directions as to the quantum of costs. A practical difficulty arises, however, in that law officers and Crown counsel, although advocates within the meaning of the Civil Procedure Ordinance, are not advocates as defined by s. 2 of the Advocates Ordinance, 1956, although s. 3 (1) entitles them to practice as advocates in connection with the duties of their office. Nevertheless, since they are not advocates, Part VI of the Ordinance which deals with the remuneration of advocates does not apply to them. This being so it appears to me that where costs are given to a private litigant who is represented by a law officer or Crown counsel, the court must specify the amount of the costs or the manner in which the amount is to be ascertained. Section 16 of the Crown Proceedings Ordinance, 1958, which provides that in civil proceedings to which the Government is a party, costs shall be awarded in the same manner and on the same principles as in cases between private persons, clearly does not apply to cases in which the attorney-general represents a private individual. In such cases there is no reason, however, why a judge when awarding costs should not direct, in the exercise of the powers conferred by s. 27 (1) of the Civil Procedure Ordinance, that the attorney-general's costs should be taxed on the scale applicable to advocates.

Whether Lewis, J., in his Order of April 22, 1959, intended to give taxed costs to the defendant is a question which only he can answer. On the general question which has been referred to me for decision by the taxing officer, I am of the opinion that the attorney-general is entitled to remuneration in respect of his appearance for the defendant in the instant case.

Since this reference arose out of an objection taken on behalf of the plaintiffs, the plaintiffs will pay the defendant's costs of this reference.

Order accordingly.

For the plaintiffs:
D. L. K. Lubogo, Kampala

For the defendant:
The Attorney-General, Uganda
A. M. McMullin (Crown Counsel, Uganda)

Saher Saif Ahmed v Sharifa Fatoom A Aziz and another
[1960] 1 EA 17 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	23 January 1960
Case Number:	55/1959
Before:	Sir Kenneth O'Connor P, Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Cambell, C.J.

[1] Rent restriction – Possession – Joint owners – Premises required for son of one owner – Suitable alternative accommodation offered to tenant – "Reasonable to make order" – Conditional order for possession – Rent Restriction Ordinance, s. 11 (*A.*).

Editor's Summary

The respondents who were joint owners of shop premises sued for possession and offered the appellant alternative accommodation. The respondents wished to set up there the son of the first respondent and brother of the second respondent. The trial judge was satisfied that the respondents reasonably required the premises and that the alternative accommodation offered by the respondents was suitable but he considered that "there would still be some degree of unreasonableness if a straight and unconditional order for possession were made". Taking the view that he had power to impose conditions the trial judge ordered that possession be given to the respondents on certain conditions. On appeal it was submitted for the appellant that although at the hearing the issues had been framed to cover a case under s. 11 (2)(*d*) of the Ordinance, which provides that an order for possession may be made where the premises are reasonably required by the landlord for the use of a relative the trial judge had decided the case under s. 11 (1)(*b*) of the Rent Restriction Ordinance, which provides that an order for possession may be made where the tenant is offered suitable alternative. It was further contended that s. 11 (2)(*d*) was not applicable because the person for whom the premises were required was not a son (or other specified relative) of both landlords but a son of one of them.

Held –

(i) s. 11 (2)(*d*) of the Rent Restriction Ordinance is not applicable where there are two joint landlords and the person for whom the premises are required is not the son (or other specified relative) of

both. *McIntyre v. Hardcastle*, [1948] 2 K.B. 82 applied.

(ii) power to impose conditions when making an order for possession does not extend to an order or judgment made or given under s. 11 (1)(*b*) of the Ordinance.

Appeal Allowed.

Cases referred to in judgment:

(1) *McIntyre v. Hardcastle*, [1948] 2 K.B. 82; [1948] 1 All E.R. 696.

(2) *Baker v. Lewis*, [1947] K.B. 186; [1948] 1 All E.R. 592.

(3) *Manmohandas Davachand v. A. J. Kalyanji and Others* (1950), 17 E.A.C.A. 63.

(4) *Trimble v. Hill* (1879), 5 App. Cas. 342.

The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree of the Supreme Court of Aden in a suit by a landlord for possession of two communicating shops on the ground floor of premises at the corner of a street in Tawahi, Aden. The suit premises were No. 41A-1A and No. 41A-1B of which the respondents were the owners. The respondents occupied accommodation on the first floor above the shops in question and communicating with them by a staircase. They wished to set up one Syed Kassim Abdo Ghanem the son of the first respondent and the brother of the second respondent, in the suit premises. Syed Kassim already had a shop, but it was not (he said) on such a good site. The respondents offered alternative accommodation to the appellant which they said was suitable.

There was an allegation in the plaint that the appellant had not paid the rent since April, 1958. The rent due was paid before the hearing. Issues were agreed by counsel and filed. These issues did not include an issue raising the question whether the alternative accommodation offered was suitable, unless this question (which was clearly raised in the pleadings) was implicit in issue 3 or issue 4 which dealt respectively with the question whether the appellant would suffer greater hardship than the respondents if an order were refused, and the question whether, having regard to all the circumstances, the court considered it reasonable that an order for possession should be made.

The learned Chief Justice, having visited the suit premises and the alternative accommodation offered, and having weighed the evidence, came to the conclusion that the alternative accommodation was suitable and decided the case in favour of the respondents on the grounds that they reasonably required the suit premises and that the alternative accommodation offered was suitable. He considered, however, that, in spite of this,

> "there would still be some degree of unreasonableness if a straight and unconditional order for possession were made."

He considered that some alterations to the alternative accommodation were required to make it equally convenient with that which the appellant would be vacating. He, therefore, made an order for possession of the suit premises to be given to the respondents; but, being of opinion that he had power to impose conditions, ordered a stay of execution for two months from such time as the respondents should have paid Shs. 3,000/- to the appellant.

Against this decree the appellant appeals.

The following are the relevant provisions of s. 11 of the Rent Restrictions Ordinance (Cap. 136):

> "11(1) No order or judgment for the recovery of possession of any premises to which this order applies or for the ejectment of any tenant therefrom shall be made or given unless the court considers it reasonable to make such order or give such judgment, and either:
>
> (*a*) the court has power to do so under the provisions of sub-s. (2) of this section; or
>
> (*b*) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect.
>
> "(2) The court shall for the purpose of sub-s. (1) of this section have power to make or give an order or judgment for the recovery of possession of any premises to which this Ordinance applies or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court

considers it reasonable so to do) if:

.

(*d*) The premises are reasonably required by the landlord . . . for occupation by himself, or any son or daughter of his over eighteen years of age or his father or mother:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the landlord or the tenant, greater hardship would be caused by granting the order or judgment than by refusing to grant it:

.

Provided that before making or giving any order or judgment under any of the provisions of this sub-section the court may impose such conditions on the landlord as shall in its opinion make such order or judgment reasonable and upon the landlord complying or undertaking to comply with such conditions an order or judgment may be made or given by the court hereunder."

It will be observed that the court may make an order for ejectment of a tenant (if the court considers it reasonable so to do):

(i) under s. 11 (1)(*b*), if suitable alternative accommodation is available to the tenant; *or*

(ii) under s. 11 (2)(*d*) if the premises are reasonably required by the landlord for occupation by himself or any son (or other specified relation) of his; provided that the court is satisfied, in all the circumstances including the availability of other alternative accommodation, that greater hardship would not be caused by granting the order than by refusing to grant it.

It will also be observed that the proviso empowering the court to impose conditions applies only to an order or judgment under sub-s. (2) and not to an order or judgment under sub-s. (1) of s. 11.

Mr. Westby-Nunn, for the appellant, complained that while the issues, which had been agreed by counsel and accepted by the learned Chief Justice, had been framed to cover a case under s. 11 (2)(*d*) (i.e. that the suit premises were reasonably required by the landlord for the use of a relative) the learned Chief Justice had decided the case under s. 11 (1)(*b*) (existence of suitable alternative accommodation). Mr. Westby-Nunn contended further that s. 11 (2)(*d*) could not apply because Syed Kassim Abdo Ghanem, for whose occupation the suit premises were required, was not a son (or other specified relative) of both landlords but only a son of one of them. He cited as authority for this proposition *McIntyre v. Hardcastle* (1), [1948] 2 K.B. 82 (C.A.) at p. 89, where a dictum of Asquith, L.J., in *Baker v. Lewis* (2), [1947] K.B. 186 was approved. *McIntyre v. Hardcastle* (1) was followed by this court in an Aden case *Manmohandas Davachand v. A. J. Kalyanji and Others* (3) (1950), 17 E.A.C.A. 63.

Mr. Sanghani, for the respondents, argued that *McIntyre v. Hardcastle* (1) was not an authority binding on this court and that, having regard to the different circumstances obtaining in a Mohamedan community from those obtaining in England, we should not follow it. Since, in my view, the learned Chief Justice did not decide the present case on s. 11 (2) (*d*), the construction of that paragraph does not, strictly speaking, arise on the appeal. Since, however, the second of the issues framed applied to that sub-section and facts were proved which might have rendered that sub-section applicable, and since the question of law has been fully argued and may arise if there is a further application relating to the suit premises after alterations to the alternative accommodation have been made, I think it well to express an opinion on it.

I think that, apart from other considerations, since *McIntyre v. Hardcastle* (1) has already been followed in Aden by this court, it is too late to doubt its applicability. The words of s. 11 (2) (*d*) of the Rent Restrictions Ordinance are, with immaterial differences, in pari materia with the provisions construed by the Court of Appeal in England in *McIntyre's* case (1), and I think that we should be bound to adopt the construction put upon the words by that court, *Trimble v. Hill* (4) (1879), 5 App. Cas. 342 and to hold that that paragraph would not apply where there were two joint landlords and the person for whom the premises were required was not the son (or other specified relative) of both. I come to this conclusion with some reluctance, having regard to the notorious fact that, owing to the application of the Mohamedan law of inheritance, plural ownership of property is far more common in Aden than it is in England. That, however, is a matter for the legislature rather than for us. I have not overlooked the fact that s. 11 (2) (*d*) of the Rent Restrictions Ordinance has been amended since *Manmohandas's* case (3) was decided; but I do not think that the amendment affects the position to such an extent as to enable me to treat that case as no longer authoritative.

With regard to s. 11 (1) (*b*), there is no doubt that it is a condition precedent to the power of the Supreme Court to make or give an order or judgment under s. 11 for the recovery of possession of premises to which the Rent Restrictions Ordinance applies that the court should consider it reasonable to make such an order or to give such a judgment. The learned Chief Justice, having found under s. 11 (1) (*b*) that the alternative accommodation offered was suitable, said that, notwithstanding this, there would still be some degree of unreasonableness if an unconditional order for possession were made. It follows that he did not consider it reasonable to make an unconditional order. He, therefore, imposed a condition. But it seems that the learned Chief Justice overlooked the fact that the proviso which empowers the court to impose conditions is a proviso to sub-s. (2) of s. 11 and the power is in terms limited to an order or judgment made or given under any of the provisions of sub-s. (2). The power does not extend to an order or judgment made or given under sub-s. (1) of s. 11. The learned Chief Justice appears to have acted under sub-s. 1 (*b*). Assuming that it was open to him on the issues as framed and argued to apply that sub-section, he had no power to make an order which he himself had found would not be reasonable without a condition. Accordingly, his order cannot stand.

I would allow the appeal and set aside the judgment and the decree dated March 12, 1959. The appellant should have his costs of the appeal. I would not disturb the order for costs made below.

Forbes VP: I agree.

Gould JA: I also agree.

Appeal allowed.

For the appellant:
Westby-Nunn & Kazi, Aden
E. Westby-Nunn

For the respondents:
P. K. Sanghani, Aden

Abdulla Lule v R

[1960] 1 EA 21 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	28 March 1960
Case Number:	473/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Appeal – Application for leave to appeal out of time – Application for copy of trial record made fourteen days after conviction – Copy of judgment alone supplied – Remainder of record not supplied prior to hearing of application – Whether cause shown for extension of time – Criminal Procedure (*Amendment*) *Ordinance,* 1958 (*U.*).

Editor's Summary

On November 12, 1959, the appellant who was not represented by counsel was convicted by a magistrate. Subsequently the appellant instructed an advocate who filed notice of appeal within the prescribed time and on November 26, applied for a copy of the proceedings before the magistrate. A copy of the judgment only was received by the advocate on December 15, 1959, and the remainder of the record had not been received by him prior to the hearing of the application for leave to file a petition of appeal out of time. The Criminal Procedure (Amendment) Ordinance, 1958, provides that an appellant must lodge his petition of appeal within fourteen days from the receipt of the copy of the judgment and if the appellant is represented by an advocate the petition must contain the grounds of appeal.

Held – where an appellant is not represented by an advocate in the lower court but instructs an advocate after conviction, it is unreasonable to expect the advocate to prepare an adequate petition of appeal if he is not in possession of a copy of the whole record of trial and accordingly good cause had been shown for an extension of time.

Zaidi Bin Sulaimani v. R., [1958] E.A. 65 (C.A.), followed.

Application allowed.

Case referred to:

(1) *Zaidi Bin Sulaimani v. R.,* [1958] E.A. 65 (C.A.).

Judgment

Sir Audley Mckisack CJ: This is an application for leave to file, out of time, a petition of appeal against a conviction in the District Court of Mengo.

Since the coming into force of the Criminal Procedure (Amendment) Ordinance, 1958, on November 7, 1958, the procedure for entering an appeal from a subordinate court to the High Court is as follows. A notice of appeal must be lodged with the registrar within fourteen days of the date of the judgment which

is the subject of the appeal. On receipt of that notice the registrar is required to cause a copy of the judgment to be served on the appellant (or his advocate). Within a further period of fourteen days, dating from service of the copy of the judgment, the appellant must lodge with the registrar a petition of appeal, which, if the appellant is represented by an advocate, must contain the grounds of appeal. The High Court has power, for good cause, to extend the time prescribed for lodging the notice of appeal and the time prescribed for lodging the petition of appeal.

In the instant case the appellant, who was not represented by an advocate at the trial in the subordinate court, was convicted and sentenced on November 12, 1959. He then instructed an advocate, and a notice of appeal was duly filed, within the prescribed period, on November 19, 1959. On November 26 the advocate wrote to the resident magistrate, Mengo, asking for a copy of the proceedings in the case. On December 15, 1959, the advocate received a copy of the judgment alone, without the remainder of the record, which he had still not received at the time he filed the affidavit in support of the present application on February 1, 1960; and on the hearing of this application on March 14 he informed me that it had not yet reached him.

It may be that the advocate's request to the resident magistrate for a copy of the proceedings went astray, or was for some reason overlooked, but, whatever may have been the cause for the omission to supply a copy of the proceedings, it is not material to a decision of the present application. In *Zaidi Bin Sulaimani v. R.* (1), [1958] E.A. 65 (C.A.), the Court of Appeal for Eastern Africa held that good cause had been shown for extending the time for filing a petition of appeal where an advocate's request to be supplied with a copy of the proceedings was not complied with until a mere two days before the period for filing the petition had expired. In the course of their judgment the Court of Appeal observed as follows:

> "It is perfectly true that s. 326 of the Criminal Procedure Code (which is identical with s. 328 of the version of the Code in force in 1951) does not exclude from the time prescribed for the filing of an appeal the time required to obtain copies of the judgment and record. In our view, however, the limitation must have been prescribed on the assumption that the record would be available within such time as would allow the filing of the appeal within the time limited by the exercise of due diligence. We cannot suppose that the legislature intended that an appellant should be deprived of his right of appeal by reason of delay in the preparation of the record, as, for instance, in a case where the record was not ready until the time limited had expired. The position might be different if the advocate prosecuting the appeal had represented the appellant in the court below, but, in a case like the present where the advocate had not appeared in the lower court, it would clearly be impossible for him to frame the memorandum of appeal until he had had an opportunity of considering the record. Counsel for the Crown conceded that an appellant's advocate could not reasonably be expected to go to the court registry (perhaps a district registry) to inspect the record if he failed to obtain a copy of the record in time."

That case was decided before the coming into force of the amending Ordinance which introduced the procedure which I have already described. Before then the Code provided that every appeal should be entered within thirty days of the date of the order or sentence appealed against, and that the appeal' should be made in the form of a petition which, if the appellant was represented by an advocate, must contain the grounds of the appeal. There was power in the High Court to extend that period of thirty days for good cause.

Despite the change in procedure I think the principles enunciated in the *Zaidi Bin Sulaimani's* case (1) are still applicable, and that, where an appellant was not represented by an advocate in the lower court but instructs an advocate after conviction, it is unreasonable to expect the advocate to prepare an adequate petition if he is not in possession of a copy of the whole record of the trial. The judgment alone (which has to be supplied automatically to an appellant or his advocate when the notice of appeal has been filed) may not, in such a case, be sufficient for the purpose.

In the instant case, therefore, I think that good cause has been shown for an extension of time and the application will accordingly be allowed. The appellant is granted leave to file a petition of appeal within fourteen days of his receipt of a copy of the proceedings.

I wish to add two observations. Firstly, where an advocate has applied for a copy of the proceedings after notice of appeal has been filed, and before a copy of the judgment has been supplied, it would be convenient that the copy of the judgment and of the remainder of the record of the proceedings should be supplied at the same time, rather than that the judgment should be supplied first; thus time would not begin to run against the appellant until he was in possession of the whole record. Secondly, where it appears to an advocate that a copy of the proceedings for which he has asked has not been supplied after the lapse of a reasonable period, he should take steps to ascertain the cause of the delay in case his request has gone astray or been overlooked.

Application allowed.

For the appellant:
John W. R. Kazzora, Kampala

For the respondent:
The Attorney-General, Uganda
S. K. Kulubya (Crown Counsel, Uganda)

Abubakar Kakyama Mayanja v R
[1960] 1 EA 23 (HCU)

Division:	HM Supreme Court of Uganda at Kampala
Date of judgment:	28 March 1960
Case Number:	497/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Practice – Commencement of proceedings – Prosecution requiring sanction of Attorney – General – Sanction obtained after accused arrested – Meaning of institution of prosecution – Legislative Council (*Powers and Privileges*) *Ordinance*, 1955, *s.* 19 (*f*) *and s.* 29 (*U.*) – *Criminal Procedure Code, s.* 85 (*U.*).

Editor's Summary

On November 9 the appellant was arrested and charged by a police officer with contravening s. 19 (*f*) of the Legislative Council (Powers and Privileges) Ordinance, 1955. On November 17 the appellant was

charged before a magistrate with the offence and pleaded not guilty. Under s. 29 no prosecution for an offence under the Ordinance can be instituted except with the written sanction of the attorney-general. The written sanction of the attorney-general was dated November 11 and at the trial it was contended that as the appellant was arrested and charged with the offence before sanction had been obtained the prosecution was unlawful. The magistrate did not accept this submission and convicted the appellant. On appeal

Held –

(i) for the purpose of s. 29 of the Ordinance the institution of a "prosecution" means the commencement of proceedings, and "proceedings" refer to court proceedings.

(ii) court proceedings began on November 17 when the appellant was brought before the magistrate and consequently proceedings in respect of the charge were not instituted until after the attorney-general had granted his written sanction.

Appeal dismissed.

Judgment

Sir Audley Mckisack CJ: The appellant was tried, with seven other persons, on three counts. He was acquitted on the first two counts, which were for unlawful assembly and assaulting a police officer, and was convicted on the third count. This was for contravening s. 19 (*f*) of the of the Legislative Council (Powers and Privileges) Ordinance, 1955 (No. 11 of 1955). He was sentenced to a fine of Shs. 1,000/-, or fourteen days' imprisonment in default.

Section 19 of the Ordinance, in so far as it is relevant to the present case, is as follows:

> "19. Any person who –
>
>
>
> (*f*) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Council or any committee while the Council or such committee is sitting;
>
>
>
> shall be guilty of an offence and shall on conviction before a court be liable to a fine not exceeding four thousand shillings or to imprisonment for any term not exceeding two years or to both such fine and imprisonment."

The particulars of the offence under this section with which the appellant and his co-accused were charged were as follows:

> "The above-named persons on 9.11.59 at Kampala in the Mengo District did create or join in a disturbance which was likely to interrupt the proceedings of Legislative Council."

Section 29 of the Ordinance is as follows:

> "No prosecution for an offence under this Ordinance shall be instituted except with the written sanction of the attorney-general."

The appeal is against both conviction and sentence. There are nine grounds of appeal against the conviction. The first is that the written sanction of the attorney-general was not obtained before the prosecution was instituted. It is necessary to look at the history of the institution of these proceedings. The date of the offence is laid in the charge as November 9, 1959. The appellant and others were arrested on that date outside the Legislative Council and they were taken to the police station. The same afternoon the appellant was charged by a police officer (P. 8) with creating a disturbance likely to interrupt Legislative Council and also with unlawful assembly. The police officer cautioned him and the appellant said nothing. He was released by the police from custody on executing a bond. Next day, November 10, he was interviewed by the same police officer and further charged with assaulting a police officer in the execution of his office. He was cautioned and made no reply. On November 11 the appellant and his co-accused appeared before the court and their pleas were taken on a charge, dated November 10, containing two counts; one being for unlawful assembly and the second for assaulting a police officer. They all pleaded not guilty. They were released on bail to appear in court on November 17. They duly appeared on that date and the officer conducting the prosecution presented amended charge containing three counts. The first two were the same as

the two counts in the former charge, and the third count was for creating a disturbance likely to interrupt the proceedings of Legislative Council. The officer conducting the prosecution produced a document bearing the signature of the attorney-general, and dated November 11, stating that he consented to the prosecution of the appellant and the other accused for this offence.

For the appellant it is contended that, as he was arrested and charged by the police with this offence on November 9, before the written sanction of the attorney-general had been obtained, the provisions of s. 29 of Ordinance 11 of 1955 have not been complied with and, consequently, the prosecution was unlawful. The same point was taken at the trial, but the learned resident magistrate decided it against the appellant. The relevant passage in the judgment is as follows:

> "A. 1 maintains that when he was charged with the offence by the police this constituted the institution of a prosecution. Since the attorney-general had not at that time given his consent, the requirements of the law had not been fulfilled. I therefore have to consider what constitutes the institution of a prosecution. I have been able to find two cases in point. The first is *Beardsley v. Giddings*, [1904] 1 K.B. 847, in which it was held that the institution of a prosecution was the laying of an information, and the other case is *Robertson v. Page*, [1943] S.C. (J.) 32, in which it was held that the institution of a prosecution is the commencement of proceedings and takes place when the complaint is placed before the clerk of the court and a date is fixed by him. In the instant case, of course, there was no complaint or information laid. However, I think it is clear from the consideration of these cases that merely telling an accused person that he is to be charged with an offence does not constitute the institution of a prosecution. If it were otherwise, an invidious position would be arrived at, since an accused person should be informed of the charges against him at the earliest moment reasonably possible, and this moment would be considerably delayed if a written permission from the attorney-general had first to be obtained. For these reasons I do not think that there is any substance in A. 1's submission on this point."

I think there is no doubt that, for the purposes of s. 29 of the Ordinance, the institution of a "prosecution" means the commencement of proceedings, and and that "proceedings" refer to court proceedings. Court proceedings do not begin by the arrest of a person by the police, nor by the police informing him of the charge on which it is intended to proceed. Proceedings do not begin until one or other of the courses provided for in s. 85 of the Criminal Procedure Code has been set on foot. Sub-section 1 of that section, which is found under the cross-heading "Institution of Proceedings" and has a marginal note in the same terms, provides that:

> "(1) Criminal proceedings may be instituted in one of the following ways:
>
> (*a*) by a police officer bringing a person arrested with or without a warrant before a magistrate upon a charge; or
>
> (*b*) by a public prosecutor or a police officer laying a charge against a person before a magistrate and requesting the issue of a warrant or a summons; or
>
> (*c*) by any person, other than a public prosecutor or a police officer, making a complaint as provided in sub-s. (3) of this section and applying for the issue of a warrant or a summons in the manner hereinafter mentioned."

Only para. (*a*) of that sub-section applies in the instant case. The appellant had been "brought before a magistrate" on November 11, but there was then no

charge for creating a disturbance. It was only on November 17 that that charge was put before the court. Consequently, proceedings in respect of that charge were not instituted until after the attorney-general had granted his written sanction. (Which, as I have said, was dated November 11).

Mr. Clerk, who appeared for the appellant, was unable to cite any authority for his proposition that the proceedings commenced when the appellant was arrested or when he was charged at the police station, and that proposition appears to run counter not only to the English cases cited by the learned trial magistrate but also to the provisions of our Criminal Procedure Code. That ground of appeal accordingly fails.

[His lordship then considered and rejected the other grounds of appeal.]

Appeal dismissed.

For the appellant:
A. V. Clerk, Kampala

For the respondent:
The Attorney-General, Uganda
S. K. Kulubya (Crown Counsel, Uganda)

Jetha Ismail Ltd v Somani Brothers
[1960] 1 EA 26 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	19 January 1960
Case Number:	82/1959
Before:	Sir Kenneth O'Connor P, Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lewis, J.

[1] Estoppel – Cheque – Representation by holder that payment remitted – Whether holder estopped from denying that payment remitted – Evidence Ordinance, s. 113 (*U.*) *– Bills of Exchange Ordinance, s.* 62 (*U.*).

[2] Bills of Exchange – Cheque – Estoppel – Representation that holder had remitted or dispensed with payment – Whether such representation should be in writing – Indian Contract Act, 1872, *s.* 23 *and s.* 63 *– Bills of Exchange Ordinance, s.* 62 (*U.*) *– Indian Evidence Act,* 1872, *s.* 115 *– Evidence Ordinance, s.*113 (*U.*).

Editor's Summary

Claiming to be holder in due course the appellants sued the respondents for Shs. 14,000/-the value of two cheques drawn by the respondents in favour of one S., which were dishonoured. The respondents contended that (*a*) payment of the cheques had been remitted under s. 63 of the Indian Contract Act and (*b*) that the appellants were estopped from claiming the value of the cheques because they had represented to the respondents that they had remitted payment of the cheques, and in reliance thereon the respondents had made certain payments to S. The appellants contended that even if there had been dispensation or remission it must under s. 62 of the Bills of Exchange Ordinance be in writing. The trial judge held that the appellants' conduct in relation to the cheques amounted to dispensation or remission under s. 63 of the Indian Contract Act and that there was no need for this remission to be in writing. On appeal

Held – the appellants represented to the respondents that they had remitted payment of cheques and the respondents acted upon that representation to their detriment; accordingly the appellants were estopped from denying that they had in fact remitted payment of the cheques.

Per Forbes, V.-P.: "It seems to me doubtful whether in fact s. 63 of the Indian Contract Act applies to bills of exchange in view of special provisions of s. 62 of the Bills of Exchange Ordinance and s. 23 of the Indian Contract Act."

Appeal dismissed.

Case referred to:

(1) *Algar v. Middlesex County Council*, [1945] 2 All E.R. 243.

The following judgments were read by direction of the court:

Judgment

Forbes VP: This is an appeal from a judgment and decree of H.M. High Court of Uganda.

The appellant firm, which was the original plaintiff, sued to recover Shs. 14,000/-, being the value of two cheques drawn by the respondent firm on Barclays Bank D.C.O., Kabale, in favour of Harnam Singh Sond, the appellant firm claiming to be the holder in due course of the cheques, which, when presented for payment, were returned unpaid marked "Payment stopped."

At the trial the evidence for the respondent firm was to the effect that on December 11, 1955, the respondent firm had entered into a contract with Harnam Singh Sond, a contractor, for the erection of a building at Kabale for the sum of Shs. 66,500/-; that on June 22, 1956, at the request of Sond, Hayedrali Juma Somani, a partner in the respondent firm, drew the two cheques in favour of Sond, post-dating them respectively August 20 and September 20, 1956; that in August, Hayedrali informed Sond that he would not meet the cheques owing to the slow progress on the building; that Sond said that the cheques were with the appellant firm but that he would arrange to get them back; that on August 15 Sond wrote the letter which was in evidence as exhibit 3 informing the respondents that he had arranged with one Rajabali, managing director of the appellant firm, to pay the appellant firm for the two cheques, and that Rajabali had promised "to send these two cheques to you at his earliest"; that Hayedrali did not receive the cheques, so stopped payment of the August cheque; and, subsequently, stopped payment of the September cheque; that Shamsher Ali J. Somani, another partner in the respondent firm, went to the appellants in August to collect the cheques and was told by Rajabali that the cheques had been misplaced but that he (Rajabali) would send them; that Shamsher Ali saw Rajabali again about 15 days later and was told by Rajabali

> "Remtulla is away on safari and he has the cheques, when he returns I will send your cheques;"

and that on completion of the building in December 1956 the respondents paid Sond in full for it, a total of some Shs. 71,900/- including extras.

The cheque dated August 20, 1956, was presented for payment on August 21, 1956, and was stopped the same day. The cheque dated September 20, 1956, was presented for payment on January 4, 1957, and was stopped on January 7. No written protest at non-payment was made by the appellant firm until April 29, 1957, when a letter claiming payment was written to the respondent firm by the advocates for the appellant firm. Harnam Singh Sond died in November 1957. He was insolvent at the time of his death and was, to the knowledge of the appellant firm, in financial difficulties in July 1956, at which time he was owing the appellant firm some Shs. 31,000/-.

For the appellant firm, Rajabali J. Ismail gave evidence and alleged that Sond gave him the two cheques towards payment of Sond's account; that he never received a copy of the letter, exhibit 3; that Shamsher Ali never came to the appellant firm's shop and asked for the cheques; that he (Rajabali) made

verbal demands for payment but was told by Hayedrali that the respondent firm were short but were arranging a loan from Diamond Investment Trust and would then pay; that he waited for a time and then asked again, and was told that the loan was not yet passed; and that he eventually waited till April 29, 1957, before seeing his advocate.

At the trial it was conceded that the appellant firm was holder of the cheques in due course, but it was pleaded and argued (*a*) that payment of the cheques had been remitted under s. 63 of the Indian Contract Act, 1872, (which applies in Uganda); and (*b*) that the appellants were estopped from claiming the value of the cheques because the appellant firm had represented to the respondents that it had remitted payment of the cheques, and in reliance on that representation the respondents had paid the full value of the building contract to Sond upon the completion of the building. Issues 3 and 4 as settled at the commencement of the trial were:

> "3. Whether the plaintiffs wholly dispensed with or remitted payment of cheques and so discharged defendants.
>
> "4. Whether the plaintiffs are estopped from claiming value of cheques by reason of the facts in para. 8 of the defence."

The determination of these issues depended in the first place on whether the appellants' or the respondents' version of the affair was to be accepted. In view of the importance of this aspect of the matter an express finding on the facts at issue was to be expected. Unfortunately the learned trial judge did not make any such express finding of fact, and the first matter we have had to consider is whether the necessary findings of fact are to be inferred from the terms of his judgment.

The learned judge in his judgment, after briefly reviewing the facts and allegations of the parties, and ruling (I think rightly) that the letter exhibit 3 was admissable in evidence under s. 30 of the Evidence Ordinance, continues:

> "On August 21, 1956, P. 1 stopped payment of the cheque dated August 20 and on January 7, 1957, stopped payment of the cheque dated September 20. The plaintiffs made no written protest about the cheques being stopped until April 29, 1957, Ex. 1. It is noted that the cheque of September 20 was not presented to the bank until January 4,1957.
>
> "The plaintiffs admitted that Sond owed them some Shs. 31,000/- in July, 1956, and did not really deny that Sond died insolvent. It was not disputed that P. 1 paid Sond all that was due under the building contract. I am convinced that P. 1 would not have done this if he had realised he might be sued on the two cheques by the plaintiffs. I think it is hereby that the disputed letter becomes of great importance.
>
> "I am satisfied that this letter was genuine. I cannot see how Sond can be said to be defrauding the plaintiffs when he wrote the letter on August 15.
>
> "The point for determination is whether the letter and the interviews with the plaintiffs spoken to by the defendants, amount to a dispensation or remission under s. 63, Indian Contract Act, and so a defence to the suit. Mr. Dholakia argued that even if there had been dispensation or remission this must, under s. 62, Bills of Exchange Ordinance, be in writing by the plaintiffs.
>
> "I consider that the letter of August 15, the interviews and the plaintiffs' conduct in relation to these cheques amounts to dispensation or remission under s. 63: and that this need not be in writing. I also consider that the letter of August 15 and the plaintiffs' conduct now estops them under s. 113, Evidence Ordinance."

I think it must be inferred from this, and especially from the last paragraph of the passage quoted, that the learned judge rejected the appellants' version of the facts and accepted that of the respondents. Had the respondents' version been rejected, that must have been an end of the case. I think it must be accepted that the learned judge found, not only that the letter, exhibit 3, was genuine, but that the appellants had agreed to look to Sond for payment of the money represented by the cheques and to return the cheques to the respondents, and had so informed the respondents through Shamsher Ali, though at the same time retaining the cheques on one pretext or another. This is a finding of fact which it was open to the learned judge to make on the evidence. While I cannot say that I would necessarily have reached the same conclusion had I been considering the matter in the first instance, the learned trial judge had the advantage of seeing and hearing the witnesses, and I certainly cannot see any ground on which a Court of Appeal could interfere with the finding. For the purposes of the appeal I think it must be taken that the respondents' version of the facts is the correct one.

On the basis of these facts, two points of law were argued on the appeal, as, indeed, they were at the trial, namely, (*a*) whether, in view of the provisions of s. 62 of the Bills of Exchange Ordinance (Cap. 217), s. 63 of the Indian Contract Act was applicable and there could be a dispensation or remission under the latter section without a renunciation in writing as required by s. 62 of the Bills of Exchange Ordinance; and (*b*) whether by reason of its conduct the appellant firm was estopped from enforcing payment of the cheques.

As to (*a*), in the judgment of this court granting leave to the appellant firm to appeal, it seems to have been assumed that s. 63 of the Indian Contract Act applied. The view expressed on the application for leave to appeal cannot, however, be taken as a concluded opinion binding on the court on the hearing of the appeal itself, particularly as it does not appear from the judgment that s. 62 of the Bills of Exchange Ordinance was considered. It seems to me doubtful whether in fact s. 63 of the Indian Contract Act applies to Bills of Exchange in view of the special provisions of s. 62 of the Bills of Exchange Ordinance (sub-s. (2) of which would be applicable in the instant case) and s. 23 of the Indian Contract Act. I do not, however, think it necessary to reach a firm conclusion on this point, since I think the appeal can be disposed of on the basis of estoppel.

The elements essential to bring a case within the scope of "estoppel" are stated as follows by the learned author of Sarkar On Evidence (9th Edn.) at p. 913 in the commentary on s. 115 of the Indian Evidence Act, which is in the same terms as s. 113 of the Evidence Ordinance:

> "(1) There must be a representation by a person or his authorised agent to another in any form-a declaration, act or omission.
>
> "(2) The representation must have been of the existence of a fact and not of promises de futuro or intention which might or might not be enforceable in contract.
>
> "(3) The representation must have been meant to be relied upon, i.e., it must have been made under circumstances which amounted to an intentional causing or permitting belief in another. The proof of the intent may be direct or circumstantial, e.g., by conduct. It is not necessary that there should be a design to mislead, or any fraudulent intention or that the representation should be false to the knowledge of the maker. Representation even when made innocently or mistakenly may operate as an estoppel.
>
> "(4) There must have been belief on the part of the other party in its truth.
>
> "(5) There must have been action on the faith of that declaration, act or omission, that is to say, the declaration, act or omission must have actually

> caused another to act on the faith of it and to alter his former position to his prejudice or detriment."

It seems to me that, on the evidence which the learned trial judge accepted, the appellant firm (through Rajabali) represented to the respondent firm (through Shamsher Ali) that the appellant firm had remitted payment of the cheques; that that representation was meant to be relied upon; that the respondent firm believed the representation; and that the respondent firm acted upon the representation to its detriment in that it paid in full for the building erected by Sond. That being so, I am of opinion that the appellant firm is estopped from denying that it had in fact remitted payment of the cheques and therefore cannot succeed in its action to enforce payment.

Mr. Phadke, for the appellant firm, argued that there can be no estoppel on a matter of law; that estoppel cannot operate against an imperative provision of the law; and that the operation of s. 62 of the Bills of Exchange Ordinance cannot be negatived by estoppel. I think, however, that the representation in this case was one of fact, i.e., that payment of the cheques had been remitted, and that the respondent firm were entitled to assume that the necessary steps had been taken to make the remission effective. In *Algar v. Middlesex County Council* (1), [1945] 2 All E.R. 243 at 251 Humphreys, J., said:

> "One realises, of course, that in dealing with the doctrine of estoppel, one must always be careful to see that the court is not saying that a man is estopped from stating what is the law. No man can ever be estopped from that. If all that happened was that a certain view of the law was taken by the Middlesex County Council, and they made a mistake in what, after all, on the part of anybody, even a judge, can only be an expression of opinion as to what is the law – if all that happened was that someone said: 'Well, in my view of the law, this, that and the other result follows', no law of estoppel can prevent him from asserting that that is the law. It is questions of fact which are dealt with. It seems to me that this is a question of fact which arises here. The applicant is saying: 'Will my superannuation rights be protected?'; and in point of fact, as I have already said, I think the Middlesex County Council could have protected his superannuation rights by saying: 'If you take this other post, we point out that you lose your superannuation rights so far as that is concerned.' But what they are saying in effect is this: 'You may take it from us that in your position your superannuation rights will not be affected.' In one sense that may be said to be a question of law, but to a very great extent, I think, it is a question of fact; and, put in that way, I should feel no doubt that that is a matter as to to which the Middlesex County Council are estopped, having regard to their representation, from setting up the contention that this man was never a registrar at all, but in point of fact was something quite different, that is to say, an interim registrar."

In the instant case the appellant firm could have remitted payment of the cheques, and represented that they had done so. No doubt, as in *Algar v. Middlesex County Council* (1), a question of law is involved, but the representation is essentially one of fact. In my opinion the respondent firm is entitled to rely on it.

For these reasons I would dismiss the appeal with costs.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellants:
Parekhji & Co, Kampala
V. V. Phadke

For the respondents:

Verjee & Verjee, Kampala
B. R. Verjee

Matayo Musoke v Alibhai Garage Limited
[1960] 1 EA 31 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	12 February 1960
Case Number:	426/1959
Before:	Bennett J
Sourced by:	LawAfrica

[1] Hire purchase – Motor vehicle registration book and car delivered to hirer – Car registered in hirer's name – Car sold by hirer to third person – Seizure of car by owner while in possession of third person – Action for return of car or its value – Estoppel by conduct – Whether registration book is document of title – Traffic Ordinance, 1951, *s.* 6 (1) (*U.*) – *Sales of Goods Ordinance*, *s.* 26 (2) (*U.*).

Editor's Summary

The defendant had hired a motor-car under a hire purchase agreement to one, S., and gave him possession of the car and the registration book. Having had the car registered in his name S. defaulted in payment of instalments under the hire purchase agreement and sold the car to the plaintiff who registered it in his own name. The defendant later seized the car in terms of the agreement with S. and the plaintiff then sued for the return of the car or its value. At the trial it was contended inter alia that the defendant was not the owner of the motor-car; that s. 26 (2) of the Sales of Goods Ordinance was applicable; and that the defendant having handed over the registration book to S. was estopped by its conduct from denying S.'s authority to sell the car.

Held –

(i) not having paid a single instalment under the hire purchase agreement S. had never exercised his option to purchase the car and therefore s. 26 (2) of the Sale of Goods Ordinance was not applicable.

(ii) a motor-car registration book is not a document of title and delivery thereof does not give to the person to whom it is delivered the means of appearing to be the owner or of having apparent authority to sell the car.

Action dismissed.

Cases referred to in judgment:

(1) *Helby v. Matthews and Others*, [1895] A.C. 471.

(2) *Central Newbury Car Auction Ltd. v. Unity Finance Ltd. and Another* (*Mercury Motors Third*

Parties), [1956] 3 All E.R. 905.

Judgment

Bennett J: In this suit the plaintiff claims from the defendant company the return of a Standard Vanguard motor-car, or Shs. 6,500/- its value. He also claims damages for being deprived of the use of the motor-car, and Shs. 30/- by way of special damages.

The defendant company, which deals in second-hand motor-cars, denies liability on the grounds that when it seized the car from the plaintiff on or about June 3, 1959, it was the owner of the car and that therefore the seizure was lawful. Although the plaintiff does not admit the defendant's ownership of the car, there is no real conflict between the evidence led on behalf of the plaintiff and the evidence led on behalf of the defendant.

The following facts have been proved to my satisfaction: The defendant acquired the car from one Kassamali Gulamhussein, who gave it in part exchange for another car which he purchased from the defendant. On December 10, 1958, the defendant gave possession of the car to one Yozefu Serunkuma under a hire purchase agreement which was in common form and

provided, inter alia, that if the hirer observed all the conditions of the agreement and paid all the instalments due thereunder, the hiring should come to an end and the car should become the property of the hirer. The agreement also empowered the owner to retake possession of the car in the event of default in payment of any instalment.

In addition to giving possession of the car to Serunkuma under the terms of the agreement, the defendant also handed over to him the registration book, the car at that time being registered in the name of Kassamali Gulamhussein. Thereafter Serunkuma had the car registered in his own name. Serunkuma defaulted in payment of the instalments due in January and February, 1959, and on March 5, sold the car to the plaintiff without informing the plaintiff that he was not the owner of the car. He gave possession of the car to the plaintiff on the same day and also handed over to the plaintiff the registration book. In due course the plaintiff had the vehicle registered in his own name. The plaintiff conceded, in evidence, that he had made no enquiries as to the ownership of the car before he bought it from Serunkuma, relying upon the fact that Serunkuma was shown in the registration book as being the owner.

On or about June 3, the defendant seized the car while it was at the plaintiff's house on the grounds that Serunkuma had failed to pay any of the instalments due under the hire purchase agreement. The car has in fact remained in the possession of the defendant ever since.

On behalf of the plaintiff it is contended that the defendant is not the owner of the motor-car. Reliance is placed on s. 6 (1) of the Traffic Ordinance, 1951, which reads:

> "The person in whose name the vehicle is registered shall, unless the contrary is proved, be deemed to be the owner of the vehicle."

This contention can be shortly disposed of by saying that I am satisfied that the defendant is and was the owner of the car as from the date on which it acquired the car from Kassamali Gulamhussein. The presumption created by s. 6 (1) has, therefore, been rebutted.

I was also pressed with the argument that this is a case to which s. 26 (2) of the Sale of Goods Ordinance applies. It is said that Serunkuma, having bought or agreed to buy the car from the defendant, transferred it to the plaintiff with the consent of the defendant, who knew that he required the car for resale, and that the plaintiff received the car in good faith. That line of argument is not open to the plaintiff in view of the decision of the House of Lords in *Helby v. Matthews and Others* (1), [1895] A.C. 471. In that case it was held that a hire purchase agreement, which was in similar terms to the agreement in the instant case, was not an agreement to buy goods within the meaning of s. 9 of the Factors Act, 1889, which is analogous to s. 26 (2) of the Sale of Goods Ordinance. To quote from the speech of Lord Watson at p. 479:

> "These stipulations, in my opinion, constitute neither more nor less than a contract of hiring, terminable at the will of the hirer, coupled with this condition in his favour, that, if he shall elect to retain it until he has made thirty-six monthly payments as they fall due, the piano is then to become his property. The only obligation which is laid upon him is to pay the stipulated monthly hire so long as he chooses to keep the piano. In other words, he is at liberty to determine the contract in the usual way, by returning the thing hired to its owner. He is under no obligation to purchase the thing, or to pay a price for it. There is no purchase and no agreement for purchase, until the hirer actually exercises the option given him."

In the instant case Serunkuma never exercised his option since he did not pay a single instalment and, in my judgment, s. 26 (2) of the Sale of Goods Ordinance does not assist the plaintiff.

Finally it is contended that the defendant is precluded by its conduct from denying Serunkuma's authority to sell the car because it handed over to him the registration book, thus enabling him to have the car registered in his own name. There might have been some substance in this argument had the registration book been a document of title. That it is not a document of title is plain from the majority decision of the Court of Appeal in *Central Newbury Car Auction Ltd. v. Unity Finance Ltd. and Another* (*Mercury Motors third parties*) (2), [1956] 3 All E.R. 905. In that case it was held that the delivery of a car registration book, as well as the car itself, did not give to the person to whom it was delivered the means of appearing to be the owner or of having apparent authority to sell the car, since the registration book was not a document of title.

It is to be observed that the registration book (exhibit P. 2) which has been produced in the instant case, has printed in bold capital letters at the foot thereof the following warning:

> "IMPORTANT – THE PERSON IN WHOSE NAME A VEHICLE IS REGISTERED MAY OR MAY NOT BE THE LEGAL OWNER OF THE VEHICLE."

Since Serunkuma was not the owner of the car and did not sell it to the plaintiff under the authority or with the consent of the owner, the plaintiff acquired no title to the car, having regard to s. 23 (1) of the Sale of Goods Ordinance.

For these reasons the suit is dismissed and the plaintiff will pay the defendant's costs.

Action dismissed.

For the plaintiff:
B. K. M. Kiwanuka, Kampala
A. W. Mukasa

For the defendant:
Carasco & Mistry, Kampala
Y. V. Phadke and *P. Carasco*

R v Charles Daki s/o Daki
[1960] 1 EA 34 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	23 March 1960
Case Number:	116/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Dying declaration – Admissibility – Dying declaration not completed –

Interruption by doctor.

Editor's Summary

In course of investigation into a murder a police officer called at the hospital where one K had been admitted suffering from gunshot wounds and asked him who had shot him. In reply K stated "Charles Daki has killed me, he has shot me with a gun. I saw him with a gun, he was on a motor cycle. Yozefu Mukalingo had visited me and I went to my garage with him". A doctor then intervened telling the police officer "to leave him alone". K later died and the man he had named was charged with murder. At the trial counsel for the defence objected to evidence of K's statement to the police officer being admitted.

Held – On the face of the recorded statement and footnote the deceased was interrupted by the doctor; the deceased might or might not have added something and accordingly on the authority of *Cyril Waugh v. R.*, [1950] A.C. 203 the statement was inadmissible.

Cyril Waugh v. R., [1950] A.C. 203 followed.

Order accordingly.

Case referred to:

Cyril Waugh v. R., [1950] A.C. 203.

Judgment

Sir Audley Mikisack CJ: Charles Daki s/o Daki was charged with the murder of Kaloli Mbizi.

In the course of the police investigations into the crime a sub-inspector of police called at the hospital where Kaloli had been admitted suffering from gunshot wounds. Kaloli in reply through an interpreter to the sub-inspector's question "Who has shot you?" made this statement:

> "Charles Daki has killed me, he has shot me with a gun. I saw him with a gun, he was on a motor cycle. Yozefu Mukalingo had visited me and I went to my garage with him".

Kaloli subsequently died.

During the examination of the police inspector at Daki's trial Mr. P. J. Wilkinson, counsel for the defence objected to the sub-inspector's evidence as to Kaloli's statement. Mr. Wilkinson pointed out that the accused was not present and that at a previous trial the inspector gave evidence that the statement of the deceased was interrupted by the doctor on the grounds that the patient was unfit. He referred to *Cyril Waugh v. R.* (1), [1950] A.C. 203.

Mr. Kulubya, counsel for the Crown argued that the statement was the answer to one question and that the patient may have completed his statement. He also argued that the doctor said "leave him alone" because he was satisfied the patient had said all that was necessary and that *Waugh's* case (1) was distinguishable.

On the authority of *Waugh's* case (1) I hold this statement inadmissible. On the face of the recorded statement and footnote thereto the deceased was interrupted by the doctor, and the deceased might or might not have added something. In *Waugh's* case (1), Lord Oaksey said:

> " . . . their Lordships are of opinion that the dying declaration was inadmissible because on its face it was incomplete and no one can tell what the deceased was about to add".

It is true that on that case the deceased fell unconscious having begun, but not completed, a sentence. But I think the principle applies equally well where, although there was apparently no unfinished sentence, it is not established that the declarant said all he wished or intended to say before the doctor intervened, telling the police officer "to leave him alone".

Order accordingly.

For the Crown:
The Attorney-General, Uganda
S. K. Kulubya (Crown Counsel, Uganda)

For the defendant**:**
P. J. Wilkinson, Kampala

Kaka Store v Shamshudin Kassam Kachra
[1960] 1 EA 35 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	13 February 1960
Case Number:	33/1959
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Practice – Summons for final disposal of suit – Magistrate appointing dates for defence and mention instead of proceeding to trial – Proper procedure where issues are simple – Subordinate Courts (*Civil Procedure – Summons and Pleadings*) *Rules*, 1955, *r.* 6, *r.* 7, *r.* 15 *and r.* 27 (T.) *– Indian Code of Civil Procedure*, 1908, *O.* 8, *r.* 10.

Editor's Summary

Upon receipt of a plaint the resident magistrate issued a summons for final disposal of the suit under r. 3 of the Subordinate Courts (Civil Procedure – Summons and Pleadings) Rules, 1955. On the date fixed the magistrate instead of proceeding to trial appointed dates for filing a defence, reply and mention and on the date appointed for mention without taking any evidence gave judgment under O. 8, r. 10 of the Indian

Code of Civil Procedure on the ground that no defence had been filed. On appeal it was argued inter alia that the magistrate ought to have required the plaintiff to prove his case and had no power to enter judgment without such proof.

Held –

(i) the magistrate had no power to give judgment under O. 8, r. 10 of the Indian Code of Civil Procedure.

(ii) in a simple case where a summons is issued for final disposal, the case should go straight to trial, but if a date is fixed for filing a defence and no defence is filed within the prescribed time then the plaintiff should be made to prove his claim ex parte under r. 15 of the Subordinate Courts (Civil Procedure – Summons and Pleadings) Rules, 1955.

Appeal allowed. Judgment and decree set aside. Order for the case to proceed to trial on the summons for final disposal.

Judgment

Spry Ag J: In the proceedings from which this appeal arises, the resident magistrate upon receipt of the plaint issued a summons for the final disposal of the suit, in accordance with r. 3 of the Subordinate Courts (Civil Procedure – Summons and Pleadings) Rules, 1955, (hereinafter referred to as the 1955 Rules). At the date of the hearing, however, instead of proceeding to trial he appointed dates for written statement of defence, reply and mention. On the date appointed for mention, learned counsel for the plaintiff applied for and obtained judgment under O. 8, r. 10 of the Indian Code of Civil Procedure (hereinafter referred to as the Code), on the ground that no written statement of defence had been filed. No evidence was taken.

The appeal was argued on two lines. The first was that the defendant must be deemed to have applied for an extention of time to file his written statement and that the magistrate ought to have exercised his discretion judicially and extended the time but failed to do so. The second was that the magistrate ought to have required the plaintiff to prove his case and had no power to enter judgment without such proof. I am therefore asked to set aside the judgment and decree and to direct the magistrate to give the defendant an opportunity to file his defence.

.

I come now to the second ground of appeal, that the magistrate erred in not requiring the plaintiff to prove his case. This was argued before me on the basis of O. 8, r. 10, applying and the argument turned on whether, the power to pronounce judgment being discretionary, that discretion could properly be exercised without formal proof of the plaintiff's case. I do not think it necessary for me to decide that point, because I am of the opinion that O. 8, r. 10, did not apply.

As I have said, the summons in this case was for final disposal but the magistrate by his order of July 8, 1959, purported to convert it into one for orders. I do not understand why he did this, as I should have thought the case was sufficiently simple to have permitted the framing of issues there and then. Again, I am not satisfied that he had the power to convert the proceedings: the 1955 Rules lay down a procedure to be followed and confer no discretion on the magistrate to depart from it. (With respect, I think High Court Circular No. 8 of 1955 is misleading in this regard.) I think it is clear that r. 6 and r. 7 provide for a summary procedure, without written statement of defence or reply, for use in cases where the issues appear to be simple. Rule 7 (*a*) is mandatory that the case will be heard on the appointed day, although there is a power to adjourn which prevents injustice where the defence takes the plaintiff by surprise.

However, the magistrate did appoint a date for the filing of a written statement of defence and no written statement was in fact filed by that date. In those circumstances, the procedure to be followed is to be found in r. 15 of the 1955 Rules, although, in view of the irregularity of the earlier proceedings, that rule would have had to be construed as if for "specified in the summons" it read "appointed by the court". In other words, the plaintiff should have applied in writing for a day to be fixed for judgment on ex parte proof. Rule 15 expressly requires proof of the claim, and there is no discretion to dispense with it.

In fact, as I have said, the plaintiff applied for and the magistrate gave judgment under O. 8, r. 10 of the Code. Section 6 (2) of the Subordinate Courts Ordinance (Cap. 3) reads as follows:

> "Subject to rules of court, subordinate courts shall in the exercise of their civil jurisdiction follow the

principles of procedure laid down in the Civil Procedure Code so far as the same may be applicable and suitable."

Rule 27 of the 1955 Rules reads as follows:

> "In the event of any conflict between these Rules and the Indian Code of Civil Procedure as applied to Tanganyika, these Rules shall prevail. Any matter not specifically dealt with in these Rules shall be dealt with in accordance with the Rules of the Indian Code of Civil Procedure."

In my view, the matter under consideration is one which is specifically dealt with in the 1955 Rules and therefore the Rules of the Code are excluded. So far as there is a conflict between r. 15 of the 1955 Rules and O. 8, r. 10, it is clear that the former must prevail. I hold, therefore, that the magistrate had no power to give judgment under O. 8, r. 10 of the Code.

Mr. Sayani also argued, if I understood him correctly, that the appeal itself was inappropriate, because the proper course was application under r. 17 of the 1955 Rules. I agree that if the proceedings had taken the proper course and judgment had been given under r. 15, the appellant, if aggrieved, could have availed himself of r. 17 but since the magistrate, in my opinion wrongly, acted under O. 8, r. 10 of the Code, I think the present proceedings are appropriate and proper.

Accordingly, I set aside the judgment and decree and direct that the proceedings do continue in accordance with the 1955 Rules, and particularly r. 7. This means that a date must be appointed when the case will be heard and finally disposed of on its merits. No question arises of extending the time for filing a written statement of defence since no such statement is necessary or appropriate in proceedings following a summons for final disposal.

Appeal allowed. Judgment and decree set aside. Order for the case to proceed to trial on the summons for final disposal.

For the appellant:
K. A. Master & Co., Dar-es-Salaam
K. A. Master, Q.C.,

For the respondent:
Sayani & Co., Dar-es-Salaam
N. R. Sayani

Manji Suleman Ladha and others v R G Patel and others
[1960] 1 EA 38 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	5 January 1960
Case Number:	41/1959
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Evidence – Document – Admissibility in evidence – Report of inspector of vehicles – Whether report a "public or other official book, register or record" – Indian Evidence Act, 1872, *s.* 35 – *Traffic Ordinance* (*Cap.* 168), *s.* 5 (*T.*).

Editor's Summary

Counsel for one of the defendants sought to introduce as evidence a report of an inspector of vehicles made on Police Form 93 as a "public or other official book, register or record" under s. 35 of the Indian Evidence Act. Its admissibility having being questioned.

Held –

(i) to be a public record, a record must be (*a*) intended for the use of the public or a section of the public, or be available for public inspection; (*b*) intended to be a permanent record and (*c*) substantially a record of facts.

(ii) the report of the inspector of vehicles on Police Form 93 was not a "public or other official book, register or record" for the purpose of s. 35 of the Indian Evidence Act and, accordingly, was inadmissible in evidence.

Order accordingly.

Judgment

Spry Ag J: I am asked to decide whether the report of an inspector of vehicles made on Police Form 93 is admissible in evidence under s. 35 of the applied Indian Evidence Act.

I am not aware of any decision of the East African Courts which is relevant. There have been many decisions of the Indian courts on the interpretation of the section but in no case, I think, were the facts sufficiently similar to make a detailed study of the cases worth while. English law is not precisely similar and the English cases are therefore only useful as illustrating the principle involved.

Section 5 of the Traffic Ordinance (Cap. 168) empowers the Governor to appoint suitable persons to be inspectors of vehicles and s. 63 of the Ordinance empowers such inspectors in certain circumstances to carry out the inspection of motor vehicles. There is, so far as I am aware, no provision which requires an inspector of vehicles to make any record of his findings, although it is obviously proper and desirable that he should do so.

The document produced to me is marked "Police Form 93" and is headed "Vehicle Inspection Report". It contains a space for "Defects" with a space below for the signature of the inspector. A second part of the form provides for a certificate that the vehicle has been passed for use in connection with passengers and goods. The form is numbered and perforated and bears the word "Original". I presume therefore that these forms are bound up in books and are completed in duplicate, the original being torn out and handed to the owner of the vehicle and the duplicate retained for the use of the police.

Now it seems to me quite clear that this is not a "public" record, in that it is not intended for the use of the public or any section of the public, nor, so far as I am aware, is it available for public inspection. The original of the form is for the use of the owner of the vehicle, telling him what repairs or adjustments

he ought to carry out to make the vehicle roadworthy: the duplicate is presumably for the use of the traffic police, so that they can check whether the necessary work has been done and if it has not been done can institute proceedings or notify the licensing authority, as may be appropriate.

Secondly, the record is not in any sense a permanent one. I do not know how long these particular records are in fact kept. As I have said, there is no legal requirement that they be kept at all and from the practical aspect, there seems no good reason for keeping them once the vehicle has been made roadworthy or an order has been made under s. 63 (1) of the Traffic Ordinance. The underlying philosophy of s. 35 of the Evidence Act seems to be that special credence can be given to records which have been prepared by responsible officials and which were intended to be enduring records. Monir, in his Principles and Digest of the Law of Evidence (2nd Edn.) at p. 340, says

> "The wording of the section . . . imports that the entry will be of a permanent nature . . ."

I respectfully agree and I think this absence of any element of permanence would alone suffice to exclude these Vehicle Inspection Reports from the scope of s. 35.

Thirdly, I think that records, to come within the provisions of s. 35 of the Evidence Act, must substantially be records of facts, even though s. 35 itself merely refers to an entry, to be admissible, having to be an entry stating a fact. In general, and ignoring for the moment the particular document before the court, Vehicle Inspection Reports will, I think, be records of opinion and not of facts. The most important questions with which they are likely to deal, such as the degree of efficiency of brakes or steering or the question whether tyres are so worn as to be dangerous, are essentially matters of opinion, that is to say matters in respect of which the right of cross-examination may be vitally important.

For all these reasons, I have no hesitatation in holding that a Vehicle Inspection Report on Police Form 93 is not a "public or other official book, register or record" for purposes of s. 35 of the Evidence Act.

Order accordingly.

For the plaintiffs:
Fraser Murray & *S. H. M. Kanji*
W. D. Fraser Murray and *S. H. M. Kanji*

For the first and second defendants:
A. C. Beynon and *C. J. Davda,* Dar-es-Salaam

For the third defendant:
K. A. Master, Q.C. Dar-es-Salaam

Lakhamshi Govindji & Co v Hasham Suleman Ltd
[1960] 1 EA 40 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 29 February 1960

Case Number: 88/1959

Before: Crawshaw Ag CJ

Sourced by: LawAfrica

[1] Carriage by road – Carriage of goods – Action against carrier for damages for loss of goods in transit – Negligence of carrier not pleaded in plaint – Common carrier – Whether common law of England applies in Tanganyika – Whether plaint discloses cause of action – Carriers Act, 1830 – *Indian Contract Act*, 1872, *s.* 148, *s.* 151 *and s.* 152 – *Tanganyika Order-in-Council*, 1920, *art.* 17 (2).

Editor's Summary

The plaintiffs handed goods to the defendants for transport from Dar-es-Salaam to Mombasa. The goods were stolen by the defendants' driver whilst in transit. The plaintiffs sued the defendants for loss of the goods and alleged that the defendants were liable as common carriers or as carriers of goods for hire. The defendants denied that they were common carriers. At the hearing of a preliminary point it was argued that even if the defendants were held to be common carriers the common law of England did not apply to common carriers in Tanganyika, that the carriage of goods by a common carrier is simply a bailment within the Indian Contract Act, and that by s. 151 and s. 152 of the Indian Contract Act a bailee's liability in damages only arises if negligence is proved against him and, since negligence was not pleaded in the plaint, it did not disclose a cause of action.

Held – the common law of England applies to common carriers in Tanganyika under which proof of negligence is not necessary and accordingly there was no need to plead negligence in the plaint.

Preliminary objection overruled.

Cases referred to in judgment:

(1) *The Irrawaddy Flotilla Company v. Bugwandas* (1891), 18 Cal. 620.

(*2*) *The Landing and Shipping Company of East Africa v. K. Naranbhai & Company* (1954), 2 T.L.R. (R.) 245.

Judgment

Crawshaw Ag CJ: The plaintiff company say in their plaint that they handed to the defendant company certain goods for transport from Dar-es-Salaam to Mombasa, for which the defendants were to be paid on delivery. That whilst in transit in the defendants' lorry, the defendants' driver stole the goods which have not been recovered by the plaintiffs. The plaintiffs allege that the defendants are common carriers or, alternately, a carrier of goods for hire, and claim damages.

The defendants admit that the goods were received from the plaintiffs for transport and that they were stolen whilst in transit and that their driver was convicted of the theft thereof, but deny liability. They deny that they were common carriers but "that they carry on the business of transporters".

The preliminary point has been taken that the plaint does not disclose a cause of action. The grounds for this contention are that even if the defendants should be held to be common carriers, the common law of England does not apply, and the relationship between the parties is one of bailment and is

governed by chapter 9 of the Indian Contract Act, 1872 (hereinafter referred to as the 1872 Act). It is argued by the defendants, as I understand it, that by virtue of s. 151 and s. 152 in that chapter a bailee's liability in damages can only arise if negligence is proved against him, and that as negligence has not been pleaded there is no case to answer.

The first question is whether the common law of England applies to common carriers in Tanganyika, for if it does the plaintiff will be put to proof that the defendants were common carriers, and if it does not, it seems to be agreed that such proof will not be necessary because, presumably, the parties would not, then differentiate between common and other carriers for the purpose of this suit. The importance clearly is that under the common law, common carriers and innkeepers were (and I now quote from Pollock and Mulla on the Indian Contract Act, (6th Edn.), 517) "liable as insurers of goods", that is they were responsible for every injury to the goods occasioned by any means whatever, except only the act of God and the King's enemies. Therefore the mere proof of delivery of goods and injury thereto, unless caused by the act of God or the King's enemies, was sufficient to entitle the plaintiffs to compensation without proof of negligence on the part of the defendants. These principles of the English Common Law applied in India, but they were subsequently modified by legislation as respects common carriers, and the Carriers Act III of 1865 now enables a bailee of this class to limit his liability by special contract in the case of certain goods, but not so as to get rid of liability for negligence. The common law in England was in similar manner modified by the Carriers Act, 1830.

There is no ordinance equivalent to the Carriers Act in Tanganyika, and Mr. Jhaveri, for the defendants, argues therefrom, if I have understood him rightly, that there being no ordinance in Tanganyika which specifically recognises the common law, the carriage of goods by common carriers is a bailment within the 1872 Act, and is governed like any other bailment by the provisions thereof. To put it another way, had there been no Carriers Act in India, the definition of "bailment" in s. 148 of the 1872 Act would have been held to be wide enough to include common carriers, but because of the Carriers Act recognising the existence of the common law, a more limited interpretation had to be placed on the definition; that in Tanganyika no such embarrassment arises.

I am afraid that this argument is not one which I can accept. There can be no doubt, I think, that as the 1872 Act did not repeal the Carriers Act, it must be taken to have recognised it, and thereby itself to have recognised the continuance of the common law in India, and be held to have intended that s. 151 and s. 152 should not apply to common carriers. There is authority for this view in The *Irrawaddy Flotilla Company v. Bugwandas* (1) (1891), 18 Cal. 620.

But it was not only because the 1872 Act failed to repeal the Carriers Act that the Privy Council in the *Irrawaddy* case (1) held that the 1872 Act did not replace the common law. It drew a fundamental distinction between common carriers and other carriers. Lord Macnaghten, in delivering the judgment of the council, said at p. 629:

> "At the date of the Act of 1872 the law relating to common carriers was partly written, partly unwritten law. The written law is untouched by the Act of 1872. The unwritten law was hardly within the scope of an Act intended to define and amend the law relating to contracts. The obligation imposed by law on common carriers has nothing to do with contract in its origin. It is a duty cast upon common carriers by reason of their exercising a public employment for reward. 'A breach of this duty', says Dallas, C.J., (*Bretherton v. Wood*, 3 B. and B., 62) 'is a breach of the law, and for this breach an action lies founded on the common law, which action wants not the aid of a contract to support it.' If in codifying the law of contract,

> the legislature had found occasion to deal with tort, or with a branch of the law common to both contract and tort, there was all the more reason for making its meaning clear."

again, he says later:

> "It was hardly disputed that the liability of a common carrier as an insurer was an incident of the contract between the common carrier and the owner of the property to be carried. Is that incident inconsistent with the provisions of the Act of 1872? No one could suggest that it was inconsistent, merely by reason of its being a term of the contract implied and not expressed. Then it would seem that the proper way of trying whether it is or is not inconsistent with the provisions of the Act of 1872 would be to write it out as part of the contract. Would it then be inconsistent? Clearly not. It would be within s. 152; it would be a special contract, saved by that section. It is difficult to see how a term of a contract can be inconsistent with the provisions of the Act of 1872 if it is implied, while it would not be inconsistent if it were expressed in the contract."

As I read the judgment in that case, the Privy Council would still have decided that the 1872 Act did not apply to common carriers, even had there never been the Carriers Act. With respect this is my view, and had not the common law applied to common carriers in Tanganyika prior to the application of the 1872 Act, the common law would have stepped in to fill the void, by virtue of the provisions of art. 17 (2) of the Tanganyika Order-in-Council. The Order provides that, subject to any other laws in force in Tanganyika,

> "and so far as the same shall not extend or apply, (the jurisdiction) shall be exercised in conformity with the substance of the common law, the doctrine of equity and the statutes of general application in force in England at the date of the Order."

In fact the Order-in-Council was dated July 22, 1920, and the 1872 Act was not applied until the promulgation of the Indian Acts (Application) Ordinance, on December 1, 1920, and therefore the common law must have applied immediately prior to the introduction of the application of the 1872 Act, and, for all I know, even prior to the Order-in-Council.

For the reasons given, I hold that the common law of England does apply to common carriers in Tanganyika. If it can therefore be proved that the defendants were common carriers, it cannot be said that the plaint does not disclose a cause of action. The defendants, however, ask that the alternate claim that the defendants are liable even if not common carriers be struck out, as negligence is not alleged. I am not sure that I can do this, for this part of the plaint seems to me to be founded on contract and not in tort, and damages are claimed solely on the ground of failure of the defendants to deliver goods entrusted to them which they were under a contractual obligation to deliver. There may be a good defence based on law, but it seems to me that this is a matter which I must decide after hearing the parties. In the words of Lowe, J. (as he then was), in *The Landing and Shipping Co. of East Africa v. K. Naranbhai & Company* (2) (1954), 2 T.L.R. (R.) 245 at p. 246:

> "It is not sufficient for a defendant to deny an averment and raise in his favour a provision of law which, he claims, dispels a cause of action; it is for the court to consider, during or after the hearing, whether or not the denial by the defendant is supported by the law and the legal effect of the provision quoted is such that the plaintiff cannot succeed in his action."

The costs of the hearing on February 18 to be paid by the defendants in any event.

Preliminary objection overruled.

For the plaintiffs:
W. J. Lockhart-Smith, Dar-es-Salaam

For the defendants:
Patel, Desai, Jhaveri & Co, Dar-es-Salaam
K. L. Jhaveri

Abdullah Ibrahim v R
[1960] 1 EA 43 (HCT)

Division:	HM High Court of Tanganyika
Date of judgment:	10 February 1960
Case Number:	13/1960
Before:	Law J
Sourced by:	LawAfrica

[1] Criminal law – Burglary and stealing – Misdirection – Recent possession of stolen property – Accused found in possession of stolen article seven months after burglary – Presumption as to recently stolen property – Necessity for magistrate to direct himself on scope and limitation of presumption – Penal Code, s. 265 *and s.* 294 (1) (*T.*).

Editor's Summary

Seven months after a burglary the appellant was found to be in a possession of a tyre pump which was part of the property then stolen. There was no direct evidence to connect the appellant with the burglary except possession of the stolen pump but he was convicted of burglary and stealing. On appeal it was argued inter alia that in convicting the appellant the magistrate misdirected himself on the law relating to recent possession.

Held –

(i) where a conviction is founded on the law of recent possession a magistrate must sufficiently direct himself on the scope and limitation of the presumption to be drawn and the magistrate had failed to do so in the instant case.

(ii) possession of an article of common use such as a tyre pump seven months after the burglary could not raise the presumption that the appellant was guilty of burglary and stealing.

Appeal allowed. Convictions on both counts quashed and sentences set aside.

Cases referred to in judgment:

(1) *Shabani s/o Juma v. R.* (1953), 20 E.A.C.A. 199.

(2) *Jagat Singh v. R.* (1953), 20 E.A.C.A. 283.

Judgment

Law J: The appellant, Abdullah Ibrahim, was charged in the district court of Dodoma at Dodoma with the offences of burglary and stealing contrary to s. 294 (1) and s. 265 of the Penal Code, and was convicted by the learned resident magistrate and sentenced to concurrent terms of 12 and 9 months imprisonment. At the hearing of the appeal on February 3, 1960, I allowed the appeal, quashed the convictions and set aside the sentences. I now give my reasons for so doing.

The charge against the appellant was as follows:

"Statement of Offence

1st count: Burglary c/s 294 (1) P.C.

2nd count: Stealing c/s 265 P.C.

Particulars of Offence

1st count: The person charged on about the month of February 1959 at about 9 p.m. within the township and district of Kongwa/Mpwapwa, Central Province, did break and enter the dwelling house of one Ahamed s/o Mzee with intent to steal therein.

2nd count: The person charged on the same date, time and place did steal –

One m/v foot pump No. S. 6639 valued Shs. 120/-

One self start valued Shs. 200/-

One dynamo valued Shs. 200/-and

One clutch handle valued Shs. 15/-,

total value of all property Shs. 535/-, the property of one Ahamed Mzee."

The facts of the case as found by the learned resident magistrate, are that on an unspecified date (which from perusal of the record would appear to have been in September or October 1959) the appellant, a motor transporter, was found to be in possession of a pump proved to have been part of the property stolen from the complainant's house. When asked to account for his possession of the pump, the appellant said it had been loaned to him by one Rajabu. When Rajabu denied this, the appellant said he had borrowed it from one Stephano, and when Stephano was called as a prosecution witness to refute this, the appellant said in evidence that he was always lending his pump and that the stolen one must have been returned to him in its place by one of the borrowers. There was no other evidence whatsoever to connect the appellant with the burglary which occurred some seven or eight months earlier, nor was there any suggestion that any of the other objects stolen on that occasion were ever in the appellant's possession.

The appellant's petition of appeal includes the following grounds:

"1. There was no or no sufficient evidence on which the learned magistrate could have found that the appellant broke and entered the complainant's premises.

"2. The only evidence as to this being that the complainant's premises were broken in February, 1959 (some seven months before the pump Ex. B. was found in the possession of the appellant) the learned magistrate should have directed himself on the law relating to recent possession. Had he properly directed himself on this point, the learned magistrate would probably not, or might well have not, come to the conclusions which he reached in the following passage –

'As this pump has been proved to my satisfaction to be part of the articles stolen from the house of Ahmed Mzee which was broken and entered, there is in my opinion no other proper inference to draw other than that the accused broke and entered the house and stole the articles mentioned.'

"3. The sentence was excessive."

As there was no direct evidence of any sort to connect the appellant with the breaking and stealing at the complainant's premises in February 1959, it would seem that the appellant was convicted as a result of the presumption arising out of the possession of recently stolen property, although the learned resident magistrate does not refer to the presumption at all in the course of his judgment. It is accordingly necessary for this court to review the law relating to recent possession, and to decide in the light of such review whether or not the learned magistrate was right in holding that there was

"no other proper inference to draw other than that the appellant broke and entered the house and stole the articles mentioned".

The following is an extract from Kenny's Outlines of Criminal Law' (15th Edn.), p. 391:

"The possessor of goods recently stolen may fairly be regarded as either

> the actual thief or else a guilty receiver. His possession raises also – but less strongly – a presumption of his guilty connection with any further crime that accompanied the theft, e.g. a burglary, arson or murder."

And on page 392:

> "As to what time is near enough to be recent, no general rule can be given, for the period within which the presumption can operate will vary according to the nature of the article stolen. Three months has been held sufficiently recent for a motor car, and four months for a debenture bond. But for such articles as pass from hand to hand readily, two months would be a long time."

In connection with the last sentence, attention is drawn to a possibly extreme view, that of Avory, J., referred to in note 8 at the foot of p. 391, where he directed a jury in these words:

> "Possession so long afterwards (the period was two days) is not sufficient evidence of stealing, you had better convict of receiving."

In *Shabani s/o Juma v. R.* (1) (1953), 20 E.A.C.A. 199, the prisoner had been charged with entering a dwelling house with intent and stealing, the only evidence against him being that two months later the prisoner was seen wearing some of the stolen articles, a pair of shorts, a kanzu and a pair of shoes. The trial judge considered two months rather too long to raise a presumption against the prisoner on the charges of entering and stealing, found him not guilty of those offences, but convicted him of receiving stolen goods. The Court of Appeal, dismissing the appeal, said:

> "Even in the case of receiving, we think an interval of two months in the case of articles such as these raised not too strong a presumption against the appellant."

As regards the necessity for a trial court to direct itself properly as to the law when purporting to act on a presumption, I refer to the following extract from the Court of Appeal's judgment in *Jagat Singh v. R.* (2) (1953), 20 E.A.C.A. 283 at p. 286:

> "It is not the law that proof of possession of recently stolen articles will necessarily or in every case justify an inference of guilt; what constitutes 'recent possession' depends upon the nature of the property and the circumstances of the particular case, and we do not find in the record any indication that the magistrate directed his mind to these factors."

The Court of Appeal made it clear that, where a conviction is founded on the law of recent possession, the magistrate must

> "sufficiently direct himself on the scope and limitation of the presumption to be drawn".

I agree with Mr. Thornton, who has appeared for the appellant, that the judgment in the case now under appeal is defective because it is clear that the learned magistrate did not direct himself at all as to the scope and limitation of the presumption to be drawn from the recent possession of stolen goods. The convictions in this case can only stand if I am satisfied that the learned magistrate would have come to the same conclusion as he did had he correctly directed himself on the law. I am not so satisfied. On the contrary, I have little doubt that if the learned magistrate had correctly directed himself, he must have come to the conclusion after consideration of the relevant law and authorities, that possession, seven months after a breaking, of an article in common use such as a tyre pump, one only of the articles stolen in the course of the breaking, could not raise the presumption that the possessor of the pump was guilty of the offences charged.

Crown counsel, whilst conceding that the convictions for breaking and stealing could not be supported, has submitted that a conviction contrary to s. 311 of the Penal Code for receiving the pump having reason to believe it to have been stolen should be substituted by this court on appeal, because of the conflicting and untrue explanations put forward by the appellant. Mr. Thornton submits that even if an adverse presumption can arise after so long an interval as seven months, the appellant's explanations for his possession of the pump are not necessarily indicative of guilt. Anybody who is suddenly asked to account for possession of an article which he has had for a long time may well give explanations which prove on investigation to be untrue, for a number of reasons including defective memory. The fact that two men have denied giving the pump to the appellant does not necessarily mean that he lied; one of them may be the thief, and he would naturally deny having had anything to do with the pump. Be that as it may, I am not satisfied that the learned magistrate, had he properly directed himself, would necessarily have found the appellant guilty even of receiving, having regard to the lapse of time and the nature of the article.

As already indicated, this appeal succeeds, and the convictions on both counts are quashed and the sentences set aside.

Appeal allowed. Convictions on both counts quashed and sentences set aside.

For the appellant:
Fraser Murray, Thornton & Co, Advocates, Dar-es-Salaam
R. S. Thornton

For the respondent:
The Attorney-General, Tanganyika
R. A. Caldwell (Crown Counsel, Tanganyika)

Daudi Ndibarema and others v The Enganzi of Ankole and others
[1960] 1 EA 47 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	16 January 1960
Case Number:	78/1959
Before:	Sir Kenneth O'Connor P, Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Sheridan, J.

[1] Constitutional law – Protectorate – Agreement between Crown and African ruler – Act of State – Jurisdiction of court – Ankole Agreement, 1901 *and* 1941, *arts.* 3, 4, 5, 6, 7 *and* 8 (*U.*) – *District Administration* (*District Councils*) *Ordinance,* 1955, *s.* 2, *s.* 3, *s.* 4, *s.* 7, *s.* 8, *s.* 10, *s.* 19, *s.* 20 (2), *s.* 25A,

s. 69 (*U.*) – *District Administration* (*District Councils*) (*Amendment*) *Ordinance*, 1958 (*U.*) – *Suits By or Against the Government Ordinance* (*Cap.* 7), *s.* 2 (*U.*) – *Crown Lands* (*Adjudication*) *Rules*, 1958, *r.* 2, *r.* 3, *r.* 5, *r.* 6, *r.* 11, *r.* 14, *r.* 16, *r.* 17, *r.* 18 (*U.*) – *Ankole Constitutional Regulations*, 1955, *r.* 13 (*U.*) – *Uganda Agreement*, 1900, *art.* 5 – *Uganda Order-in-Council*, 1902, *s.* 2, *s.* 7, *s.* 15 – *Foreign Jurisdiction Act*, 1890, *s.* 4 – *Uganda Order-in-Council*, 1920, *s.* 14 – *Crown Lands Ordinance* (*Cap.* 117), *s.* 2, *s.* 24 (2), *s.* 35 (*U.*) – *Crown Lands* (*Declaration*) *Ordinance* (*Cap.* 118), *s.* 2 (*U.*) – *Native Courts Ordinance* (*U.*) – *Registration of Titles Ordinance* (*U.*) – *African Authority* (*Amendment*) *Ordinance*, 1955 *and* 1958, *s.* 2, *s.* 3 (*U.*) – *African Authority Ordinance* (*Cap.* 72), *s.* 2, *s.* 3 (1), *s.* 8, *s.* 13A (*U.*) – *Royal Instructions*, *s.* 32 (6).

Editor's Summary

The appellants sued for declarations that the Ankole Agreement, 1901, was still valid, subsisting and incorporated into the municipal law of Uganda, that the Crown Lands (Adjudication) Rules, 1958, were inconsistent with the Agreement and null and void, and upon sundry other constitutional questions affecting the district of Ankole. On appeal from the High Court of Uganda dismissing the action.

Held –

(i) whilst the Ankole Agreement, 1901, was, no doubt, still valid and subsisting, the trial judge was right in refusing so to declare, because the subsistence and validity of treaties are not matters upon which the municipal courts should pronounce.

(ii) the Ankole Agreement, 1901, is not part of the municipal law of the Uganda Protectorate.

(iii) although it is difficult to see what practical significance a declaration that the resolutions passed at the meeting of the Eishengyero on August 8, 1958, could have, since the respondents in their defence had admitted the resolutions were invalid, it would make the position clear beyond doubt if the declaration sought were granted and accordingly a declaration to that effect would be made as prayed.

(iv) the Crown Lands (Declaration) Ordinance was not made without jurisdiction merely because of inconsistency with the Ankole Agreement, 1901, since the jurisdiction of the Crown in Ankole did not derive solely from that Agreement; in any event the court could not entertain such a proposition, since the jurisdiction which the Crown by its acts has exercised is conclusive as to the extent of the jurisdiction of the Crown.

(v) the Crown Lands (Adjudication) Rules, 1958, dealing as they did exclusively with Crown land which, under the Ankole Agreement, 1901, was vested in the Governor on trust for the Crown, did not conflict with the

Agreement and the High Court of Uganda was right in refusing to declare the rules illegal, or null and void as ultra vires.

(vi) there is nothing in s. 3 of the Ankole Agreement, 1901, which states that the Omugabe is the sole channel of communication with the people of Ankole; under s. 8 of the African Authority Ordinance, administrative officers have, since 1919, had power to deal direct with chiefs and to require chiefs to issue orders to the people themselves.

(vii) there was no evidence that land in Ankole belonged by customary law to the Omugabe as the sole custodian of his people, and even if this were so with regard to land which was not Crown land, it was not so now with regard to Crown land, to which land only the Land Titles scheme applied.

Appeal dismissed. Decision of the High Court of Uganda, [1959] E.A. 552 (U.) affirmed save that a declaration was made that the resolutions of the Eishengyero passed on August 8, 1958, were invalid.

Cases referred to in judgment:

(1) *Nyali Ltd. v. Attorney-General*, [1956] 1 Q.B. 1; [1956] 2 All E.R. 689.

(2) *Jerusalem-Jaffa District Governor v. Suliman Murra*, [1926] A.C. 321.

(3) *Katosi v. Kahizi* (1907), 1 U.L.R. 22.

(4) *In re Southern Rhodesia*, [1919] A.C. 211.

(5) *Amodu Tijani v. The Secretary, Southern Nigeria*, [1921] 2 A.C. 399.

The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree dated May 28, 1959, of the High Court of Uganda dismissing with costs a suit by the appellants in which they claimed sundry declarations relating to constitutional matters arising in the district of Ankole, part of the Uganda Protectorate. The appellants also claimed injunctions to restrain the Protectorate Government and certain officials of that Government, and the Enganzi (Principal Executive Officer) of Ankole and the District Commissioner of Ankole from proceeding with certain proposed governmental measures to which the appellants objected. These measures, the appellants said, were contrary to the provisions of the Ankole Agreement, 1901, (hereinafter referred to as "the Agreement") and ultra vires the Protectorate Government and the Eishengyero (District Council) of Ankole which had purported to adopt them. The first appellant is one of the original signatories to the Agreement and one of the chiefs named in, and claiming rights under, art. 3 of the Agreement. The second appellant, a former chief, was a witness to the Ankole Agreement, 1941, which was expressed to be read as one with the Agreement. The third and fourth appellants are elected members of the Eishengyero of Ankole. It is to be observed that the Omugabe of Ankole was not a plaintiff in the suit and that the Enganzi of Ankole was a defendant, and is a respondent to the appeal. The second defendant, the District Commissioner, was sued because he had, under s. 8 of the District Administration (District Councils) Ordinance, 1955, held that there was a quorum at a meeting of the Eishengyero of Ankole held on August 8, 1958, which approved the setting up of an Appointments Board and the introduction of a pilot land titles scheme in Ankole. It was alleged

by the plaintiffs that the District Commissioner's decision was wrong, and that decision was not supported by the defendants at the hearing. The third defendant was sued under the Suits By or Against the Government Ordinance as the officer against whom suits by or against the Government of the Protectorate may be instituted.

The measures to which the appellants principally took objection were, first, the application to Ankole of the Crown Lands (Adjudication) Rules, 1958 (published in Legal Notice No. 91 of 1958 of the *Uganda Gazette Supplement* and applied to the Ankole district by notice dated September 8, 1958 – Legal Notice No. 233 of 1958) and the inauguration of a pilot scheme for the issue of land titles in Ankole; and, secondly, the setting up of an Appointments Board for Ankole in purported pursuance of s. 25A of the District Administration (District Councils) Ordinance, 1955, as amended by the District Administration (District Councils) (Amendment) Ordinance, 1958. The appellants averred that the Crown Lands (Adjudication) Rules, 1958, were in conflict with the provisions, or alternatively with the spirit and intendment, of the Agreement relating to land in Ankole; and that the proposal to set up an Appointments Board in Ankole (among whose duties would be the appointment of chiefs) was also in conflict with the terms of the Agreement supplemented by certain statutory provisions which they specified and which will be referred to later.

As already mentioned, the plaintiff/appellants also averred in the High Court that the proceedings at the meeting of the Eishengyero of Ankole held on August 8, 1958, at which it was resolved that land titles on a pilot scheme should be introduced into Ankole and at which, apparently, a proposal to set up an Appointments Board for Ankole was approved, were invalid because of lack of a quorum. It was admitted in the defence that there had been no quorum at this meeting and, accordingly, that the resolutions passed thereat were invalid. It was, however, alleged by the defendant/respondents that the Eishengyero on that occasion were merely being consulted and that the invalidity of their resolutions had no effect on the responsibility of the Governor for making the necessary Rules and Regulations.

In detail, the claim of the plaintiff/appellants in the court below was as under:

> "The plaintiffs claim:
>
> "A declaration: That the Ankole Agreement of 1901 is still valid and subsisting.
>
> "2. (*a*) A declaration that any act or omission which is inconsistent with the provisions of the aforesaid Agreement, or alternatively, with its spirit and intendment (e.g. The Crown Lands (Adjudication) Rules, 1958) is illegal and null and void.
>
> "(*b*) Alternatively, the plaintiffs will contend that Her Majesty's Government is estopped from alleging that the Ankole Agreement of 1901 is not a valid document because the aforesaid Agreement having been interwoven into the fabric of the Constitution of Ankole Kingdom forms part of the constitution of the aforesaid Kingdom and as such does create enforceable rights.
>
> "3. (*a*) A declaration that the Omugabe and (Saza) chiefs of Ankole are by virtue of s. 3 of the aforesaid Agreement as supplemented by or read together with the District Administration (District Councils) Ordinance, No.1 of 1955, and the Eishengyero of Ankole Constitutional Regulations of 1955, the only legitimate and lawful persons entitled to appoint chiefs. Therefore, the purported resolutions of the General Purposes Committee passed on or about March 7, 1958, and that of the Eishengyero of Ankole passed on or about August 8, 1958, both and each of them purporting to set up an Appointments Board in Ankole Kingdom are null and void as being ultra vires. Similarly, the resolution passed by the Eishengyero of Ankole on August 8, 1958, stating that land titles on a pilot scheme should be introduced in Ankole is invalid in as much as there was no quorum in the Eishengyero of Ankole held on August 8, 1958, to pass such and/or any other resolutions.

"(*b*) A declaration that unless and until the appointments of chiefs are made by the Omugabe and the Saza chiefs of Ankole in accordance with the provision of s. 3 of the Ankole Agreement as supplemented by or read in conjunction with the District Administration (District Councils) Ordinance, No.1 of 1955, and with the Eishengyero of Ankole Constitutional Regulations, 1955, any purported appointment or appointments made or to be made by the Appointments Board in Ankole Kingdom are unlawful and invalid and of no effect whatever, in as much as the Governor of Uganda has not, and had not at any material time any power to set up an Appointments Board for the purpose of appointing chiefs of the Kingdom of Ankole, nor did he or has he any overriding control over chiefs. Further, or in the alternative, that the setting up of such Board is in breach of the Ankole Agreement of 1901.

"4. (Abandoned at the hearing).

"5. A declaration that the minutes, resolutions and/or proceedings of the Eishengyero of Ankole held on August 8, 1958, are invalid and of no effect whatever because the provisions of s. 10 of the District Administration (District Councils) Ordinance, No.1 of 1955, not having been complied with, the requisite quorum of sixty members was not present when the Eishengyero of Ankole purported to pass the aforesaid resolutions.

"6. An injunction to restrain the Enganzi of Ankole and/or the District Commissioner of Ankole from acting on the aforesaid invalid resolutions, or from forwarding them to His Excellency the Governor.

"7. Alternatively, an injunction to restrain the Appointments Board from being constituted, or functioning, or alternatively, to declare the proceedings of the Appointments Board (if any) or its resolutions (if any) and/or its minutes null and void and of no effect whatsoever.

"8. An injunction to restrain the Minister of Natural Resources and/or the Uganda Government from introducing the Crown Lands (Adjudication) Rules, 1958, in the Ankole Kingdom in as much as they are invalid and null and void as being ultra vires.

"Alternatively, to declare land titles granted under the aforesaid rules invalid and of no effect whatever.

"9. Costs of the action."

The learned judge refused all these prayers for reasons which he gave and which will be referred to hereafter.

The history of the matter is as follows:

On October 25, 1901, the Agreement was entered into

"between Frederick J. Jackson Esq., C.B., His Majesty's Acting Commissioner and Consul General for the Uganda Protectorate and adjoining Territories representing the Government of His Britannic Majesty the King of Great Britain and Ireland, and Emperor of India, on the one part, and the Kabaka and chiefs of the district of Ankole, on the other part."

The relevant articles of the Agreement are:

"3. By this Agreement the Chief Kahaya is recognised by His Majesty's Government as the Kabaka or supreme chief over all that part of the Ankole District which is included within the limits of the above mentioned administrative sub-divisions. Buchunku is recognised as chief over the Mitoma sub-division; Masiko is recognised as the chief over the Nyabushozi sub-division: Rutasharara is recognised as the chief over the Nsara sub-division; Mazinyo is recognised as the chief over the Ishingiro sub-division;

Dhuara is recognised as the chief over the Ruampara sub-division; Nduru is recognised as the chief over the Buzimba sub-division; Baguta Katikiro is recognised as chief over the Ngarama, and Shema, and Kashari sub-divisions; Mkotani is recognised as chief over the Igara sub-division (to be temporarily administered by Regent Bakora until such time as Mkotani shall come of age); Rubarremma shall be recognised as chief over Buhwezo sub-division; and Kaihura shall be recognised as chief over Bunyaraguru sub-division.

> "So long as the aforesaid Kabaka and chiefs abide by the conditions of this Agreement they shall continue to be recognised by His Majesty's Government as the responsible chiefs of the Ankole district.
>
> "They shall be allowed to nominate their successors in the event of their demise, and the successors thus nominated shall be in like manner recognised by His Majesty's Government as the successors to the dignity of chieftainship, on the understanding that they equally abide by the terms of this Agreement.
>
> "But should the Kabaka or the other chiefs herein named fail at any time to abide by any portion of the terms of this Agreement, they may be deposed by His Majesty's principal representative in the Uganda Protectorate, and their titles and privileges will then pass to any such other chiefs as His Majesty's principal representatives may select in their place.
>
> "Should the Kabaka of Ankole – Kahaya or his successors – be responsible for the infringement of any part of the terms of this Agreement, it shall be open to His Majesty's Government to annul the said Agreement, and to substitute for it any other methods of administering the Ankole district which may seem suitable.
>
> "4. All the waste and uncultivated land which is waste and uncultivated land at the date of this Agreement, all forests, mines, minerals, and salt deposits in the Ankole district shall be considered to be the property of His Majesty's Government, the revenue derived there from being included within the general revenue of the Uganda Protectorate; but the natives of the Ankole district shall have the same privileges with regard to the forests as have been laid down and formulated in the regulations in force in the Uganda Protectorate as are applicable to the natives of each province or other administrative division of the Protectorate within such province or administrative division.
>
> "His Majesty's Government shall have the right of enforcing on the natives of the Ankole district, as elsewhere in the Uganda Protectorate, the protection of game; and in this particular it is hereby agreed that within the Ankole district the elephant shall be strictly protected, and that the killing or capture of elephants on the part of the natives of the Ankole district shall be regulated by the Sub-Commissioner of the Western Province."

Article 5 deals with taxation and art. 6 with the administration of justice between native and native and the destination of court fees and fines. Article 7 sets out the shares of revenue collected which is to be paid to the Kabaka and the recognised chiefs of sub-divisions and provides the size of the private estate which the Kabaka is to have and estates of which the Katikiro and the chiefs of sub-divisions are to enjoy the usufruct.

Article 8 contains a paragraph:

> "In all respects Ankole district will be subjected to the same laws and regulations as are generally in force throughout the Uganda Protectorate."

The Agreement contains no such exception as is provided by art. 5 of the Uganda Agreement, 1900, for Buganda. The office of "Kabaka" referred to in the Agreement means the "Omugabe" and "Katikiro" means the "Enganzi".

It will be observed what the High Court was asked by prayer 2 (*a*) to do was to construe the Agreement and to declare that any act or omission which is inconsistent with the provisions of the Agreement, or alternatively with its spirit or intendment (e.g. the Crown Lands (Adjudication) Rules) is illegal, null and void. This the court rightly refused to do. Mr. Kazzora argued that the Agreement has been made part of the municipal law of the Protectorate and drew attention to various Ordinances in which the Agreement is mentioned either in the preamble or in the body of the Ordinance. I am not satisfied, however, that the Agreement has been made part of the municipal law of the Protectorate, and I think that it must be regarded only as one of the Native Agreements or treaties under which the Crown derives the jurisdiction in Uganda which it has since exercised. The jurisdiction of the protecting power in a Protectorate is not necessarily confined to the jurisdiction acquired by the treaty or agreement on which it is based, but may be extended by usage, sufferance or other lawful means. It does not follow that, even if an Order-in-Council or other legislative act appears to exceed the jurisdiction originally ceded by the treaty, it is without validity. In *Nyali Ltd. v. Attorney-General* (1), [1956] 1 Q.B. 1 at p. 15 Denning, L.J. (as he then was), speaking of the Kenya Protectorate, said:

> "Although the jurisdiction of the Crown in the Protectorate is in law a limited jurisdiction, nevertheless the limits may in fact be extended indefinitely so as to embrace almost the whole field of government. They may be extended so far that the Crown has jurisdiction in everything connected with the peace, order and good government of the area, leaving only the title and ceremonies of sovereignty remaining in the Sultan. The courts themselves will not mark out the limits. They will not examine the treaty or grant under which the Crown acquired jurisdiction: nor will they inquire into the usage or sufferance or other lawful means by which the Crown may have extended its jurisdiction. The courts rely on the representatives of the Crown to know the limits of its jurisdiction and to keep within it. Once jurisdiction is exercised by the Crown the courts will not permit it to be challenged. Thus, if an Order-in-Council is made affecting the protectorate, the courts will accept its validity without question: see *Sobhuza II v. Miller and Others*, [1926] A.C. 518, 528. It follows, therefore, that in the present case we must look, not at the agreement with the Sultan, but at the Orders-in-Council and other acts of the Crown so as to see what jurisdiction the Crown has in fact exercised; because they are the best guide, indeed they are conclusive, as to the extent of the Crown's jurisdiction."

Morris LJ, said at p. 22:

> "In the Order-in-Council of 1902 there are no words such as the words 'Subject . . . to any treaties for the time being in force relating to the Protectorate'. If, in an Order-in-Council, there is a reference to a treaty in such manner that it may become necessary to decide whether the terms of the treaty warrant some particular course of action, then the court may have to decide such a question. But, in the ordinary course, it is not for the court to accept an invitation to investigate whether the power and jurisdiction of the Crown results from treaty or from grant or from usage or from sufferance or from other lawful means: nor is it for the court to permit any challenge to the pronouncement of the Crown that it has power and jurisdiction within certain territories."

Parker LJ (as he then was), said at p. 33:

> " . . . it is, I think, clear that these courts will not consider the limits of the jurisdiction granted by treaty or otherwise to Her Majesty. Such limits may be extended by sufferance and usage and the courts will and must assume that the legislative or other acts in question are within the jurisdiction granted. All that they can do is to look at the instrument manifesting the exercise of the jurisdiction to see whether it has been lawfully exercised according to the law in force. (Cf. *Sobhuza II v. Miller*, [1926] A.C. 528)."

Mr. Kazzora relied on *Jerusalem-Jaffa District Governor v. Suliman Murra* (2), [1926] A.C. 321, but in that case the Order-in-Council expressly limited the enacting power of the Governor to Ordinances which were not inconsistent with the mandate. There is nothing of the kind in the Uganda Orders-in-Council. In the absence of words restricting the legislative power to legislation which is in accordance with the Agreement, the court is not entitled to examine the Agreement for the purpose of pronouncing whether or not legislative acts done by the Crown or by the local legislature are within or without the jurisdiction ceded by it. But where local legislation is either made subject to the provisions of a Native Agreement or evinces an intention to observe the provisions of a Native Agreement, the court must be at liberty to examine the Agreement for the purpose of construing the legislation. I think that the court is also entitled to examine a Native Agreement to see whether a question of jurisdiction arises which would justify a reference to a Secretary of State under s. 4 of the Foreign Jurisdiction Act, 1890, to have the extent of the jurisdiction determined (see *Katosi v. Kahizi* (3) (1907), 1 U.L.R. 22).

I have already set out the relevant parts of the Agreement, and I proceed now to consider the relevant legislative acts. It will be convenient first to set out the legislation concerning land titles and thereafter to deal with the question of the proposed Appointments Board.

On August 11, 1902, the Uganda Order-in-Council, 1902, was enacted. That Order-in-Council recited that His Majesty had by treaty, grant, usage, sufferance and other lawful means, power and jurisdiction within the territories known as the Uganda Protectorate; and the Order-in-Council was made in exercise of the powers on this behalf by the Foreign Jurisdiction Act, 1890, or otherwise, in His Majesty vested.

By s. 2, "Crown Lands" was defined to mean

> "all public lands in Uganda which are subject to the control of His Majesty by virtue of any treaty, convention or agreement, or of His Majesty's Protectorate, and all lands which shall have been acquired by His Majesty for the public service or otherwise howsoever."

The relevant parts of s. 7 read:

> "7.(1) All rights of His Majesty in or in relation to any Crown lands shall vest in and may be exercised by the Governor for the time being in trust for His Majesty, or if the Secretary of State at any time with respect to all or any such lands by order under his hand so directs, in such other trustee or trustees for His Majesty as the Secretary of State may appoint."
>
>
>
> "(3) The Governor, or such other trustee or trustees, may make grants or leases of any Crown lands, or may permit them to be temporarily occupied, on such terms and conditions as he or they may think fit, subject to the provisions of any Ordinance."

Section 15 constitutes His Majesty's High Court of Uganda with full jurisdiction, civil and criminal over all persons and all matters in Uganda and

sets out the law and doctrines of equity to be applied by the court in the exercise of that jurisdiction. The provisions of this section are well known and I do not propose to set them out, except to note that the law and doctrines of equity are to be in force in the Protectorate so far only as the circumstances of the Protectorate and its inhabitants "and the limits of His Majesty's jurisdiction permit. . ." Similar words were considered in *Nyali Ltd. v. Attorney-General* (1), where Morris, L.J., said, at p. 24:

> "The reference to the limits of jurisdiction does not seem to me to be sufficiently explicit to be a reference to the treaty of 1895. If however the terms of the treaty are to be looked at, it is clear that the Crown is given powers in the matter of tolls."

Similarly, if art. 4 of the Agreement is to be looked at, the effect of it, read with s. 7 and the definition of Crown lands in s. 2 of the Uganda Order-in-Council, 1902, appears to be that all land which was waste and uncultivated on October 25, 1901, was considered to be the property of His Majesty's Government and was vested in the Governor in trust for His Majesty and was known as Crown lands. It is to be observed that "Crown lands" did not include lands which were not waste and uncultivated as at October 25, 1901.

By s. 14 of the Uganda Order-in-Council, 1920, the Governor was empowered to make grants of lands within the Protectorate which might be lawfully disposed of by His Majesty: provided that every such grant . . . be made in conformity either with some Order-in-Council or law now or hereafter in force in the Protectorate or with Royal Instructions.

By s. 2 of the Crown Lands Ordinance (Cap. 117 first enacted in 1903) conveyances etc. made on behalf of His Majesty were to be taken or drawn in the name of the Governor. By s. 24 (2) of the same Ordinance, Africans were permitted to occupy Crown lands (situate outside Buganda and outside townships and trading centres) without a lease or licence from the Crown, and it was provided that compensation might, in the discretion of the Governor, be paid if the Crown took possession of such land. Section 35 gave the Governor power to make Rules regulating the procedure to be followed for applications for a conveyance, lease, or licence for the temporary occupation of Crown lands.

The Crown Lands Declaration Ordinance (Cap. 118 enacted in 1922) provided, by s. 2, that all lands in the Protectorate should be presumed to be the property of the Crown, unless they had been or should thereafter be recognized by the Governor by document to be the property of a person, or by proof, as provided in the Ordinance, that they were not Crown lands. Claims to possession against the Crown were to be dealt with by a Special Commissioner.

The Crown Lands (Adjudication) Rules, to which objection is taken in the present case, were made under s. 35 of the Crown Lands Ordinance. In r. 2 of those Rules, "land" is defined as meaning "Crown land". It appears, therefore, that these Rules deal only with Crown land. The Rules provide inter alia that "after the application of these Rules to any district" the district commissioner may require any county chief in such district to make arrangements in accordance with the Rules for the election of an adjudication committee for each parish in his county. Each county chief on receiving such a request from the district commissioner is to call together the adult males in each parish to attend a meeting for the purpose of electing an adjudication committee for such parish and is to forward to the district commissioner the names of the persons elected (r. 3). Where, in any district to which the Rules have been applied, any person who is in occupation of any land by virtue of any native customary right is desirous of being registered as proprietor of a freehold estate in respect thereof, such person may apply in manner provided by the Rules to be adjudged the owner of such land by native custom (r. 5). An application under r. 5 is to be made in writing to the district commissioner

(r. 6). Rule 11 places on the adjudication committee the duty of verifying the boundaries of the land and determining whether or not the applicant is the person recognised as the owner of the land by native custom. Rule 14 provides for an appeal to a District African Court or native court established under the Native Courts Ordinance and r. 16 and r. 17 provide for the registration of successful applicants as proprietors of freehold estates and for the issue of certificates of title. Rule 18 expressly provides that nothing in the Rules is to be so construed as to entitle any person to be adjudged the owner by native custom or registered as proprietor, of an estate of freehold in any land which after survey is found to be comprised within the boundaries of any land in respect of which (inter alia) any person is registered proprietor under the Registration of Titles Ordinance or any mining lease or temporary occupation licence, or the ownership of which has been vested in any person, other than the Governor, by virtue of the provisions of any Ordinance. It will be observed that the Crown lands (Adjudication) Rules do, as their title implies, deal with nothing but Crown lands and that they preserve most carefully the rights of registered proprietors and occupants under temporary occupation licences, and give other occupants an opportunity of being registered as proprietors of a freehold estate in respect of their land. The learned judge said that he was unable to see how these Rules conflicted with the Agreement.

Mr. Kazzora, however, for the appellant, argued that in all African communities, land belongs to the community and that the notion of individual ownership is foreign to native ideas. In support of these propositions he cited amongst other authorities *In re Southern Rhodesia* (4), [1919] A.C. 211, 215; and *Amodu Tijani v. Secretary Southern Nigeria* (5), [1921] 2 A.C. 399. Mr. Kazzora went on to assert that all land in Ankole belonged to the Omugabe as the notional head of the clan. There was no evidence of this, no authority was cited for this latter proposition; and I do not think that the court would be entitled to take judicial notice of it; but, even assuming it to be correct that all land in Ankole before October 25, 1901, belonged to the Omugabe, the position would appear to have been quite different after that date. It will be recalled that by art. 4 of the Agreement it was provided that all the waste and uncultivated land which was waste and uncultivated at the date of that Agreement was to be considered to be the property of His Majesty's Government. It seems perfectly clear that after the date of the Agreement, (whatever may have been the position before that date) the Omugabe was not the owner of all land in Ankole. He was the owner of the estate specifically granted to him by the Agreement and may have been the notional owner of all the land in Ankole other than land which was waste and uncultivated at the date of the Agreement, but he was not, after such date, the owner of such waste and uncultivated land. That land, by s. 4 of the Agreement, was considered to be the property of His Majesty's Government and, by s. 7 (1) of the Uganda Order-in-Council, 1902, was vested in the Governor on trust for His Majesty. In short, the Crown Lands (Adjudication) Rules dealt only with Crown lands and Crown lands were, under the Agreement, vested in the Governor on trust for His Majesty.

Mr. Kazzora, however, asserted that the Crown Lands (Declaration) Ordinance (Cap. 118), referred to above, was inconsistent with and ultra vires the Agreement, presumably because the Ordinance might have included in the category of Crown lands, land which would not have been Crown lands under the Agreement. But Mr. Kazzora did not attempt to establish that proposition by giving any instance of land presumed, under s. 2 of that Ordinance, to be the property of the Crown, which was not already Crown land under the provisions of the Agreement. In any event, having regard to the principles laid down in the *Nyali* case (1), the court could not have entertained a proposition to the effect that the Crown Lands (Declaration) Ordinance was made without jurisdiction

merely because of inconsistency with the Agreement, since the jurisdiction in Ankole of His Majesty did not derive solely from that Agreement, and since the jurisdiction which the Crown by its acts has exercised is conclusive as to the extent of the Crown's jurisdiction and, once exercised, the court will not permit such jurisdiction to be challenged. The Crown Lands (Declaration) Ordinance received the Royal assent and must be taken to be an exercise of jurisdiction by the Crown.

On this part of the case I find myself in the same position as the learned judge. Assuming, as the appellants allege and the respondents admit, that the Agreement, as varied from time to time, is a valid and subsisting Agreement and even if it were to be assumed that the court is entitled to pronounce upon the extent of the jurisdiction conferred by it and in particular upon the construction of art. 4 and the above-quoted paragraph of art. 7, it has not been demonstrated that the Crown Lands (Adjudication) Rules, dealing as they do exclusively with Crown lands, conflict at all with the Agreement.

Further, even if the position was that the Crown Lands Declaration Ordinance was ultra vires in so far as it presumed to include as Crown land, land which was not already Crown land by virtue of the Agreement, and if, as contended by Mr. Kazzora, the Omugabe is the notional owner of such land in Ankole, it is still not shown that the Crown Lands (Adjudication) Rules would produce a result inconsistent with that position. If the Omugabe is the owner of all land by native custom, presumably an applicant under those Rules would not be able to satisfy an Ankole adjudication committee that he was entitled to be recognised "as the owner of the land by native custom". An adjudication committee composed of natives of Ankole and presumably acquainted with Ankole customary tenure would find that the Omugabe and not the applicant was the owner of the land, though the applicant might be entitled to rights of occupation, enjoyment or usufruct.

For all these reasons, I would affirm the learned judge's refusal of the relief asked for in prayers 2 (*a*) and 8 of the amended plaint.

I turn now to consider that part of the case which refers to the proposal to set up an Appointments Board in Ankole which Board would have as part of its duties the appointment of chiefs.

It will be recalled that under art. 3 of the Agreement, Chief Kahaya was recognised by His Majesty's Government as supreme chief over all that part of the Ankole district which was referred to in the Agreement, and certain other named chiefs (of whom the first appellant is one) were recognised as chiefs over their respective sub-divisions; and it was provided that those chiefs should be allowed to nominate their successors in the event of their demise and that their successors thus nominated should be recognised by His Majesty's Government as successors to the dignity of chieftainship on the understanding that they equally abode by the terms of the Agreement.

The learned judge found that, before 1901, the Omugabe appointed chiefs on the advice of his elders and the Saza (county) chiefs. After 1901, the procedure was the same, with the addition that the candidates and names were forwarded to the District Commissioner and through him to the Provincial Commissioner for submission to the Governor for his approval.

By s. 2 of the African Authority (Amendment) Ordinance, 1955 (Ordinance No. 2 of 1955) "chief" is defined to mean

> "any person or any one of a class of persons recognised by the Governor as a chief."

Section 3 inserts a sub-section in the African Authority Ordinance (Cap. 72) which provides that

> "notwithstanding the fact that a chief is employed by a district council, he shall in respect of his duties under s. 3 (1) of that Ordinance be subject to the directions of the Governor."

The preamble to the District Administration (District Councils) Ordinance, 1955 (Ordinance No. 1 of 1955) contains the following words

> "Whereas the authority of the Mukama of Bunyoro-Kitara, the Mukama of Toro and the Mugabe of Ankole has been recognised in Agreements and whereas such rulers are customarily advised by their councils."

By s. 2 "chief" is defined as

> "any person or any one of a class of persons recognised by the Governor as a chief."

Section 3 empowers the Governor to establish in any area in the Protectorate a council under the provisions of the Ordinance which shall be the district administration of such area. Section 4 provides that, in addition to any other matter which the Governor may prescribe under the Ordinance, the Governor may

> "after consultation with the representatives of the peoples of the district, by regulations made in respect of a council established under the provisions of s. 3 of the Ordinance:
>
> (*c*) provide for the appointment of chiefs."

Under s. 7, the district commissioner is to advise the council in the performance of its duties.

Under s. 19, subject to its constitutional regulations, a council is to appoint a finance, and an appointments, committee. A committee appointed under that section may include persons who are not members of the council.

Under s. 20 (2), the appointments committee is to be responsible for the appointment of chiefs: provided that where under the constitutional regulations of any council it is provided that any other person can make any appointment, then the appointments committee is to recommend to such person the person who should be appointed.

The Eishengyero of Ankole Constitutional Regulations, 1955, were made under s. 4 of the District Administration (District Councils) Ordinance on September 21, 1955. By reg. 13 every chief is required to be appointed by the Omugabe in conformity with the advice of the Appointments Committee. Thus, at this date, the power of appointing chiefs (subject to recognition by the Governor) was still in the Omugabe, though the appointment had to be in conformity with the advice of the Appointments Committee. In 1958, however, the appointment of chiefs was made one of the responsibilities of newly established Appointments Boards acting on behalf of the district councils. To this, the appellants take strong objection.

On May 22, 1958, the District Administration (District Councils) (Amendment) Ordinance, 1958, came into force. This inserted a new s. 25A in the District Administration (District Councils) Ordinance. That section reads:

> "Establishment of Appointments Boards.
>
> "25A. (1) In every district in which a council has been established under the provisions of this Ordinance, there shall be established an appointments board which shall, on behalf of the council, be responsible for the appointment, dismissal and discipline of officers, chiefs and employees in the service of the council, in accordance with regulations made under the provisions of s. 69 of this Ordinance.

> "(2) The Governor shall after there have been discussions with the council concerned, in respect of every district to which sub-s. (1) of this section applies, make regulations for establishing the appointments board and any such regulations may, without prejudice to the generality of the foregoing power:
>
> (*a*) prescribe the constitution of the appointments board and the number of the members thereof including the number of members that shall constitute a quorum of such board;
>
> (*b*) provide for the appointment and remuneration of such members;
>
> (*c*) specify the qualifications of persons entitled to be appointed as members of the appointments board and the period of their tenure of office;
>
> (*d*) provide for a chairman of the appointments board;
>
> (*e*) provide for the attendance at meetings of the appointments board of, and for participation in the deliberations of such board by, persons who are not members thereof."

Section 69 of the Ordinance empowers a council to make staff regulations regulating inter alia appointments. I understand that no regulations have, as yet, been made under sub-s. (2) and no appointments board for Ankole has as yet been established.

I think it is only necessary to refer to one other statutory provision. By s. 2 of the African Authority (Amendment) Ordinance, 1958, a s. 13A was inserted in the African Authority Ordinance which, so far as relevant, reads:

> "13A. (1) Notwithstanding the provisions of any other law, but subject to the provisions of any Agreement made between Her Majesty's Government or the Protectorate Government and any Native Government, the Governor may suspend or terminate the appointment of any chief if he considers such suspension or termination is desirable in the public interest."

It is to be noted that this provision is expressed to be subject to the provisions of any Agreement made between Her Majesty's Government and any Native Government.

Mr. Kazzora asserted that from time immemorial chiefs in Ankole have been appointed by the Omugabe by virtue of his position; they may have had to be recognised by the Governor (see art. 3 of the Agreement and the definition of "chief" in s. 2 of the African Authority Ordinance as amended by s. 2 of the African Authority (Amendment) Ordinance), but they were appointed by the Omugabe. Mr. Kazzora complains that s. 25A (1) of the District Administration (District Councils) Ordinance, which purports to make an Appointments Board responsible for the appointment and dismissal of chiefs, is an usurpation of the Omugabe's power to appoint chiefs and a derogation from his position as supreme chief recognised as such by s. 3 of the Agreement. It is to be observed that there is nothing in art. 3 of the Agreement which expressly states that any power in the Omugabe to appoint chiefs (other than his own successor) is recognised by His Majesty's Government. On the contrary, the named chiefs of sub-divisions are to be allowed to nominate their own successors. The inference is that Kahaya was not to nominate any successor to a named chief though he could nominate his own successor. Even if Kahaya had a power of appointment as distinct from a power of nomination, a successor nominated by a named chief would be recognised by His Majesty's Government rather than Kahaya's appointee. It seems that, since October 25, 1901, whoever appointed chiefs in Ankole, their tenure of office depended on recognition by the Governor. It may be correct that chiefs (except successors

to sub-divisional chiefs mentioned in s. 3 of the Agreement) were appointed by the Omugabe. There was some evidence that the Omugabe and chiefs appointed chiefs. There was no evidence whether or not the Omugabe had delegated this power to an Appointments Board. The Omugabe is not a party to the suit. From the fact that the Enganzi was a defendant and not a plaintiff, it does not look as though the Omugabe objects to the establishment of an Appointments Board with power to appoint chiefs. In these circumstances I find it impossible to say that the learned judge should, in the exercise of his discretion, have granted the declaration asked for in prayer 3 (*a*) of the Amended Plaint. The case for a declaration was not made out.

Mr. Kazzora says also that the first appellant objects to s. 25A and the Appointments Board because he was, by s. 3 of the Agreement, expressly recognised as a chief and allowed to nominate his successor in the event of his demise, whereas under s. 25A, the power of appointing and dismissing chiefs is given to the Appointments Board. This, the first appellant avers, is a breach of the Agreement, and he seeks redress from the court, though no relief for him individually is claimed in the pleadings.

We were informed that the first appellant had already made two nominations to his chieftainship. If he has been permitted to nominate a successor (or successors) who have been appointed and have held office as chiefs prior to his demise, he has been permitted to do more than the Agreement entitled him to do. If a nominee of the first appellant remains in office as chief of his sub-division after the first appellant's demise, it can hardly be suggested that there has been a breach of the provisions of the Agreement which relate to the first appellant. In my opinion, it has not been shown that the first appellant has been or will be damnified or that he is entitled to any relief on his own account. Having regard to the extreme importance of avoiding anything, in relations with a native state, which could be construed as a breach of faith, if I had thought that the Omugabe or the first appellant was damnified and that a serious question of jurisdiction arose, it might have been appropriate to direct a reference to a Secretary of State under s. 4 of the Foreign Jurisdiction Act, 1890, to have the extent of the jurisdiction determined. However, in the circumstances of this case, I do not think that such a reference would be justified.

It remains to deal individually with the various grounds of appeal.

Ground 1 (*a*). This alleges that the learned judge erred in declining to grant a declaration that the Agreement is still valid and subsisting, since this was admitted in the defence. The learned judge said that he had no doubt that the agreement was valid and subsisting. I also entertain no doubt that this is so; but the subsistence and validity of treaties are not matters upon which the municipal courts should pronounce, unless the treaty is made part of the municipal law. As I have said, in my opinion, the Agreement is not part of the municipal law of the Uganda Protectorate and the learned judge, though he entertained no doubt of its validity, was right in refusing to make a declaration upon it.

Ground 1 (*b*). This alleges that the learned judge was wrong in not declaring that the resolutions of the Eishengyero at the meeting held on August 8 were invalid for want of a quorum. It was admitted in para. 10 of the defence that the plaintiffs were entitled to a declaration to this effect. In view of the facts (*a*) that no consultation with the council was legally necessary before the Crown Lands (Adjudication) Rules, 1958, were made and applied to Ankole (see s. 35 Crown Lands Ordinance (Cap. 117)), however politic such consultation might be; and (*b*) that we were informed that the draft Appointments Board Regulations, which were the subject of the invalid resolution, have been dropped and that new regulations have been drafted as to which there will have to be discussions de novo to satisfy s. 25A of the District Administration (District

Councils) Ordinance, it is difficult to see what practical significance the desired declaration would have. Nevertheless, I think it desirable to make it clear beyond doubt that the resolutions passed at the meeting of August 8, 1958, were invalid, and I would, therefore grant the declaration sought.

Ground 2 alleges that the learned judge erred in law in not recognising that s. 3 of the Agreement imposed upon His Excellency the Governor as the representative of Her Majesty's Government an obligation to recognise the authority of the Omugabe in his Kingdom which if recognised, precluded the Governor from by-passing the Omugabe in dealing with the Omugabe's subordinates, as the Omugabe is the sole channel of communication with the people of the Ankole Kingdom. I do not doubt that the learned judge recognised that s. 3 of the Agreement placed upon the Governor as the representative of Her Majesty the obligations set out in the Agreement, except to the extent that they might have been later modified; but the construction of the Agreement and the definition of those obligations are not matters for the municipal courts. There is nothing in s. 3 of the Agreement which states that the Omugabe is the sole channel of communication with the people of Ankole, and under s. 8 of the African Authority Ordinance (Cap. 72) Administrative officers have, since 1919, had power to deal direct with chiefs and to require them to issue orders, or to issue orders to the people themselves.

Grounds 3 *and* 4. These allege that the judge erred in law in holding that the Ankole Agreement had not been incorporated into, or did not form part of the municipal law of the Uganda Protectorate. As I have already said, I think that the learned judge was right in so holding.

Ground 5. This alleges that the learned judge was wrong in presuming that the Omugabe had no right to land in Ankole since, by customary law, land belongs to the Omugabe as the sole custodian of his people. As I have already said, there was no evidence that by customary law land in Ankole belongs to the Omugabe as the sole custodian of his people. Even if this be so with regard to land other than Crown land, it is not so now with regard to Crown lands, to which land only the land titles scheme applied.

Ground 6. This alleges that the learned judge was wrong in holding that Her Majesty's Government cannot be estopped from alleging that the Agreement is not a valid document. So far as has appeared in this case, Her Majesty's Government has evinced no desire to make any such allegation. Her Majesty's Government is not a party to these proceedings and it is difficult to see how an estoppel could arise against that Government. The Protectorate Government has also evinced no desire to deny the validity of the Agreement. On the contrary, the Attorney-General informed us that the Protectorate Government does regard the Agreement as a valid document and will loyally abide by it; it may of course be varied by subsequent agreement or usage.

Grounds 7, 8 *and* 9 relate to the invalid resolutions of the Eishengyero at the meeting on August 8, 1958. I have already said that it was admitted that those resolutions were invalid and the appellants should have a declaration to that effect.

Ground 10. Mr. Kazzora apparently argued in the court below that the Bill or Bills which introduced the legislation which he said was inconsistent with the Agreement should not have been assented to by the Governor because, under s. 32 (6) of the Royal Instructions, the Governor was commanded not to assent to any Bill which should appear to be inconsistent with obligations imposed on Her Majesty by treaty. The learned judge pointed out that Her Majesty's acts relative to obligations imposed on Her Majesty by treaty were not matters for the municipal courts, and he added:

> "A further answer to Mr. Kazzora's point is that I would be unable to say whether, in accordance with the concluding words of s. 32, the Governor had not previously obtained instructions upon the relevant Bills through the Secretary of State."

The tenth ground of appeal alleges that this was wrong; the learned judge should not have speculated about consent having been obtained but should have required a certificate of the Secretary of State to be produced in court. No doubt, the learned judge could have referred to the relevant *Gazette* notifications by which non-disallowance of Ordinances by Her Majesty is notified. But the point is quite unimportant, since the learned judge was right in holding that the acts of Her Majesty relative to the obligations imposed on Her Majesty by treaty are not subject to the control of the municipal law and cannot be canvassed in the municipal courts.

Ground 11 attacks a dictum of the learned judge that it might be implied from art. 4 of the Agreement that occupied land was at the disposal of the occupiers; and alleges that this is wrong, since, before 1901, the notion of individual ownership of land was unknown. This point, even if correct, is immaterial. It does not matter, for the purposes of this case, who was entitled to the occupied land under the Agreement. The point is that the Crown was entitled to the unoccupied land.

Grounds 12 *and* 13 attack the exercise by the learned judge of his discretion. In my opinion, the learned judge exercised his discretion correctly, except in his refusal to grant a declaration that the resolutions of the Eishengyero on August 8, 1958, were invalid for lack of a quorum. I think that there was no valid reason for refusing that declaration.

I would dismiss the appeal except as to ground 1 (*b*) of the memorandum of appeal. I would grant a declaration to the effect that the purported resolutions of the Eishengyero of Ankole passed on August 8, 1958, were invalid for lack of a quorum. I would maintain the learned judge's refusal of the other prayers. The defendant/respondents should have five-sixths of the costs of the appeal. As the single point upon which the appellants have now succeeded was admitted in the defence, I would not interfere with the order for costs made below.

Forbes VP: I agree.

Gould JA: I also agree.

Appeal dismissed. Decision of the High Court of Uganda, [1959] *E.A.* 552 (*U.*) *affirmed save that a declaration was made that the resolutions of the Eishengyero passed on August* 8, 1958, *were invalid.*

For the appellant:
Binaisa & Kazzora, Kampala
J. W. R. Kazzora

For the respondent:
The Attorney-General, Uganda
R. L. E. Dreschfield, Q.C. (Attorney-General, Uganda) and *M. J. Starforth* (Crown Counsel, Uganda)

P H R Poole v R
[1960] 1 EA 62 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 March 1960
Case Number:	217/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP, Gould and Windham JJA, Farrell J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Sir Ronald Sinclair, C.J.

[1] Judgment – Stare decisis – Application for full appellate bench with a view to overruling previous decision – Whether application for full bench essential – Whether full bench of court has greater powers than a division.

[2] Criminal law – Practice – Nolle prosequi – Whether entry of nolle prosequi at trial discharges proceedings at preliminary inquiry – Criminal Procedure Code (*Cap*. 27), *s*. 69, *s*. 250 (*K*.).

[3] Criminal law – Practice – Arrest after entry of nolle prosequi – -Simultaneous filing of new information – New and previous informations identica – Powers of court to order arrest of accused after discharge on first information – Criminal Procedure Code (*Cap*. 27), *s*. 28, *s*. 32, *s*. 66, *s*. 69, *s*. 82, *s*. 233, *s*. 236, *s*. 250, *s*. 255, *s*. 280, *s*. 281, *s*. 282, *s*. 283, *s*. 284, *s*. 285, *s*. 286, *s*. 287, *s*. 288 (*K*.).

[4] Criminal law – Practice – Appeal – Appeal from conviction by judge and jury – Alleged irregularities – Accused absent from part of trial – Reference by judge to accused's failure to give evidence – Judge's direction as to law not specifically applied to facts – Summing-up clear and accurate both in law and on fact – Criminal Procedure Code (*Cap*. 27), *s*. 3 (3), *s*. 83, *s*. 84, *s*. 193, *s*. 222, *s*. 233, *s*. 236, *s*. 246, *s*. 290, *s*. 381 (*K*.) – *Penal Code* (*Cap*. *24*), *s*. 199 (*K*.) – *Kenya Colony Order-in-Council*, 1921, *art*. 4, *para*. (*2*) – *Kenya* (*Constitution*) *Order-in-Council*, 1958, *art*. 74 – *Criminal Procedure Code* (*Cap*. 24), *s*. 79 (*U*.) – *Administration of Justice* (*Miscellaneous Provisions*) *Act*, 1933, *s*. 2 – *Eastern African Court of Appeal Rules*, 1954, *r*. 42 (4) – *Indian Code of Criminal Procedure*, *s*. 537.

Editor's Summary

The appellant was charged with murder and, having pleaded not guilty, a jury was chosen and sworn. Crown counsel then opened his case and was about to call the first witness when a juror intimated that he had a conscientious objection to giving a verdict of guilty, on religious grounds. After an adjournment Crown counsel entered a nolle prosequi and simultaneously handed to the deputy registrar a fresh information in identical terms, except for the date, and this was served on the appellant, after his discharge on the first information. The deputy registrar then executed a warrant as authority for the detention of the appellant in custody pending trial upon the new information, and he was later tried and convicted of murder. On appeal before a bench of five judges it was contended that the trial was a nullity because the nolle prosequi brought the appellant's prosecution to an end, that if the Crown wished to proceed against him upon the same facts, the prosecution must begin again ab initio, the part of the trial took place in the absence of the appellant and that the summing-up was defective and the verdict unreasonable.

Held –

(i) a full Court of Appeal has no greater powers than a division of the court; but if it is to be contended that there are grounds, upon which the court could act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges.

(ii) the provisions of the Criminal Procedure Code for the entry of a nolle prosequi and the consequences which follow thereon, are comprehensive and displace the common law.

(iii) it is the court's order of discharge effects the release of an accused from custody and not the entry of a nolle prosequi.

(iv) the proviso to s. 69 of the Criminal Procedure Code does not of itself require that in circumstances such as those in the instant case a fresh preliminary inquiry must be held.

(v) on the assumption that the Supreme Court of Kenya had jurisdiction to try the appellant on the second information filed, it had power under s. 66 of the Criminal Procedure Code to order the arrest of the appellant and his detention pending the trial upon that information.

(vi) the entry of a nolle prosequi in respect of a charge on an information filed by the attorney-general under s. 250 of the Criminal Procedure Code did not discharge the proceedings at the preliminary inquiry upon which such charge was based so as to preclude the filing of any other charge upon information based on the facts disclosed at that preliminary inquiry; nor did the identical terms of the charge in the second information affect the position.

(vii) the decision in *R. v. Noormahomed Kanji* (1937), 4 E.A.C.A. 34, that upon a nolle prosequi being entered in respect of any charge in an information, a fresh information in respect of the same charge might be filed without a fresh preliminary inquiry being held, is correct.

(viii) the appellant's absence from the first demonstration of distances, notwithstanding that his presence had not been dispensed with under s. 193 of the Criminal Procedure Code, amounted to no more than an irregularity curable under s. 381 of the Code.

(ix) there was no reason whatever to interfere with the verdict of the jury in this case as there was ample evidence on which they could reach the conclusion which they did reach, nor was there any misdirection in the summing-up.

Appeal dismissed.

Cases referred to in judgment:

(1) *Joseph Kabui v. R.* (1954), 21 E.A.C.A. 260.

(2) *Kiriri Cotton Co. v. R. K. Dewani*, [1958] E.A. 239 (C.A.).

(3) *Commissioner for Lands v. Sheikh Mohamed Bashir*, [1958] E.A. 45 (C.A.).

(4) *Young v. Bristol Aeroplane Co., Ltd.*, [1944] 2 All E.R. 293.

(5) *R. v. Noormahomed Kanji* (1937), 4 E.A.C.A. 34.

(6) *R. v. Allen*, 121 E.R. 929.

(7) *R. v. Mitchel*, 3 Cox C.C. 93.

(8) *R. v. Ridpath*, 88 E.R. 670.

(9) *Goddard v. Smith*, 91 E.R. 803.

(10) *R. v. Stratton*, 99 E.R. 156.

(11) *R. v. Wylie, Howe and McGuire* (1919), 83 J.P. 295.

(12) *Gilchrist v. Gardner* (1891), 12 N.S.W.L.R. (L.) 184.

(13) *E. B. K. Sey v. R.* (1950), 13 W.A.C.A. 128.

(14) *R. v. St. George*, 173 E.R. 921.

(15) *R. v. George Smellie*, 14 Cr. App. R. 128.

(16) *R. v. Hales*, [1924] 1 K.B. 602.

(17) *Wachira* s/o *Murage and Others v. R.* (1956), 23 E.A.C.A. 562.

(18) *Karamat v. R.*, [1956] A.C. 256.

(19) *Tameshwar and Another v. R.*, [1957] A.C. 476.

(20) *Polkuri Kotayya v. R.* (1947), 74 I.A. 65.

(21) *Waugh v. R.*, [1950] A.C. 203.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant was, on December 10, 1959, convicted by the Supreme Court of Kenya sitting at Nairobi of the murder of one Kamawe s/o Musunge, and was sentenced to death. He has appealed to this court against his conviction and sentence.

The appellant is a European, and his trial accordingly took place before a judge and jury in accordance with the provisions of s. 222 of the Criminal Procedure Code (Cap. 27).

Prior to the hearing of the appeal counsel for the appellant intimated that he intended to ask the court to depart from one of its own previous decisions and, in accordance with the dictum of the court in *Joseph Kabui v. R.* (1) (1954), 21 E.A.C.A. 260, applied that a bench of five judges should be assembled to hear the appeal. This court adheres to the principle of stare decisis, unless it is of opinion that to follow its earlier decision which is considered to be erroneous involves supporting an improper conviction (*Joseph Kabui v. R.* (1); *Kiriri Cotton Co. v. R. K. Dewani* (2), [1958] E.A. 239 (C.A.) at p. 245). A full Court of Appeal has no greater powers than a division of the court (*Commissioner for Lands v. Sheikh Mohamed Bashir* (3), [1958] E.A. 45 (C.A.) at p. 50; *Young v. Bristol Aeroplane Co.*, Ltd. (4), [1944] 2 All E.R. 293); but if it is to be contended that there are grounds, upon which the court can act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges. In the instant case it proved possible to make the necessary arrangements, and accordingly the appeal came before a full bench.

Fifteen grounds of appeal are set out in the memorandum of appeal, and two further grounds were added by a supplementary memorandum. Counsel for the appellant expressly abandoned grounds 2, 3 and 4 of the memorandum of appeal, and intimated that he would argue the appeal on three broad heads which would cover such of the remaining grounds of appeal as he relied on. We will deal with the appeal on the basis of the heads of appeal argued by counsel.

The three heads of appeal that were argued by counsel for the appellant were (1) that the trial was a nullity; (2) that the verdict of the jury was, in all the circumstances, unreasonable; and (3) that the summing-up was defective in certain respects. It will be convenient to deal with the first head, which relates to matters of procedure, before referring to the facts of the case.

The contention that the trial was a nullity is based on two entirely separate matters of procedure. The first referred to an abortive trial of the appellant for the murder of the deceased which was concluded by the entry of a nolle prosequi. The relevant facts as to the abortive trial are as follows: The appellant was on October 14, 1959, arrested without warrant upon a charge of murder of the deceased. In due course a preliminary inquiry was held in accordance with the provisions of Part VIII of the Criminal Procedure Code (hereinafter referred to as the Code), and the appellant was committed for trial before the Supreme Court upon the charge, framed by the committing magistrate under s. 233 of the Code,

> "that he did on the 12th day of October, 1959, in Nairobi in the Nairobi Extra-Provincial District, murder Kamawe s/o Musunge, the offence being contrary to s. 199 of the Penal Code".

The appellant was remanded in custody to appear before the Supreme Court under s. 236 of the Code. An authenticated copy of the depositions and statement

of the appellant was duly transmitted to the attorney-general under s. 246 of the Code, and the attorney-general, on November 18, 1959, under s. 250 of the Code filed an information charging the appellant with the offence of murder contrary to s. 199 of the Penal Code, the particulars given of the offence being that the appellant

> "on or about the 12th day of October, 1959, at Nairobi in the Nairobi Extra-Provincial District, murdered Kamawe s/o Musunge".

The information was signed on behalf of the attorney-general by the deputy public prosecutor in pursuance of powers conferred on him under s. 83 of the Code. Section 250 of the Code reads:

> "250.(1) If, after the receipt of the authenticated copy of the depositions as aforesaid, the attorney-general shall be of the opinion that the case is one which should be tried upon information before the Supreme Court, an information shall be drawn up in accordance with the provisions of this Code, and when signed by the attorney-general shall be filed in the registry of the Supreme Court.
>
> "(2) In any such information the attorney-general may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial."

The trial of the appellant on the information filed on November 18, 1959, was fixed for November 30, 1959. On that date the appellant was arraigned before the learned Chief Justice and pleaded not guilty to the information. A jury was chosen and sworn, and the appellant was given in charge in accordance with the provisions of s. 280 to s. 288 inclusive of the Code. Crown counsel thereupon opened for the Crown and was about to call the first prosecution witness when one of the jurors intimated that he had

> "a conscientious objection to giving a verdict of guilty in this case on a religious objection".

After a short adjournment counsel for the appellant addressed the court, submitting that the juror in question was not incapacitated, or, if he was, that the trial should proceed with eleven jurors. A further adjournment ensued to enable Crown counsel to consider the position. Upon resumption Crown counsel is recorded as saying:

> "Submit no power to discharge juror as he is not incapable. Court may have inherent power to discharge jury. Think it is safer to enter a nolle prosequi and do so now."

Counsel for the appellant submitted that there was no inherent power to discharge the jury in the circumstances, and that this was not one of the cases in which a nolle prosequi could be entered. The learned Chief Justice then ruled:

> "In view of the entry of a nolle prosequi the accused is discharged in respect of the charge for which the nolle prosequi is entered."

We were informed by the learned solicitor-general who appeared for the Crown that Crown counsel, as he informed the court that he did not intend to proceed, handed a fresh information, duly signed, to the deputy registrar; that the deputy registrar, upon the adjournment of the court, after the discharge of the appellant and after he had left the dock, said to him "would you come with me" or words to that effect; that the appellant then accompanied the deputy registrar to the anteroom of the court, where the deputy registrar served the new information upon him; and that the deputy registrar then executed a

warrant as authority for the prisons officers to detain the appellant in custody pending his trial upon the new information. The terms of the new information were identical with those of the original information except that the new information was dated November 30, 1959, and was signed for the attorney-general by the acting senior Crown counsel who was appearing for the Crown. It was not contested that the acting senior Crown counsel was duly authorised under s. 83 of the Code to enter a nolle prosequi and sign an information. It was upon the new information of November 30 that the appellant was subsequently tried, before the learned Chief Justice and a new jury, and was convicted.

It may be remarked in passing that it appears to this court that, upon the juror in question announcing that he had a conscientious objection to giving a verdict of guilty, the learned Chief Justice might properly in the exercise of his discretion have discharged the jury and ordered the re-trial of the appellant before another jury. The matter was, however, taken out of the learned Chief Justice's hands by the entry of the nolle prosequi, and it is necessary to consider the position created by the course which was adopted.

Counsel for the appellant argued that the effect of the nolle prosequi entered on November 30 was to bring the prosecution to an end altogether, and that if the Crown wished to proceed against the appellant again upon the same facts it was necessary for the prosecution to start again ab initio, that is to say, that the appellant must be re-arrested and that a new preliminary inquiry and committal for trial must take place. He referred to the decision of this court in *R. v. Noormahomed Kanji* (5) (1937), 4 E.A.C.A. 34 (in which the court held that, under the section of the Criminal Procedure Code of Uganda which corresponds with s. 82 of the Code, upon a nolle prosequi being entered in respect of any charge in an information, a fresh information in respect of the same charge might be filed without a fresh preliminary inquiry being held) and contended that that decision put too narrow a construction on s. 82 read in the context of other sections of the Code and should not be followed; that upon a proper construction of s. 82 of the Code, upon the entry of a nolle prosequi, an accused must be discharged from custody forthwith and that the recognizances of any witnesses bound over to give evidence at his trial are discharged; that the Code provides no method for the subsequent arrest of an accused except arrest without warrant under s. 28; that upon such arrest the accused must be taken before a magistrate under s. 32; and that the ensuing procedure provided for in the Code, culminating with a committal for trial by a subordinate court, must be followed before the accused can again be brought before the Supreme Court. Counsel also contended that the use, in s. 82, of the term "nolle prosequi" which is an expression of the English common law, connoted common law ideas; that the section should, therefore, be construed by reference to the meaning of the term at common law; and that at common law upon the entry of a nolle prosequi the prosecution must be started again in all its aspects; and he referred to English authorities including *R. v. Allen* (6), 121 E.R. 929; *R. v. Mitchel* (7),3 Cox C.C. 93; *R. v. Ridpath* (8), 88 E.R. 670; *Goddard v. Smith* (9), 91 E.R. 803; *R. v. Stratton* (10), 99 E.R. 156; and *R. v. Wylie, Howe and McGuire* (11) (1919), 83 J.P. 295; and to the Australian case of *Gilchrist v. Gardner* (12) (1891), 12 N.S.W.L.R. (L.) 184.

We do not propose to refer to the English and Australian authorities except to say that it is by no means clear to us that they establish the proposition for which counsel for the appellant contended. Most of the English authorities refer to ex officio informations of the attorney-general and so must be of doubtful application in the case of an information upon a committal for trial by a magistrate. It is not suggested that the information in this case is an ex officio information under s. 84 of the Code. So far as *R. v. Ridpath* (8) is concerned, the reports (the case is also reported in 92 E.R. at p. 890) do not

support learned counsel's contention that a nolle prosequi at common law operates as a discharge of the accused from custody and of recognizances entered into by him. That case, however, is one of those relating to ex officio informations.

In the instant case we think that the matter falls to be decided upon the provisions of the Code. It is true that under para. (2) of art. 4 of the Kenya Colony Order-in-Council, 1921, as extended by art. 74 of the Kenya (Constitution) Order-in-Council, 1958, the common law is in force in Kenya, but it is in force only in so far as it may not be modified, amended or replaced by, inter alia, any Ordinance for the time being in force. It is also true that sub-s. (3) of s. 3 of the Code provides that:

> ". . .the Supreme Court may . . . in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before His Majesty's High Court of Justice in England at the date of the coming into operation of this Code."

The Code does, however, make provision for the entry of a nolle prosequi, and the consequences which are to follow thereon; and, incidentally, in sub-s. (2) of s. 82 of the Code it confers upon the attorney-general power to enter a nolle prosequi before an information has been filed, whereas in England a nolle prosequi may not be presented until an indictment has been found (*R. v. Wylie, Howe and McGuire* (11)). The relevant provisions of the Code are comprehensive and in our view displace the common law.

Section 82, which is the relevant section of the Code, reads as follows:

> "82.(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the attorney-general may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.
>
> "(2) If the accused shall not be before the court when such nolle prosequi is entered, the registrar or clerk of such court shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the keeper of the prison in which such accused may be detained, and also, if the accused person has been committed for trial, to the subordinate court by which he was so committed, and such subordinate court shall forthwith cause a similar notice in writing to be given to any witnesses bound over to prosecute and give evidence and to their sureties (if any) and also to the accused and his sureties in case he shall have been admitted to bail."

In *R. v. Noormahomed Kanji* (5), the case which counsel for the appellant submits ought not to be followed, this court, in considering a similar situation in relation to s. 79 of the Uganda Criminal Procedure Code (which is in the same terms as s. 82 of the Code), said:

> "Various English authorities were cited both by Mr. Shaylor and Mr. Mathew, for the Crown, but none of these authorities bear directly on the point in issue.
>
> "It is convenient to state here that it is within the knowledge of the members of this court that the practice adopted by the Crown in this case

> has been, in the past, the practice in the East African Dependencies and, further, it is within the knowledge of one member of the court that a similar practice was observed in West Africa on a section similarly worded.
>
> "On a close reading of the section in question, it will be observed that the accused person is to be discharged in respect of the charge for which the nolle prosequi is entered. It seems clear that these words refer to the charge in the information as the information is 'the charge' on the trial before the High Court, and the nolle prosequi is entered in the High Court in respect of that information. The attorney-general states that the 'proceedings' should not continue. If, then the information is the charge, the proceedings are the High Court proceedings, and the nolle prosequi puts an end to these proceedings.
>
> "Crown counsel has conceded that, in view of the wording of the section, a nolle prosequi may be entered in respect of the proceedings in subordinate courts as well as the High Court. This may be so, but we do not consider that this fact in any way interferes with the reasoning set forth supra. We are of opinion, therefore, that after a nolle prosequi has been entered in respect of any given charge contained in an information, there is no necessity for a fresh preliminary inquiry to be held before a further information is filed."

The charge preferred in an information signed and filed by the attorney-general under s. 250 of the Code is clearly distinct from both the charge on which an accused is arrested and that which is framed by the magistrate under s. 233 of the Code. It is expressly stated in s. 250 that in the information the attorney-general may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial. Section 82 provides that the accused

> "shall be at once discharged in respect of the charge for which the nolle prosequi is entered".

Prima facie, we should be disposed to agree with the decision in *Noormahomed Kanji* (5), that where a nolle prosequi relates to a charge in an information, it is the proceedings in respect of that charge only which are discontinued. Counsel for the appellant in fact conceded that if two informations had been filed against an accused, e.g. in the case of a multiple murder, the entry of a nolle prosequi in the course of the trial upon one information, in respect of charge contained in that information, would not preclude proceedings continuing against the accused on the second information. He argued, however, that in the instant case a second information had not been filed when the nolle prosequi was entered; that the entry of the nolle prosequi immediately effected the release of the appellant from custody; and that, as has been said previously, the only way of getting the appellant back into custody was by arrest under s. 28 of the Code, which involved following the procedure prescribed by the Code upon the making of an arrest under that section.

We do not agree that the entry of a nolle prosequi under s. 82 of the Code immediately effects release of an accused from custody. The section, as we read it, requires that the accused be discharged by the court "in respect of the charge for which the nolle prosequi is entered", and thereupon, if he has been committed to prison in respect of the offence charged, he is to be released: that is to say, if the accused is in court, his release follows upon his discharge by the court.

Learned counsel's principal argument, however, concerned the alleged procedural difficulty of bringing the appellant before the Supreme Court again

once he had been released upon the entry of a nolle prosequi. With respect, we think that learned counsel's argument ignores the provisions of s. 66 of the Code. That section reads as follows:

> "66 Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within the Colony, or which according to law may be dealt with as if it had been committed within the Colony, and to deal with the accused person according to its jurisdiction."

The section was not cited to us by either counsel, possibly because it appears under the heading "Place of Inquiry or Trial". The words of the heading, however, cannot restrict the plain words of the section, and, it is further clear from the provisions of s. 69, that the sections under that heading have a wider application than the mere matter of the place where an inquiry or trial is to be held. Section 69, which is also relevant to the question under consideration, reads:

> "69 The Supreme Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings:
>
> "Provided that, except under s. 84 no criminal case shall be brought under the cognizance of the Supreme Court unless the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court."

As we read it, the proviso to s. 69 does not of itself require that in circumstances such as those which occurred in the instant case a fresh preliminary inquiry must be held. The condition that the case

> "shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court"

is satisfied by the holding of the original preliminary inquiry unless under the other provisions of the Code the effect of a nolle prosequi is to discharge the proceedings on the preliminary inquiry as well as those in the Supreme Court.

Reverting to s. 66, we think that that section authorises the Supreme Court to issue process to cause to be brought before it a person charged with an offence which it has jurisdiction to try. We see no reason why the Supreme Court should not act under this section to compel the attendance before it of a person properly charged upon information, including ordering the arrest of such person if he should happen to be at liberty. In the case of a multiple murder, which has already been instanced, it would seem patently absurd to suggest that, if after a preliminary inquiry into all the murders, an information had been signed and filed in respect of one murder only and it proved necessary to enter a nolle prosequi on the charge in that information, involving under s. 82 the release of the accused, a further information filed subsequently in respect of the second murder must of necessity be abortive because there is no means of bringing the accused before the court. We are of opinion that, on the assumption that the Supreme Court had jurisdiction to try the appellant on the second information filed, it had power under s. 66 of the Code to do what it purported to do, that is, to order the arrest of the appellant and his detention pending the trial upon that information. We are of opinion that the arguments of counsel for the appellant that there is no machinery provided in the Code whereby an accused can be brought before the court again once he has been "discharged" under s. 82 are based on a false assumption and must fail.

So far as s. 82 of the Code is concerned, we are unable to find anything in the wording of the section to indicate that a nolle prosequi entered in respect of a charge in an information operates as a discharge of the proceedings on the preliminary inquiry. It is true that, as remarked in *Noormahomed Kanji's* case (5), the attorney-general has the power, which does not exist in England, of entering a nolle prosequi at any stage before the filing of an information. In such a case the nolle prosequi would clearly be in respect of the charge in the subordinate court and would effectively terminate those proceedings. In our view, however, the proceedings on a charge in an information, though necessarily based on the proceedings in the subordinate court, are distinct from the latter. That is not to say that proceedings against an offender do not commence with his arrest; but proceedings against an offender are in distinct stages, and, in s. 82 of the Code the reference to "proceedings" must, in the context, be the proceedings "in respect of the charge for which the nolle prosequi is entered": that is to say, the proceedings in respect of the charge in the information, which are the proceedings in the Supreme Court. Equally, the words in the section "if he has been committed to prison shall be released" cannot be a general direction for the release from custody of the prisoner whatever other charges may be pending against him, but must be read in the context as a direction for the release of the prisoner "in respect of the charge for which the nolle prosequi is entered".

Counsel for the appellant argued, as has been mentioned, that under sub-s. (2) of s. 82 of the Code, upon the entry of a nolle prosequi, the recognizances of witnesses bound over to give evidence at the trial are discharged. This, however, is not what the sub-section says. It merely provides that notice of the entry of the nolle prosequi is to be given to the witnesses, and does not provide that the effect of such notice is to discharge their recognizances. It would appear that the witnesses' recognizances "to appear at the trial to give evidence" remain valid in respect of any trial on an information founded upon the particular preliminary inquiry.

In our view, therefore, the entry of a nolle prosequi in respect of a charge on an information filed by the attorney-general under s. 250 of the Code, does not discharge the proceedings at the preliminary inquiry upon which such charge is based so as to preclude the filing of any other charge upon information based on the facts disclosed at that preliminary inquiry; and we have not found any other provision of the Code which appears inconsistent with this construction of the provisions of s. 82. We do not think that the fact that the terms of the charge in the second information may be identical with the terms of the charge in the first information affects the position.

In any event it appears that at the moment of the appellant's discharge under s. 82 there was in existence a valid information charging him with an offence. In his reply counsel for the appellant to some extent challenged the information which the learned solicitor-general had given us as to events immediately after the entry of the nolle prosequi, saying that there was no note on the record as to what had happened, that he was informed that the learned Chief Justice had refused to look at the new information, and that the new information was not properly before the court when the nolle prosequi was entered. Since the proceedings before the court at that stage were not concerned with the second information it was to be expected that the record would contain no note of what happened and that the learned Chief Justice would not look at the second information. The second information at that stage concerned the registrar and not the learned Chief Justice. We see no reason why we should not accept the learned solicitor-general's statement of the facts, since it appears to be the effect of those facts rather than the facts themselves which are challenged.

As to the effect of the handing of the new information to the deputy registrar, its acceptance by the

deputy registrar would appear to constitute a sufficient

"filing" for the purposes of s. 250 of the Code. The information had not been handed to the deputy registrar at the moment that Crown counsel entered the nolle prosequi, but, as we have indicated, we are of opinion that it is the court's order of discharge which effects the release of the appellant, and not the entry of the nolle prosequi. We are informed and accept that the second information had been handed to the deputy registrar before the order of discharge was made. It follows that at the moment of discharge on the first information, there was already in existence and filed a second information. The situation then obtaining appears indistinguishable from that in which different informations have been filed in respect of different offences arising out of facts found at one preliminary inquiry, and a nolle prosequi has been entered in respect of one such information. As already mentioned, counsel for the appellant conceded that in such case the proceedings on the second information were competent and could continue.

Apart from the question whether or not the second information had been filed at the moment when the appellant was released in respect of the first information, it is to be noted that under s. 255 of the Code the critical moment when an information becomes effective would seem to be the moment of signing of the information and not that of filing. That section provides, inter alia, that an information when signed by the attorney-general

> "shall be as valid and effectual in all respects as an indictment in England which has been signed by the proper officer of the court in accordance with the Administration of Justice (Miscellaneous Provisions) Act, 1933".

Under s. 2 of that Act

> "where a bill of indictment has been so preferred the proper officer of the court shall . . . sign the bill, and it shall thereupon become an indictment and be proceeded with accordingly".

There is no doubt that in the instant case the second information had been signed before the nolle prosequi was entered on the first information, and that therefore there was in existence a valid information when the nolle prosequi was entered. We are unable to see why the appellant should not be held in custody pending the disposal of the charge on this information, whatever may be the power of the Supreme Court to cause him to be re-arrested. But, as indicated, we consider that the Supreme Court had the necessary power to cause the appellant to be re-arrested, even if he had been released and allowed to go free for a period of time.

For the reasons given we respectfully agree with the conclusion of the court in *Noormahomed Kanji's* case (5) and hold that this ground of appeal must fail. It may be noted that in *E. B. K. Sey v. R.* (13) (1950), 13 W.A.C.A. 128 the West African Court of Appeal reached a similar conclusion upon the corresponding provisions of the Criminal Procedure Code of the Gold Coast, as it then was.

The second matter on which counsel for the appellant relied for his contention that the trial was a nullity was what he described as "an unfortunate accident" which occurred in the course of the trial. The incident in question occurred when Titoro s/o Sabai, an African eye-witness of the alleged murder of the deceased, was giving evidence. His evidence involved specification of the distances between various points at the scene and between the witness and the appellant and deceased at various stages in the episode which terminated in the death of the deceased. It is common practice in East Africa, where the majority of African witnesses are incapable of expressing distances in terms of the ordinary units of measure, for a witness to be asked to give a visual demonstration of any particular distance which may be material. In the instant

case, after completion of the examination-in-chief, cross-examination and re-examination of the witness, the learned Chief Justice desired the witness to give a visual demonstration of certain distances which were mentioned in his evidence. The court room was too small for the purpose, and the learned Chief Justice accordingly adjourned outside the court building where a visual demonstration of the distances was given by the witness. On resumption in the court room, it was found that the appellant had not been present at the demonstration. The learned Chief Justice then caused the demonstration to be repeated in the presence of the appellant. No objection was taken at the time to the procedure adopted by the learned Chief Justice.

The details of the incident were at one stage in dispute, and accordingly a report from the trial court was called for under r. 42 (4) of the Eastern African Court of Appeal Rules, 1954. The report of the learned Chief Justice submitted under that rule fully sets out the details of the incident, and was accepted as correct by counsel for the appellant. Counsel for the appellant conceded that the appellant had suffered no actual prejudice as a result of the incident, and that the point was purely a technical one, and accordingly it is not necessary to set out the learned Chief Justice's report in detail in this judgment. The essential facts are that a demonstration which lasted between fifteen and twenty minutes and which constituted part of the trial took place in the absence of the appellant, though in the presence of his advocate; that the demonstration was repeated in the presence of the appellant, on this occasion occupying about half the time taken on the previous demonstration; that it is not suggested that any matter was demonstrated on the first occasion which was not repeated on the second occasion, though, owing to the witness having already been through the demonstration once, the second demonstration took a much shorter time; that after the demonstration the advocate for the appellant was given an opportunity to cross-examine the witness; and that it is conceded (rightly, in our view) that no actual prejudice was suffered by the appellant.

Counsel for the appellant argued, however, that the trial of the appellant was a trial on a charge of felony; that on a charge of felony the prisoner must be tried at the bar; that unless there is good cause the whole trial must take place in the presence of the prisoner; that the fact that by accident, part of the trial took place in the absence of the prisoner was such an irregularity as must vitiate the trial; and that no action taken by the trial judge could cure the irregularity which had occurred, as the irregularity was one which went to the root of criminal procedure. Counsel referred, inter alia, to s. 193 and s. 290 of the Code and to *R. v. St. George* (14), 173 E.R. 921; *R. v. George Smellie* (15), 14 Cr. App. R. 128; *R. v. Hales* (16), [1924] 1 K.B. 602; *Wachira s/o Murage and Others v. R.* (17) (1956), 23 E.A.C.A. 562; *Karamat v. R.* (18), [1956] A.C. 256, and *Tameshwar and Another v. R.* (19), [1957] A.C. 476.

There is no doubt that the absence of the appellant from the first demonstration was an irregularity, and the only question is whether it is an irregularity curable under s. 381 of the Code, or whether it is so fundamental that it cannot be cured under that section notwithstanding that it has occasioned no failure of justice. The distinction between irregularities which are curable and those which are not is made clear in the following passage from the judgment of the Privy Council in *Polkuri Kotayya v. R.* (20) (1947), 74 I.A. 65 at p. 75. Section 537 of the Indian Code of Criminal Procedure, to which that passage relates, is in similar terms to s. 381 of the Code. The passage reads:

> "Even on this basis, Mr. Pritt for the accused has argued that a breach of a direct and important provision of the Code of Criminal Procedure cannot be cured, but must lead to the quashing of the conviction. The Crown, on the other hand, contends that the failure to produce the notebook in question amounted merely to an irregularity in the proceedings

> which can be cured under the provisions of s. 537 of the Code of Criminal Procedure if the court is satisfied that such irregularity has not in fact occasioned any failure of justice. There are, no doubt, authorities in India which lend some support to Mr. Pritt's contention, and reference may be made to *Tirkha v. Nanak* ((1927) I.L.R. 49 A. 475), in which the court expressed the view that s. 537 of the Code of Criminal Procedure applied only to errors of procedure arising out of mere inadvertence, and not to cases of disregard of, or disobedience to, mandatory provisions of the Code and to *In re Madura Muthu Vannian* ((1922) I.L.R. 45 M. 820), in which the view was expressed that any failure to examine the accused under s. 342 of the Code of Criminal Procedure was fatal to the validity of the trial, and could not be cured under s. 537. In their lordships' opinion, this argument is based on too narrow a view of the operation of s. 537. When a trial is conducted in a manner different from that prescribed by the Code (as in *N. A. Subramania Iyer's* case ((1901) L.R. 28 I.A. 257), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under s. 537, and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind. This view finds support in the decision of their lordships' Board in *Abdul Rahman v. The King Emperor* ((1926) L.R. 54 I.A. 96), where failure to comply with s. 360 of the Code of Criminal Procedure was held to be cured by s. 535 and s. 537. The present case falls under s. 537, and their lordships hold the trial valid notwithstanding the breach of s. 162."

While the Penal Code preserves the distinction between felonies and misdemeanours, the Criminal Procedure Code in fact makes little distinction between them so far as procedure is concerned. Section 193 of the Code applies to offences of all kinds and provides:

> "193. Except as otherwise expressly provided all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)."

We think that the English cases relating to the necessity for trial at the bar in cases of felony have little application in Kenya, and that the provision which has to be considered is s. 193 of the Code. Under that section this court has held that it is competent for a trial court to dispense with the presence of an accused person if he persists in making such an uproar that the trial cannot properly proceed in his presence – *Wachira s/o Murage and Others v. R.* (17). The English decisions disclose a similar practice in English courts. It is stressed, however, that in the instant case the presence of the appellant was not dispensed with, and that there was no good reason to dispense with his presence. Counsel for the appellant relied on the decision of the Privy Council in *Tameshwar v. R.* (19). That was a case where the jury viewed the scene of the offence in the absence of the trial judge and during the view certain witnesses indicated various positions relevant to the case. In the course of their judgment their lordships said at p. 487:

> "There remains the question whether the absence of the judge at this view vitiates the trial. Their lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their lordships

> are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their lordships may well think it necessary to advise Her Majesty to allow an appeal – see *Attorney for New South Wales v. Bertrand* ((1867) L.R. 1 P.C. 520, 530; *Ibrahim v. The King* ((1914) A.C. 599, 615, per Lord Sumner. Their lordships think it plain that if a judge retired to his private room while a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the judge had been present he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked; and his summing-up might be affected by it. Their lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Mr. Le Quesne argued that the conviction should not be set aside unless the absence of the judge was shown to have affected the result of the trial; but their lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass."

Counsel contended that the same principle should be applied to the absence of an accused person during the course of a trial, and that it should be held to be "too disturbing a precedent to allow it to pass". It must be noted, however, that, while there is no provision in the Code, or for that matter, in any other system of law of which we are aware, which enables a trial to proceed in the absence of the trial judge, s. 193 of the Code expressly contemplates that there may be circumstances in which a trial can proceed in the absence of an accused. No doubt such a procedure is only to be adopted in exceptional circumstances, as is indicated by s. 290 of the Code, which provides for the discharge of the jury and adjournment of the case if an accused through sickness or other sufficient cause becomes incapable of remaining at the bar. But the fact that circumstances can exist in which evidence may be taken in the absence of an accused indicates that the accused's presence throughout the trial is not so fundamental a requirement as is the presence of the trial judge. This view is supported by the decision of the Privy Council in *Karamat v. R.* (18). In that case a view was directed, but the accused declined to attend the scene. Their lordships held that the view, in which the witnesses who had already given evidence attended and placed themselves in the positions in which they had been at the material times or indicated the positions of others, was unobjectionable so long as the witnesses taking part were recalled to be cross-examined if desired. They continued at p. 265:

> "It was, however, strenuously argued before this Board that as the accused was not present this is a fatal objection. A short answer to this point was made by Mr. Le Quesne, for the Crown, who pointed out that under the Criminal Procedure Ordinance it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their lordships desire to say that if an accused person declines to attend a view which the court thinks desirable in the interests of justice he cannot afterwards raise the objection that his absence of

> itself made the view illegal and a ground for quashing the conviction, if one follows, though he could, of course, object if any evidence were given outside the scope of the view as ordered. The appellant had the opportunity of attending and declined it."

We think it follows that the presence of an accused person throughout a trial is not an absolute requirement that necessarily goes to the root of a conviction. We consider that in the instant case the trial was conducted substantially in accordance with the provisions of the Code. It is true an irregularity occurred in that a witness gave a demonstration of distances in the absence of the appellant. The demonstration was in no sense a view and was merely supplemental to evidence he had already given in court in the presence of the appellant. The demonstration was in the presence of the appellant's advocate. The demonstration was immediately repeated in the presence of the appellant. The appellant's advocate had the opportunity of cross-examining the witness after the demonstrations. No objection was taken at the trial to the procedure which had been followed. And no suggestion is made that the appellant suffered any actual prejudice as a result of the irregularity. In these circumstances we are of opinion that the appellant's absence from the demonstration, notwithstanding that his presence had not been dispensed with under s. 193 of the Code, amounts to no more than an irregularity curable under s. 381 of the Code. We think this ground of appeal must fail.

For the reasons given we hold that the trial was not a nullity, and we now consider the grounds of appeal which relate to the facts and to the summing-up.

It has never been contested that on October 12, 1959, at about 3 p.m., the appellant shot the deceased in the chest with a pistol, killing him almost immediately. The version of the affair most favourable to the appellant appears in a statement made by the appellant to Senior Superintendent Baker of the Kenya Police shortly after the incident. This statement was put in evidence at the trial without objection; and the appellant, who declined to give evidence on oath, in a brief unsworn statement to the trial court said that there was nothing he could add to it. The statement, omitting a passage which relates to events after the shooting, reads as follows:

> "About ten minutes before I made the '999' call, I can't be more specific than that, I was in the lounge of my house, at corner of Gordon Road and Kilimani Road, when my wife called out to me. I think she was in the kitchen, I'm not sure – I think she might have been going through to the kitchen – that an African was throwing stones over the fence at the dogs. I looked out of the window and saw that there was an African, the one who was subsequently shot. He was throwing stones over the fence from Kilimani Road. I called to my wife to get the pistol out of the safe, a home armoury safe which is fixed to the wall. I was in the midst of constructing a radiogram. She brought the pistol to me. I put it in my pocket and went outside into the garden towards the Kilimani side where the boy was. I was yelling at him to stop, as I went towards him. He threw one more stone as I got outside, directed at me, which did not hit me. He then mounted his bicycle and went along Kilimani Road in the direction of Gordon Road. I raced up the drive after him, calling out to the dogs to get him and at the top of the Kilimani Road he turned on the dirt track running alongside Gordon Road. As I got out of my gate I followed him along the dirt path towards the Ngong Road. Somewhere about Milne Drive, which is about thirty to thirty-five yards from my gate, I caught up with him, the dogs having gone ahead and having forced him off his bicycle. I called the dogs back and he threatened the dogs with stones. I think he had two stones in his left hand, they were about the size of your hand. Each time the dogs moved forward, as dogs will, he threatened

> them by drawing his arm back, as though he was going to throw them. I moved forward and he threatened me as well, again by gesture, not by words. I pointed the pistol at him and said 'Kama unatupa mawe nibapigu we'. I pointed the pistol at him as I spoke. I meant that if he threw the stones at me I would shoot, and there is no doubt in my mind that he understood because he then dropped the bicycle and stood there with the stones in his hand. He then stood there and said 'Piga mimi', repeating this several times in an attempt to call my bluff, indicating that he didn't think I would shoot him whatever he did. I told him that I wanted to take him back to my house to ring the police – this was in Swahili. I'm sure he understood this. He then reached down and picked up his bicycle. He dragged his bicycle backwards and so I told the dogs to get him again, because he was clearing off. The dogs moved towards him and made him drop his bicycle again. This happened on three or four occasions each time we both moved closer to the Ngong Road, until I should say we were eight to ten yards from the hedge at the corner of Ngong Road and Gordon Road. All this time he was dropping the bike when the dogs went towards him and then picking the bike up when they moved away from him. He kept on saying 'Piga mimi, piga mimi', drawing his hand across his throat and his chest. His right hand this would be, he still had the stones in his left hand. On the third or fourth occasion that this happened, that would be on the last occasion, I managed to dart forward enough to grab hold of the carrier of his bicycle and he dragged me some three or four feet across the Ngong Road. He let go of the bicycle, partly threw it down with a discarding gesture of his right hand, and drew back his left arm, he must have been left-handed. This was a far more threatening gesture than before, and there is no doubt in my mind that he had come to the stage when he was going to throw the stone to hit me. We were at that stage six or seven feet apart. I fired one shot, intending to strike his legs. I'm not sure where the shot hit. This stopped his arm which was in the process of throwing. By throwing I mean that his arm was travelling forward, but the stone wasn't released. He let out a yelp and I should say that both the yells and the sudden stopping of the throw were due solely to the shock by being hit, if he was hit, or by the sound of the shot. There was a momentary pause and he drew back his arm again in a further attempt to throw the stone. It was his left arm again, as I said he must have been left-handed as far as I can see. As he went to throw again, that is as his body moved forward for the actual throw, I fired again – at him. I meant to stop him. He dropped his arm, made some noises, unintelligible to me, I didn't distinguish what he said. He turned and ran round the corner. I followed to the corner and he was lying on the ground with his shoulders up to the bushes of the hedge
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> "There is no doubt in my mind that I fired in self-defence, the African was going to throw the stone, I'm quite sure. It wouldn't have done me much good had he hit me. He still had another stone and I should have been unable to defend myself had I been knocked unconscious at this stage. Had one of these stones hit me it was highly likely that I would have been knocked unconscious at least."

Two eye-witnesses, Titoro s/o Sabai, who has already been mentioned, and Mrs. Hook, a European nursing sister, gave evidence. Counsel for the appellant stated that he had no criticism to make of the learned Chief Justice's summing-up of the facts, and it is convenient to refer to the relevant passages of the summing-up for the versions of the affair given by these two witnesses. The gist of Titoro's evidence as summarised by the learned Chief Justice is as follows:

> "On October 12 he (i.e. Titoro) finished work at about 2 p.m. and went to Adam's Arcade, which is in Ngong Road, where he bought some articles. He was on foot. After leaving the Arcade he went along Ngong Road and turned into Gordon Road where he was passed by the deceased on a bicycle. The deceased turned into Kilimani Road. When he, that is Titoro, reached Kilimani Road he saw the deceased some forty yards along Kilimani Road. He said the deceased was near the accused's gate leading on to Kilimani Road. You will notice from the plan that this gate is over seventy yards from the junction where the witness says he was standing. The deceased had dismounted and was being attacked by some Alsatian dogs. The deceased picked up some soil and threw it at the dogs. The dogs retreated. The deceased then commenced to wheel his bicycle back to Gordon Road, turned into Gordon Road and continued towards Ngong Road. He was holding a bicycle pump in his hand. In the meantime the accused came out from his house, called his dogs and followed the deceased. The accused caught up with him, that is the deceased, near the corner of Ngong Road, caught hold of the deceased's bicycle and pulled a pistol out of his pocket. He then shot at the deceased twice, there being about a second between each shot. Both shots, he said, were fired at the same spot. The first shot missed the deceased, but the second shot hit him. After the first shot, the dogs which were with the accused, ran away and on the second shot the deceased left his bicycle and ran round the corner of the hedge into Ngong Road, bending over and holding his stomach."

There were discrepancies and contradictions in Titoro's evidence which were duly pointed out to the jury.

Mrs. Hook's evidence, as given in the summing-up, is as follows:

> "Mrs. Hook, the nursing sister, appears to have been the next witness on the scene. She said that on October 12 she turned into Gordon Road from Ngong Road at about five minutes to three. On the right-hand side of the road and a short distance down the road, she saw an African, the deceased, with a bicycle being attacked by two large dogs. He was pushing at the dogs with his bicycle as if he was trying to push the dogs away. She stopped her car just short of Kilimani Road on the opposite side of Gordon Road wondering what to do. The deceased was on the other side of the road almost level with the car.
>
> "Shortly after, a European, who she said was the accused, came from Kilimani Road. The dogs seemed to run towards him and the deceased bent down and picked up what appeared to her to be two large red stones.
>
> "They were round and about the size of large oranges. He held one in each hand raised above his shoulders as you saw her demonstrate. The way he was holding the stones in his hands did not impress her as threatening. His bicycle was supported against his body.
>
> "The accused called out in Swahili, 'If you hit my dogs, I'll hit you'. As he said that he took a gun out of his pocket and pointed it at the deceased. He moved nearer to the deceased. The dogs had then returned and were attacking the deceased. The accused told them to go away; they started to go away but came back again. Then the deceased said, 'Yes, hit me. I am not bad. We will go to the court and the police will know'. As he said this he beat his chest with his hand. There was a heated argument between them and a lot of shouting. During this time the deceased was backing towards Ngong Road and in a few seconds they were behind her. The accused and deceased were both pulling the bicycle. When they were nearly at Ngong Road she reversed her car and stopped

> it almost at the corner of Ngong Road. At about the time she stopped the car, she heard a shot. That made her look up and she saw the gun in the accused's hand. The deceased was near the corner and the accused was three or four yards away. They were more or less level with where she stopped the car. The accused was then facing towards her and the deceased was, she thought, also facing towards her. The deceased had his hands raised, but she could not say whether he had stones in them or not. The deceased then went round the corner into Ngong Road and the accused followed him. Seconds later, she heard another shot. She then got out of her car and went round the corner."

The discrepancies between the three versions of the affair were brought to the attention of the jury and, as has already been indicated, counsel for the appellant accepted that the facts had been correctly and adequately dealt with by the learned Chief Justice in the summing-up.

Nevertheless counsel submitted that the verdict of the jury in all the circumstances was unreasonable, and that they should have brought in a verdict of manslaughter. He conceded that he could not argue that self-defence had been established; and further conceded that if Titoro's evidence was accepted, it was a case of murder. But he submitted that it was clear from the learned judge's summing-up that he thought little of Titoro's evidence, and that he seemed to have had doubts as to the accuracy of Mrs. Hook's evidence. He submitted that the only reliable basis for the prosecution case was the appellant's own story; that on that story the case amounted to no more than a sudden quarrel between two men, one armed with stones and the other with a pistol, which culminated in one using the pistol; and that this constituted a classic case of manslaughter. He also stressed the publicity which the affair had attracted and suggested that the jury might have been influenced by political considerations notwithstanding the learned Chief Justice's warning to put out of their minds all they had read about the case.

We do not consider that the publicity attracted by the affair and its political aspect are any ground for interfering with the verdict of the jury if that verdict is otherwise reasonable on the evidence. The learned Chief Justice carefully directed the jury to return a verdict according to the evidence heard in court and that evidence alone, and to put out of their minds anything heard or read about the case outside the court. We cannot assume that the jury did not heed that injunction merely because the case did attract publicity. To do so would involve the setting aside of a verdict of guilty in every case in which there had been publicity. Such publicity is, no doubt, unfortunate, but in present circumstances the jury system has to work with such publicity, and the best that can be done is for the trial judge to instruct the jury to ignore the publicity.

As to the alleged unreasonableness of the verdict, we are satisfied that there was ample evidence on which the jury could reach the conclusion which they did reach. As was conceded by counsel for the appellant, if they accepted Titoro's evidence the case was clearly one of murder. There were discrepancies between Titoro's evidence and the evidence given by Mrs. Hook and between Titoro's evidence at the trial and his evidence at the preliminary inquiry. These discrepancies were duly brought to the attention of the jury by the learned Chief Justice, but the jury may nevertheless have reached the conclusion from his evidence that the appellant's dogs had attacked the deceased in the road and that the deceased had been merely defending himself against them. Mrs. Hook's evidence, if accepted by the jury, indicated that the appellant was the aggressor throughout the time she was present. Even if the jury discounted Titoro's evidence, upon the appellant's own account it is clear that he armed himself with a loaded pistol before there was any question

of provocation which could justify such action. The jury heard all the witnesses and had the effect of their evidence and the whole of the defence case clearly put before them in the summing-up. It is not for this court to speculate as to the view of the evidence which they took in arriving at their verdict. This court will not substitute its own verdict for that of the jury, and will only intervene if satisfied that the verdict cannot stand on the evidence or that the jury has been misled by a material misdirection. We see no reason whatever to interfere with the verdict of the jury in this case.

The last head of appeal concerns alleged misdirections in the summing-up, and to some extent overlaps the last ground of appeal considered, in that it is alleged that, on the evidence, if the misdirections had not occurred, the jury might well have brought in a verdict of manslaughter; and that therefore the conviction of murder should be set aside and one of manslaughter substituted.

Two misdirections were alleged, first, that the learned Chief Justice, while commenting on the appellant's absence from the witness-box, omitted to point out to the jury that the appellant was not bound to give evidence; and secondly, that the learned Chief Justice had not adequately "married" his directions on law to the facts of the case.

As regards the first alleged misdirection, the relevant passage in the summing-up reads as follows:

> "Turn now to the accused's story. He has not given evidence on oath and subjected himself to cross-examination, but from the dock he stated that he had made a statement which had been read in this court and there was nothing he could add to it. I think it necessary to read that statement to you again in full and you may have it when you retire to consider your verdict."

The learned Chief Justice then proceeded to read the appellant's statement to the jury in full, and pointed out where support for the appellant's version was to be found in other evidence given in the course of the trial. The contention that the passage set out above amounts to a misdirection is based on the judgment of the Privy Council in *Waugh v. R.* (21), [1950] A.C. 203. In that case the learned trial judge had referred nine times in the course of the summing-up to the failure of the accused to give evidence, and in one passage, which is set out in their lordships' judgment, said:

> "But as I have said before, the prisoner has not told you how it happened. You have not been able to ask him one question; the one person who is alive today to tell us what happened, does not see fit to go there (pointing to the witness-box) and tell you what happened."

The passage in their lordships' judgment on which counsel for the appellant relies reads as follows:

> "The law of Jamaica is the same as the law of England both as to the right of a judge to comment on a prisoner's not giving evidence and as to dying declarations. Whilst much of the summing-up is unexceptionable, there are certain parts of it which, in their lordships' view, do constitute a grave departure from the rules that justice requires, and they are therefore of opinion that the conviction must be quashed. It is true that it is a matter for the judge's discretion whether he shall comment on the fact that a prisoner has not given evidence, but the very fact that the prosecution are not permitted to comment on that fact shows how careful a judge should be in making such comment. Here the appellant had told the same story almost immediately after the shooting, and his statements to the prosecution witnesses and his statement to the police made the same day were put in evidence by the prosecution. Moreover, his story was corroborated

> by the finding of the bag of coconuts and the iron tool and by the independent evidence as to the place where the shooting took place. In such a state of the evidence the judge's repeated comments on the appellant's failure to give evidence may well have led the jury to think that no innocent man could have taken such a course. The question whether a prisoner is to be called as a witness in such circumstances and on a murder charge is always one of the greatest anxiety for the prisoner's legal advisers, but in the present case their lordships think that the prisoner's counsel was fully justified in not calling the prisoner, and that the judge, if he made any comment on the matter at all, ought at least to have pointed out to the jury that the prisoner was not bound to give evidence and that it was for the prosecution to make out the case beyond reasonable doubt."

We are unable to see any resemblance between the situation in *Waugh's* case (21) and that in the instant case. In *Waugh's* case (21) the trial judge repeatedly commented, and commented most adversely, on the accused's failure to give evidence. In the instant case the learned Chief Justice's single reference to the appellant's failure to give evidence amounts to no more than a statement of the fact, which in any case was self-evident. No adverse comment on the fact was made, and the learned Chief Justice gave the fullest weight to the defence story as set out in the appellant's statement to the police, stressing where support for that story was to be found in other evidence. He had already directed the jury that:

> "The fourth principle which must guide you and which above all you must bear in mind, is that the burden of proof is upon the prosecution to satisfy you that the accused is guilty. It is not for him to satisfy you that he is innocent. It is the duty of the prosecution to prove beyond reasonable doubt the guilt of the accused."

In these circumstances we do not think that any misdirection occurred on the point.

As to the second alleged misdirection, counsel for the appellant conceded that the summing-up contained a clear and accurate review of the facts, and an accurate statement of the law, but complained that the learned Chief Justice dealt with the law in vacuo, and did not relate it to the facts; he submitted that the jury were entitled to more guidance than was given, and that, had they been more fully directed, they might well have brought in a verdict of manslaughter.

We can only say that, reading the summing-up as a whole, we can see no substance in this submission. The learned Chief Justice, it is true, adopted the course of directing the jury as to the law, and then proceeded to review the facts. His direction as to the law, however, so far as we can see, and as was conceded by counsel, was clear and accurate. The law was concisely stated, but was none the less clear on that account. We see no reason to suppose that the jury had any difficulty in applying the law as it had been explained to them to the facts of the case, or that any further direction would have had any effect on their verdict. If we may say so, with respect, we think that the summing-up as a whole was admirably clear and accurate both as to law and fact.

For the reasons given we think this appeal must fail and it is accordingly dismissed.

Appeal dismissed.

For the appellant:
Sirley & *Kean*, Nairobi
F. H. Lawton, Q.C. (of the English Bar), and *B. Sirley*

For the respondent:
The Attorney-General, Kenya
D. W. Conroy, Q.C. (Solicitor-General, Kenya), and *K. C. Brookes* (Crown Counsel, Kenya)

Mahmud Nasser Rattansey v Hamidabai Mahmud Rattansey (Nee Hazel May Higgins)

[1960] 1 EA 81 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	12 March 1960
Case Number:	7/1959
Before:	Spry Ag J
Sourced by:	LawAfrica

[1] Divorce – Marriage between Christian and Khoja – Marriage by statutory civil ceremony – Wife subsequently converted to Islam – Marriage ceremony according to Muslim law – Divorce by talak according to Muslim law – Whether court can grant declaration that such divorce is recognised in Tanganyika – Marriage Ordinance (*Cap.* 109), (*T.*) *– Matrimonial Causes Ordinance* (*Cap.* 364), (*T.*) *– Marriage, Divorce and Succession* (*Non-Christian Asiatics*) *Ordinance* (*Cap.* 112), *s.* 3 *and s.* 4 (T.) *– Tanganyika Order-in-Council*, 1920, *art.* 17.

[2] Jurisdiction – Divorce – Petition for declaration that divorce by talak under Muslim law is recognised by law of Tanganyika – Whether court empowered to grant such declaration – Marriage Ordinance (*Cap*. 109), (*T.*) *– Matrimonial Causes Ordinance* (*Cap.* 364), (*T.*) *– Marriage, Divorce and Succession* (*Non-Christian Asiatics*) *Ordinance* (*Cap.* 112), *s.* 3, *and s.* 4 (T.) *– Tanganyika Order-in-Council*, 1920, *art.* 17.

Editor's Summary

The petitioner a member of the Khoja Ithna-asheri community married the respondent who was a Christian by a civil ceremony under the Marriage Ordinance. The respondent soon became a convert to Islam and was admitted to the Ithna-asheri community. On the same day the petitioner and the respondent went through a ceremony of marriage according to Muslim law. Subsequently the petitioner having divorced the respondent by pronouncement of talak according to Muslim law applied to the court for a declaration that the divorce pronounced by talak was recognised by the law of Tanganyika as dissolving the marriage between the parties.

Held –

(i) by virtue of art. 17 of the Tanganyika Order-in-Council, 1920, the court has inherent powers under the common law of England derived from the practice of the ecclesiastical courts to make declaratory decrees in matrimonial causes where no other relief is sought.

(ii) a religious disqualification which would be valid to prevent a marriage under religious law cannot be invoked to invalidate a civil marriage.

(iii) the petitioner and the respondent were validly married by the civil ceremony and the second marriage ceremony between the parties under the Muslim law had no legal effect as the parties had

already the status of man and wife.

(iv) the admission of the respondent into the Ithna-asheri community following her conversion to Islam made her subject in all respects to the religious law of that community and the marriage between the petitioner and the respondent was dissolved by pronouncement of talak under that law although contracted by civil ceremony under the Marriage Ordinance.

(v) s. 4 of the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance does not prevent the dissolution by divorce in religious form of a marriage contracted under the Marriage Ordinance.

Per Curiam: "In Tanganyika, where there is something like an internal conflict of laws, the validity of a divorce of persons domiciled in Tanganyika should be decided according to the personal law to which the parties are subject at the time of the divorce unless there is any express statute law to the contrary."

Declaration as prayed.

Cases referred to in judgment:

(1) *Har-Shefi v. Har-Shefi*, [1953] 1 All E.R. 783.

(2) *Chetti v. Chetti*, [1909] P. 67.

(3) *R. v. Hammersmith Superintendent Registrar of Marriages*, [1917] 1 K.B. 634.

(4) *Skinner v. Skinner* (1897), 25 I.A. 34.

(5) *Khambatta v. Khambatta* (1935), 59 Bom. 278.

(6) *Harvey v. Farnie* (1881), 6 P.D. 35.

(7) *Maleksultan w/o Sherali Jeraj d/o Allarakhia Dhalla v. Sherali Jeraj* (1955), 22 E.A.C.A. 142.

Judgment

Spry Ag J: On April 12, 1950, the petitioner, who is and has at all material times been a follower of Islam and a member of the Khoja Shia Ithna-asheri community, married the respondent who was a Christian, by a civil ceremony performed under the Marriage Ordinance (Cap. 109). On May 18, 1950, the respondent became a convert to Islam and was admitted as a member of the Ithna-asheri community. On the same day she and the petitioner went through a ceremony of marriage according to Muslim law. On January 7, 1959, the petitioner divorced the respondent by pronouncement of *talak* in accordance with Muslim law. The petitioner now asks for a declaration that the divorce is recognised by the law of Tanganyika.

The first question that has to be considered is whether this court has jurisdiction to make such a declaration. Mr. Patel himself expressed doubt whether the Matrimonial Causes Ordinance (Cap. 364) applied and in the alternative argued that the court had jurisdiction under art. 17 of the Tanganyika Order-in-Council, 1920, read together with the Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance (Cap. 112). There would appear to be no provision in Cap. 364 for declaratory orders, and Cap. 112, while it is expressed in more general terms to give the High Court jurisdiction to hear and determine matrimonial causes and suits, does not expressly authorise applications for declaratory decrees where no other relief is sought. In England such applications may be entertained under O. 25, r. 5 of the Rules of the Supreme Court as applied by r. 80 of the Matrimonial Causes Rules, 1950. In India they are permitted by s. 42 of the Specific Relief Act, 1877. Unfortunately there appears to be no equivalent provision under the law of Tanganyika. It appears to be the accepted view in India that the courts have no power to make a merely declaratory decree independently of s. 42, but I think that here in the absence of any such provision the court is entitled to rely on art. 17 of the Order-in-Council and to use its inherent powers under the English common law as derived from the practice of the ecclesiastical courts. The judgment of Denning, L.J., in *Har-Shefi v. Har-Shefi* (1), [1953] 1 All E.R. 783, is, I think, good authority that such powers exist, and it is desirable that they should be used

> "on the ground that it is material for their own sakes (that is, the sakes of the parties) and that of the public that their status should be known."

Having disposed of this preliminary point, the next question to be decided is whether the civil marriage was a valid one. Mr. Patel did not initially question this, but in answer to a proposition put to him by the court he submitted that the marriage of a Muslim man to a Christian woman is void under Shia law. I can

find no authority on the question whether a religious disqualification invalidates a civil marriage but I think that many of the arguments in *Chetti v. Chetti* (2), [1909] P. 67 are relevant. That case was concerned with systems of law applying in different countries, and the court held that a foreigner domiciled abroad who

went to England and there married in due form in accordance with English law a person domiciled in England should not be allowed to carry about with him the burden of an incapacity imposed by the religious laws of the country of his domicile and to repudiate his marriage on the grounds that he was incapable of doing what he had done. The present case concerns two systems of law applying in one country, the statute law which permits civil marriage and the law of Islam according to the appropriate school or sect which under the Order-in-Council governs the Muslim community in those matters, such as marriage and divorce, which are peculiarly associated with religion. It seems to me that a religious disqualification which would be valid to prevent a marriage under religious law cannot be invoked to invalidate a civil marriage. To hold otherwise might largely defeat the object of the legislature in providing a form of civil marriage. It is significant, in this respect, that the provisions of the Marriage Ordinance are only excluded in the case of marriages to which each of the parties is a Muslim, Hindu, Buddhist or pagan, thus clearly contemplating marriages between members of different religious communities, marriages which are likely to be forbidden by the respective religious laws. Section 33 and s. 34 of the Marriage Ordinance are not entirely satisfactory because I do not think the former is exclusive as to the grounds for holding a marriage invalid, but I think they indicate the line of approach to the question, both in regard to Christian and to civil marriages. It is interesting to note that there is no provision in the Ordinance comparable with the provision in the Indian Christian Marriage Act, 1872, that nothing in that Act should be deemed to validate any marriage which the personal law applicable to either party forbade him or her to enter into. It has not been suggested that there was any other impediment to the marriage or that there was any failure to comply with the provisions of the Marriage Ordinance. I hold therefore that the petitioner and the respondent were validly married by the civil ceremony held on April 12, 1950.

In my opinion, the second marriage ceremony between the parties, that under Muslim law, had no legal effect. The parties already had the status of man and wife. I have considered whether the second marriage might not be regarded as a kind of novation, leaving the marriage status intact but varying the rights of the parties thereunder, but I think any such idea must be rejected. Although marriage is a contract, it is a contract of a special kind and not one which the parties are able to vary or determine at will.

Next it is necessary to consider the effect of the conversion of the respondent to Islam and her acceptance into the Ithna-asheri community. It is I think clear that while the civil marriage changed the domicile of the respondent it did not affect her religion or subject her to religious law. In *R. v. Hammersmith Superintendent Registrar of Marriages* (3), [1917] 1 K.B. 634, Viscount Reading, C.J., said, at p. 643, of an English woman who in England married an Indian Muslim, that:

> " . . . a woman . . . acquires by the status of marriage the domicile of the husband and is subject to the law of that domicile, but she does not acquire his religion or become subject to the laws of his religion except so far as they are the law of his domicile, and then to that extent only."

On May 18, 1950, however, the respondent participated in a ceremony at which she expressed her conversion to Islam and was accepted into the Ithna-asheri community. The effect of a change of religion has several times been considered by the courts although generally inconclusively. In *Skinner v. Skinner* (4) (1897), 25 I.A. 34, Lord Watson giving the judgment of the judicial committee said at p. 41:

> "Whether a change of religion, made honestly after marriage with the assent of both spouses, without any intent to commit a fraud upon the law,

> will have the effect of altering rights incidental to the marriage, such as that of divorce, is a question of importance and it may be of nicety."

but he did not find it necessary to answer that question. Mr. Patel relied particularly on the case of *Khambatta v. Khambatta* (5) (1935), 59 Bom. 278, in which Blackwell, J., said at p. 296:

> "It has been argued for the appellant that the status imposed by operation of law upon persons who marry in Christian form cannot be altered by the voluntary act of the parties. But, if a change of domicile, which is a voluntary act, may result in a change of status by reason of the application of a different system of law, it is difficult to see why a change of religion, the domicile remaining unchanged, may not also result in a change of status, if the law to be applied is then different by reason of the difference of religion."

I respectfully agree. Although the arguments in that case are of the greatest assistance, the decision has no, however, direct bearing on the present case because most of the grounds for the decision are not applicable. The petitioner, who was domiciled in Scotland, married in Scotland an Indian Muslim domiciled in India. Subsequently, she was converted to Islam and later was divorced by *talak.* The peculiar feature of the case was that under the statute law of India at that time the husband had no right to apply for the form of divorce appropriate to a Christian marriage, while the wife lost her right on her conversion. It was this factor that greatly influenced the court in deciding that the petitioner must have had some, and could only have had a religious, right of divorce.

In principle, I see no reason why entry into a religious community should be by birth alone, and I am not aware of any reason why a person should not elect to join a religious community with the consent of that community, performing any ceremonies customary and appropriate. It should be stressed, I think, that this is not a case where an inward and spiritual change of faith is alleged but one where there has been a ceremonial entry into and acceptance by a religious community. I would add that there is no reason to doubt that the conversion was genuine and sincere: it took place over eight years before the divorce and according to the evidence of the petitioner the respondent was a practising Muslim during those years.

If a religious community in Tanganyika is governed by its religious law in matters peculiarly appropriate, and if the respondent became in all respects a member of a religious community, I see no reason why she should not be bound in all respects by the religious law of that community. It is of course a recognised principle that parties cannot confer jurisdiction by consent, but a voluntary act may well have the effect of creating jurisdiction as, for example, in the case of a voluntary change of domicile.

There is no principle of law that a marriage must be dissolved under the same system as that under which it was contracted. There is ample authority to the contrary, going back to *Harvey v. Farnie* (6) (1881), 6 P.D. 35. In the ordinary way the deciding factor is the domicile of the parties at the time of the divorce. In Tanganyika, where there is something like an internal conflict of laws, it seems to me that the validity of a divorce of persons domiciled in Tanganyika must be decided according to the personal law to which the parties are subject at the time of the divorce, unless there is any express statute law to the contrary.

I think it is clear that the petitioner cannot have been in a position to choose between two systems of law. If the admission of the respondent into the Ithna-asheri community meant that the marriage status of the parties became governed by Muslim law, then, I think, the marriage ceased to be one capable of being dissolved under the provisions of Cap. 364. It could not be dissolved under

s. 3 of Cap. 112, because of the provisions of s. 4. It could therefore only be dissolved under Muslim law. The marriage could, I think, only have been dissolved under Cap. 364 if the status of the parties was wholly outside Muslim law, that is, in effect, if the admission of the respondent to the Ithna-asheri community was without legal effect, and that, as I have said earlier, I do not believe to have been the case.

There remains one difficult question and one on which, unfortunately, I did not have the benefit of argument from Mr. Patel, that is, whether the provisions of s. 4 of Cap. 112 should lead me to the opposite conclusion. The Marriage, Divorce and Succession (Non-Christian Asiatics) Ordinance (Cap. 112) as originally enacted provided for the marriage and divorce under religious law of non-Christian Asiatics but contained a stipulation, in s. 4, that nothing in that Ordinance should permit the dissolution of a marriage contracted under the Marriage Ordinance. In 1943, the former Ordinance was amended so as to relate, and it was provided that it should be deemed always to have related, to marriages between non-Christian spouses either of whom is an Asiatic. At the same time s. 3, relating to divorce, was amplified and clarified. Section 4 was left unchanged. The Ordinance was again amended in 1948, when s. 3 was repealed and replaced by a new section giving the High Court jurisdiction in matrimonial causes arising out of the marriage of non-Christian spouses either of whom is an Asiatic. Section 4 was also repealed and replaced but the new section, like the old, provided that nothing in the Ordinance should permit the dissolution of a marriage contracted under the Marriage Ordinance.

The 1948 amendment was considered by H.M. Court of Appeal for Eastern Africa in the case of *Maleksultan w/o Sherali Jeraj d/o Allarakhia Dhalla v. Sherali Jeraj* (7) (1955), 22 E.A.C.A. 142, when the court held that from the inception of British rule in Tanganyika marriages and divorces in accordance with personal law and religious beliefs must have been recognised as valid *de jure* and that Cap. 112 did no more than record the existing law. Accordingly it was held that the 1948 repeal of s. 3 did not preclude the courts from recognising a divorce effected in accordance with religious law.

It seems clear then that, whatever the intention of the legislature may have been, s. 4 of Cap. 112 does not in fact prevent the dissolution of a marriage contracted under Cap. 109 by a divorce in religious form, since such divorces are not effected under Cap. 112. The legislature could have provided that a marriage contracted under Cap. 109 should be incapable of dissolution in the Territory except under the provisions of Cap. 364 but it has not done so. In the absence of any such statutory prohibition, I do not consider that I should be justified in implying any such limitation on the scope of religious and personal law in Tanganyika.

I accordingly grant a declaration as prayed that the divorce between the petitioner and the respondent pronounced by *talak* on January 7, 1959, dissolved the status of marriage between the parties.

Declaration as prayed.

For the petitioner:
Patel & Co., Dar-es-Salaam
N. S. Patel

The respondent did not appear and was not represented.

Oloo s/o Gai v R

[1960] 1 EA 86 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 February 1960
Case Number:	218/1959
Before:	Forbes VP, Gould JA and Templeton J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Wicks, J.

[1] Criminal law – Evidence – Child – Ability to understand nature of oath-Judge's duty when child tendered as witness – Whether finding should be recorded – Oaths and Statutory Declarations Ordinance (*Cap*. 20), *s.* 19 (K.) – *Oaths and Statutory Declarations* (*Amendment*) *Ordinance*, 1954, (*K.*).

[2] Criminal law – Murder – Self-defence – Onus of proof.

[3] Criminal law – Evidence – Child – Corroboration.

Editor's Summary

At the trial of the appellant on a charge of murder the Crown case rested entirely upon the evidence of the young daughter of the deceased. When she was called as a witness the judge recorded that she appeared to be aged about twelve, intelligent, was attending school and church and knew truth from false-hood. He did not then record that he had allowed her to be sworn or that he considered she was capable of understanding the nature of an oath although he did so in his judgment. In his summing-up of the evidence to the assessors he gave no warning of the danger of convicting on the uncorroborated evidence of a young child. On appeal against conviction.

Held –

(i) whilst it would have been better for the trial judge to record in terms that he had satisfied himself that the child understood the nature of an oath, this was the effect of his finding.

(ii) in directing the assessors as to the onus of proof in relation to the defence of self-defence or accident the reference by the trial judge to "the balance of probabilities" was unfortunate, but in the context of the whole direction the judge had removed any misapprehension created by the use of the expression.

(iii) since the judge had failed to direct himself or the assessors on the danger of relying on the uncorroborated evidence of a child of tender years and had also overlooked significant items of evidence bearing on the reliability of her story, the conviction could not stand.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

(1) *Kibangeny Arap Kolil v. R.*, [1959] E.A. 92 (C.A.).

(2) *Chan Kau v. R.* (1955), 2 W.L.R. 192; [1955] 1 All E.R. 266.

(3) *Festo Shirabu s/o Musungu v. R.* (1955), 22 E.A.C.A. 454.

Judgment

The following judgment was read by direction of the court: This is an appeal from a conviction of murder by the Supreme Court of Kenya sitting at Kisii on December 9, 1959.

The appellant was charged with the murder of his sister-in-law, Agero w/o Ambet, on July 8, 1959. The evidence indicated a background of antagonism between the appellant and the deceased in respect of a money transaction, the deceased believing that the appellant had failed to pay to her some Shs. 10/- or Shs. 12/-, being part of a sum entrusted to the appellant for the deceased by her husband.

It was not contested that the deceased met her death as a result of a knife wound on the inside of her right thigh about five inches above the knee, which had severed a major vein and two arteries, and that this wound was received in the course of a struggle between the appellant and the deceased and was caused by a knife which belonged to the appellant. The Crown case depended entirely on the evidence of one Ambingu, a daughter of the deceased, who was a girl of about twelve years of age. Her evidence was to the effect that the deceased was in a cassava field uprooting cassava plants when the appellant went up to the deceased; that the appellant said to the deceased "You have despised me for a long time and today I am going to kill you"; that the appellant struck the deceased once on each side of her neck with a stick which was about four feet six inches long and one inch thick; that the appellant then knocked the deceased down and caught her by the neck with his hands; that the appellant then took out a knife and stabbed the deceased with it; that she (the witness) did not actually see the knife enter the deceased as her attention was diverted at that moment by one of the younger children who was present putting its arms around her; that the deceased drew the knife out of her thigh and as she did this the appellant was striking her on the neck with a cassava branch; that one, Asuto s/o Gai, then came to the scene attracted by the witness's screams, and threw a stick at the appellant who ran away; and that the deceased subsequently died.

The appellant's version of the affair, which he gave in an unsworn statement to the court, was to the effect that he was returning to his boma when he encountered the deceased "standing by the corner quarrelling with herself"; that he tried to appease her saying that he had no money left and that the money he had he had given to her; that she then came at him and seized him by his private parts and also drew his knife from him; that he tried to seize her hand, and during the struggle for the knife they both fell down; that he then saw blood and realised she had hurt herself with the knife; that the wound was caused accidentally and that he had not had any intention to hurt her; and that on the following day he went with his brother to the headman who took him to the chief. This account was consistent with a short statement which he made to the police on being charged and cautioned, and in which he said "I caused her injuries unknowingly". He also said in his statement to the police that the deceased was "a stubborn headed woman" and that on one occasion she had assaulted her husband and cut his feet with a panga and that her husband had been admitted to hospital. This view of the deceased was apparently accepted by the learned trial judge.

The memorandum of appeal contained some fifteen grounds. The three principal grounds, however, are:

(*a*) that the learned judge misdirected himself and the assessors on the question of onus of proof that for the appellant to succeed it was necessary for him to show that on the balance of probabilities it was self-defence or accident or provocation;

(*b*) that the learned judge erred in that he allowed the prosecution witness, Ambingu, to give evidence on oath without satisfying himself that such witness was capable of sufficiently understanding the nature of an oath; and

(*c*) that the learned judge erred in that he did not consider or direct the assessors that the uncorroborated evidence of the prosecution witness Ambingu should be accepted with great care and that he should not have accepted the uncorroborated evidence of such witness.

The remaining grounds of appeal relate principally to alleged misdirections or non-directions on matters of fact. Some of these are relevant to the consideration

of the third ground of appeal mentioned above and will be referred to in that context. We do not think it necessary to deal with them independently.

As regards the second ground of appeal mentioned above, that is that the learned trial judge did not satisfy himself that the witness, Ambingu, a girl of twelve years of age, was capable of sufficiently understanding the nature of an oath before allowing her to be sworn, it is of course well established that it is the duty of a court under s. 19 of the Oaths and Statutory Declarations Ordinance (Cap. 20) as amended by the Oaths and Statutory Declarations Ordinance, 1954:

> "to ascertain, first, whether a child tendered as a witness understands the nature of an oath, and, if the finding on this question is in the negative, to satisfy itself that the child 'is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth'."

(*Nyasani s/o Bichana v. R.*, [1958] E.A. 190 (C.A.) cited and followed in *Kibangeny Arap Kolil v. R.*, [1959] E.A. 92 (C.A.)).

In *Kibangeny Arap Kolil v. R.* (1), [1959] E.A. 92 (C.A.) this court further said:

> "The investigation [i.e. whether the child tendered as a witness understands the nature of an oath] should precede the swearing and the evidence and should be directed to the particular question whether the child understands the nature of an oath rather than to the question of his general intelligence."

In *Kibangeny's* case (1) also this court held that the expression "child of tender years" for the purposes of s. 19 of the Oaths and Statutory Declarations Ordinance should be taken to mean, in the absence of special circumstances, any child of an age or apparent age of under fourteen years, although essentially it remained "a matter of the good sense of the court".

In the instant case the transcript of the record reads:

> "Ambingu d/o Ambet, appears to be about twelve years of age. Goes to school. Appears to be intelligent and understands proceedings. Satisfied knows truth from falsehood. States a Catholic and goes to the Catholic Church."

It does not appear from this passage that the learned judge made a finding as to her capacity to understand an oath, nor indeed that the witness was sworn. In the judgment, however, the learned judge said:

> "Ambingu (P.W. 1) is a girl who appears to be about twelve years of age. Although shy, I was satisfied that she understood the nature of proceedings in court, the difference between truth and falsehood, held sound religious belief in the Roman Catholic faith, and was fit to be sworn. She was sworn as a witness . . ."

While the passages cited do not contain specific reference to the understanding of an oath, and it would undoubtedly have been preferable for the learned judge to have recorded in terms that he had satisfied himself that the witness understood the nature of an oath, we think that in fact this is the effect of the learned judge's finding. He states that the witness

> "held sound religious belief in the Roman Catholic faith and was fit to be sworn."

Religious belief is fundamental to the understanding of an oath, and we think it is to be inferred from the passage cited that the learned judge was satisfied

that the witness's religious belief was such as to enable her to appreciate the nature of an oath. We should not have allowed the appeal on this ground.

The first ground of appeal mentioned above is that the learned judge misdirected himself on the question of onus of proof. The passage in the judgment on which counsel for the appellant relied is the following:

> "All that is necessary for the defence to succeed is to show that on the balance of probabilities it was self-defence or accident . . ."

Counsel for the appellant also claimed that the learned trial judge again misdirected himself and the assessors in the following passage which appears in the judgment:

> "If, however, they are satisfied that he did stab Agero or she received the wound in the course of a struggle with him, then to set up a defence of self-defence it must be shown, or at least it must be a reasonable inference from the facts, that the accused did all that could be expected of him to avoid doing the act which resulted in the death . . .

Taken in isolation the first passage set out above is undoubtedly a serious misdirection. The law as re-stated by the Privy Council in *Chan Kau v. R.* (2) (1955), 2 W.L.R. 192, in a passage which has been repeatedly cited in judgments of this court is that:

> ". . . in cases where the evidence discloses a possible defence of self-defence the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder and the onus is never upon the accused to establish this defence any more than it is for him to establish provocation or any other defence apart from that of insanity. Since the decisions of the House of Lords in *Woolmington v. Director of Public Prosecutions* and *Mancini* v. *Director of Public Prosecutions*, it is clear that the rule with regard to the onus of proof in cases of murder and manslaughter is of general application and permits of no exception save only in the case of insanity, which is not strictly a defence."

In applying that statement of the law in *Festo Shirabu s/o Musungu v. R.* (3) (1955), 22 E.A.C.A. 454 at p. 455, this court said:

> "So far from it being necessary that the facts relied on as provocation should be 'strictly proved', it is only necessary that there should be such evidence of them as to raise a reasonable probability that they may exist – not even a balance of probability. If this is the effect of the evidence, the onus lying on the prosecution is not discharged and murder is not proved."

In the instant case the use of the phrase "balance of probabilities" in relation to the establishment of the defences of self-defence or accident is most unfortunate, and had we thought that it had or might have affected the impression given by the summing-up as to the onus of proof as a whole, we must on this ground alone have allowed the appeal. Reading the passage in the judgment relating to the onus of proof as a whole, however, we think that the impression conveyed was a correct one. The whole of the relevant passage in the summing-up reads as follows:

> "I explained the nature of the charge to the assessors and instructed them that the onus of proving the guilt of the accused rested on the prosecution, that it was not for the accused to prove his innocence. That it was for the prosecution to prove the accused guilty beyond reasonable doubt and if, having considered all the evidence, they were left in doubt as to the truth of the matter then the accused must have the benefit of it and their opinion must be not guilty. I also instructed the assessors that

> in a case such as this where the evidence discloses the possible defence of self-defence or accident the onus remained throughout on the prosecution to prove beyond reasonable doubt that it was not self-defence or accident and the burden is never on the accused to prove or establish such defences. All that is necessary for the defence to succeed is to show that on the balance of probabilities it was self-defence or accident, or to put it another way, that the evidence convinces them, or leaves them in doubt, that it was self-defence or accident, and he will be entitled to be acquitted. The same principles apply to the defence of provocation except that in this case if the defence succeed the opinion will be guilty of manslaughter. I instructed the assessors that if they are not satisfied that the accused stabbed Agero, or that she received her wound in the course of a struggle with him, then they need go no further and their opinion must be not guilty. If, however, they are satisfied that he did stab Agero or she received the wound in the course of a struggle with him, then to set up a defence of self-defence it must be shown, or at least it must be a reasonable inference from the facts, that the accused did all that could be expected of him to avoid doing the act which resulted in the death, if retreat was possible he must have retreated as far as possible in the circumstances and did the act with the object of saving injury to his own person, and it must appear that the act of self-defence was reasonable in relation to the violence offered."

It will be noted that in the very sentence in which the reference to a balance of probabilities is made the learned judge continues

> "or to put it another way, that the evidence convinces them, or leaves them in doubt, that it was self-defence or accident."

This is a perfectly correct direction, and, we think, must have made clear the correct position notwithstanding the unfortunate reference to a balance of probabilities. We do not think that the second passage in the judgment relied on by counsel for the appellant amounts to a misdirection, and it seems to us from the direction read as a whole that the learned judge in fact applied the correct standard. Accordingly we should not have been inclined to allow the appeal on this ground, though the position might well have been different if the rest of the direction had not been so clear as to remove any misapprehension created by the reference to a balance of probabilities.

The third ground of appeal referred to above relates to the failure of the learned judge to warn the assessors and himself of the danger of convicting an accused person upon the uncorroborated evidence of a child of tender years even though such evidence is given on oath. We were referred to various cases at the hearing of the appeal, but this court had occasion to consider the same question in *Kibangeny's* case (1), a recent case which was not referred to in argument on the appeal. In that case this court said at p. 95:

> "There was moreover another irregularity regarding the evidence of these boys which has fortified us in allowing the appeal, and that is the failure of the learned trial judge, so far as can be gathered from the record, to warn either himself or the assessors of the danger of convicting on their uncorroborated evidence. Had their evidence been neither sworn nor affirmed, then there would have been a legal necessity for its corroboration by other material evidence implicating the appellant, by virtue of the proviso to s. 19 (1), and a conviction upon it, if uncorroborated, would have been bad notwithstanding such a warning. But even where the evidence of a child of tender years is sworn (or affirmed), then although there is no necessity for its corroboration as a matter of law, a court ought not to convict upon it, if uncorroborated, without warning itself and the assessors (if any) of the danger of so doing. This rule must be distinguished

> from the rule whereby this court will look for and require corroboration of the evidence of complainants, whether they be children or adults, in sexual offences: vide *Njuguna s/o Wangurimu v. R.* (1953), 20 E.A.C.A. 196. In *R. v. Leonard bin Ngimbwa* (1943), 10 E.A.C.A. 113, a case where a girl of about eleven years old was the sole eye-witness to a murder, and whose evidence was given on affirmation, this court held that
>
> > 'even though she was affirmed the court must be very careful before acting on her evidence and should weigh and scrutinize it closely in the light of all the surrounding circumstances,'
>
> and the appeal was dismissed in that case only because the trial court had appreciated the danger and had looked for and found corroboration of the girl's story. In such cases the trial court must either find corroboration implicating the accused or must, after warning itself of the danger of convicting without it, express itself to be convinced of the truth of the child's story nothwithstanding that danger."

In the instant case the learned trial judge did not direct himself, or apparently the assessors, as to this danger. It was conceded that in fact there was no corroboration to support the evidence of the child, Ambingu, as to the way in which the fatal wound was inflicted. In this connection three matters of misdirection and non-direction on fact in the judgment are relevant. First, the learned judge states in the judgment that Ambingu "then saw the accused take a sheath knife from his belt and raise it". Ambingu did not state in evidence, according to the record, that she saw the accused raise the knife. The misdirection might in other circumstances have been insignificant in relation to the remainder of her evidence, which clearly indicated an attack by the appellant on the deceased, but is nevertheless an exaggeration of her evidence which, we think, carries more significance in view of the necessity for close scrutiny of her evidence and the absence of a direction as to the necessity for such scrutiny. Secondly, there are two relevant items of evidence to which the learned judge does not refer in his judgment. These are (*a*) that the evidence shows that the appellant habitually carried the knife with which the wound was inflicted, and (*b*) that the medical evidence did not corroborate Ambingu's evidence that the deceased was struck on the neck first with a stick and later with a cassava branch. As to the knife, the assessors appear to have taken the view that the appellant went to the deceased armed with a knife in order to kill her. It is difficult to see how such an inference can be drawn when both Ambingu and the witness Asuto s/o Gai stated that the appellant "always carried" the knife. So far as the medical evidence is concerned, the failure of the doctor to find evidence of bruising on the deceased's neck tends to throw doubt on the evidence of the child Ambingu. It is true the doctor found bleeding from the nose of the deceased, but he stated that this could have happened "if she had fallen on it or from a blow with a blunt instrument". It is not contested that a struggle took place and both appellant and deceased fell in the course of the struggle, and the damage to the deceased's nose cannot be said to be necessarily inconsistent with the appellant's version of the affair. Both these matters were extremely relevant to the question whether Ambingu's evidence could be accepted notwithstanding the absence of corroboration.

The learned judge therefore has not merely omitted to give himself a proper direction as to the desirability of corroboration in the case of evidence given by a child of tender years, even though such evidence is given on oath, and the need for caution in convicting without such corroboration, but has, so far as can be inferred from the judgment, overlooked items of evidence relevant to the reliability of her story, and has tended to overstate the evidence which she gave. In these circumstances we think the conviction cannot stand.

The appeal is accordingly allowed and the conviction and sentence are set aside. The appellant must be released forthwith.

Appeal allowed. Conviction and sentence set aside.

For the applicant:
S. K. Kapila, Nairobi

For the respondents:
The Attorney-General, Kenya
J. P. Webber (Crown Counsel, Kenya)

Salem Ahmed Hasson Zaidi v Faud Hussein Humeidan
[1960] 1 EA 92 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	23 January 1960
Case Number:	51/1959
Before:	Sir Kenneth O'Connor P, Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Campbell, C.J.

[1] Res judicata – Same cause of action and subject matter – Contested suit dismissed at trial owing to plaintiff's absence – Subsequent action by plaintiff for same relief – Whether dismissal of earlier suit amounted to a decision on merits – Civil Courts Ordinance, s. 20 (*A.*) *– Rules of Court, r.* 108, *r.* 115, *r.* 116, *r.* 178, *r.* 202, *r.* 203 (*A.*) *– Indian Code of Civil Procedure*, 1908, *s.* 11 *– Indian Civil Procedure Rules, O. X, r.* 4 (2), *O. XV, r.* 4, *O. XVII, r.* 3.

[2] Agent – Ostensible authority – Tenancy granted bona fide by former agent for property without notice of revocation of authority – Whether tenant took reasonable care to ascertain authority of agent – Transfer of Property Ordinance (*Cap.* 154), *s.* 41 (*A.*).

Editor's Summary

Upon the partition of a deceased's estate in 1956 the respondent as one of the heirs acquired certain premises which had been managed by A. under a power of attorney purporting to bear the signatures of all the heirs except the respondent whose signature was by a rubber stamp. The respondent denied having impressed this stamp on the power. After the partition A. continued to manage the property until April, 1957, as he was not notified of the partition, and in March, 1957, he granted a tenancy to the appellant. The respondent began an action in October, 1957, alleging that the appellant was a trespasser and

claiming an injunction. The appellant filed a defence and when at the trial the respondent did not appear his advocate declined to go on without him and the action was dismissed. In June, 1958, the respondent filed an action claiming the same relief as before, to which the appellant filed a similar defence alleging that he had obtained a valid tenancy from A. and also claiming that the action was res judicata. The trial judge held that the respondent had not signed the power of attorney, that the appellant had not taken reasonable care to ascertain A's authority and, assuming that the first action had been dismissed under r. 115 of the Rules of Court, found that the action was not res judicata. On appeal

Held –

(i) the appellant had not taken reasonable care to ascertain that the grantor of the tenancy had the requisite power to grant it.

(ii) the earlier action had been dismissed under r. 178 of the Rules of Court and not under r. 115.

(iii) the matter directly and substantially in issue in the second action was also directly and substantially in issue in the first action.

(iv) a judgment pronounced against a party under r. 178 of the Rules of Court must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence, and accordingly the matters in issue in the first action must be deemed to have been heard and determined; the dismissal of the earlier action therefore operated as res judicata.

Appeal allowed.

Cases referred to in judgment:

(1) *Chand Koer v. Partab Singh* (1917), A.I.R. P.C. 201.

(2) *Venkatachalam v. Mahalakshmamma* (1887), 10 Mad. 272.

(3) *Sahdeo Ram and Another v. Saligram* (1929), A.I.R. All. 543.

(4) *Rama Rao v. Suriya Rao and Another* (1876), 1 Mad. 84.

The following judgments were read:

Judgment

Forbes VP: This is an appeal from a judgment and decree of the Supreme Court of Aden, whereby the appellant was

> "prohibited and restrained from committing a trespass on the suit premises, No. 142M/48E4, situated at Zangabeel Place, Tawella, Crater, Aden",

and was ordered to pay Shs. 160/50 costs.

The respondent, who was the original plaintiff, is the owner of the suit premises. The suit premises comprised part of the estate of one Hussain Mohamed Humeidan, deceased, who died in or before the year 1954. The premises were acquired by the respondent, one of the heirs of the deceased, upon a partition of the deceased's property which, it was conceded by the appellant, took place some time in the year 1956. Prior to the partition the premises were managed by one Awad bin Awad by virtue of a power of attorney dated June, 1954, which purported to be given by the heirs of the deceased. The power of attorney purported to bear the signatures of the heirs of the deceased, but, in the case of the respondent, the alleged signature was impressed by means of a rubber stamp, and the respondent denied having impressed the signature. Awad bin Awad continued to manage the property till April, 1957, not having been previously notified of the fact of partition.

The appellant, who was the second defendant in the suit, entered into possession of the suit premises as tenant in March, 1957. He succeeded one Ahmed Saleh Ranglah, who was the first defendant in the suit. The plaint alleged that Ahmed Saleh Ranglah had sublet the premises to the appellant. The learned judge, however, found that, as pleaded in the appellant's written statement of defence, Ahmed Saleh Ranglah had given up possession voluntarily, and that Awad bin Awad had then given the appellant the tenancy in place of Ahmed Saleh Ranglah. I see no reason to differ from this finding, which is in

accordance with the evidence. The appellant relied on the tenancy given him by Awad bin Awad as being a valid tenancy.

The suit from which this appeal is brought was commenced in June, 1958. The respondent had previously commenced a suit against the same two defendants in October, 1957, the plaint in the earlier suit being virtually identical with the plaint in the later suit, apart from a reference in the latter to

the dismissal of the earlier suit. The first defendant did not file a valid written statement of defence in either suit, but the appellant filed a written statement of defence in the earlier suit, substantially identical with that which he filed in the later suit, apart from a plea in the latter that the suit was barred by reason of the dismissal of the former. The earlier suit had been dismissed because, when it came on for hearing, the respondent was not personally present, though he appeared by his advocate, and his advocate stated that by reason of the respondent's absence he could not go on. There was no appeal against this dismissal, nor any application for reinstatement of the suit. The appellant, in his written statement of defence in the second suit, pleaded that by reason of the dismissal of the earlier suit, the second suit was not maintainable at law. In both suits he pleaded that he had obtained a valid tenancy from Awad bin Awad.

The learned Chief Justice, who tried the case, posed two issues for decision:

> "Firstly whether the suit is res judicata. Secondly whether the second defendant has acquired a valid tenancy."

The learned Chief Justice dealt with the second issue first and held, inter alia, that the respondent had never signed the power of attorney, and that the appellant was precluded from relying on the ostensible authority of Awad bin Awad under s. 41 of the Transfer of Property Ordinance (Cap. 154) because the appellant had not, in terms of the proviso to the section, taken

> "reasonable care to ascertain that the transferor had power to make the transfer".

These findings were challenged on the appeal. On this aspect of the matter it is sufficient to say that it is apparent on the face of the power of attorney that Awad bin Awad was appointed attorney of the heirs of the deceased jointly; that therefore even if the alleged signature of the respondent on the power of attorney were genuine, it would not authorise Awad bin Awad to manage the suit premises after they became the sole property of the respondent; that accordingly in order to succeed the appellant must rely on the ostensible authority of Awad bin Awad; and that though I have little doubt that the appellant acted in good faith, yet, on the evidence given by the appellant himself, I am unable to say that the learned Chief Justice was wrong in holding that the appellant had failed to take reasonable care to ascertain that Awad bin Awad had power to grant the tenancy. If this were the only question before the court I think the appeal would have to be dismissed.

There remains, however, the question of res judicata. The learned Chief Justice dealt with this issue as follows:

> "I now come to the last question which has to be decided. This is whether, although I have found that the suit is entitled to succeed on the law and the facts, nevertheless it must fail as being statutorily barred. A suit No. C.S. 793 of 1957 was filed on January 31, 1957 between these same parties. The statements of claim are almost identical. When that suit was set down for hearing on June 3, 1958, Mr. Luqman appeared on behalf of the plaintiff and Mr. Gandhi holding Mr. Sanghani's brief appeared for both the defendants. Mr. Luqman informed the court that the plaintiff was not present and that he was therefore unable to proceed with the case as he had no evidence. Mr. Gandhi therefore asked for the suit to be dismissed and this was done. No application for restoring the suit was made.
>
> "Rule 115 of the Civil Courts Rules provides that where a defendant appears and the plaintiff does not appear court shall make an order that

the suit be dismissed. Rule 116 provides that where a suit is dismissed under Rule 115 the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. The question is therefore whether or not the cause of action in this suit is the same as in Civil Suit No. 793 of 1957.

.

"In my view the cause of action against the second defendant is the wrongful retention of possession of the suit premises when he has been asked to go. It may well be that he committed his first wrong on September 1, 1957, when he obtained the invalid tenancy and entered into the suit premises. But every day that he continues to stay there gives rise to a fresh cause of action in respect of recurrent trespasses. The events of September 1, 1957, are important inasmuch as they are evidence by which the second defendant sought to prove that he had obtained a valid tenancy and then gone into possession. The cause of action is the trespass – not the events preparatory to the trespass. In my view this contention of the second defendant must fail."

It is clear that, although the note of the proceedings in the earlier case does not state the rule under which the court purported to act in dismissing the suit, the learned Chief Justice assumed that the dismissal was under r. 115 of the Rules of Court, and that therefore the provisions of r. 116 applied. With respect, I cannot see that the dismissal of the earlier suit could have been under r. 115. The relevant rules, under the heading "Appearance of Parties and Consequence of Non-appearance" are r. 108 and r. 115 of the Rules of Court, the material provisions of which read as follows:

"108. On the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the court in person or by their respective pleaders, and the suit may then be heard unless the hearing is adjourned to a future day fixed by the court."

"115. Where the defendant appears and the plaintiff does not appear, the court shall make an order that the suit be dismissed, unless the defendant admits the claim . . ."

In my view r. 115 must be read with r. 108, and an order for dismissal for non-appearance of the plaintiff under r. 115 can only be made if (1) the plaintiff fails to appear either in person or by advocate, and (2) such failure occurs on the day fixed in the summons for the defendant to appear and answer. If the failure to appear occurs at an adjourned hearing, r. 202, to which I will refer presently, would apply. In this instant case neither of these circumstances was present. The summons in the earlier suit fixed December 2, 1957, as the date for the defendants to appear and answer. The note of proceedings on and after that date reads as follows:

"2/12/57 Luqman

Sanghani Vakala for defendant 2

files w.s.

Defendant 1 in person s.o. to 9/12/57

R. A. Campbell.

9/12/57 Luqman

Sanghani Vakala for defendant 1

W/S 16/12/57

R. Campbell.

16/12/57 Luqman

Sanghani files W/S for defendant 1

Hearing 3rd June, 1958.

R. Campbell.

3/6/58 Luqman for plaintiff

Gandhi for defendants.

Luqman: I submit defendants should begin.

Order: Plaintiff to begin, although the defendant may have to prove certain things so does the plaintiff.

Faud Hussein Humeidan:

Luqman: My client is not here I cannot go on.

Gandhi: I ask for case to be dismissed.

Court: Suit dismissed with costs."

Clearly the dismissal took place on the day to which the hearing had been adjourned, and the plaintiff did appear by his advocate, though he was not personally present. It has never been suggested that the advocate had no instructions. In these circumstances r. 115 was not applicable. It may be noted that under r. 115 the court makes an "order" of dismissal, whereas in this case a decree was issued.

If the suit was not dismissed under r. 115, it is necessary to ascertain the rule under which it was dismissed. The importance of this lies in the fact that dismissal under r. 115 does not operate as res judicata under s. 20 of the Civil Courts Ordinance (Cap. 25), though r. 116 does prohibit a fresh suit "in respect of the same cause of action". (*Chand Koer v. Partab Singh* (1) (1917), A.I.R. P.C. 201; Chitaley and Rao, Civil Procedure Code (6th Edn.), p. 445.) On the other hand dismissal under one of the other provisions of the Rules of Court may operate as res judicata.

Mr. Sanghani for the appellant argued that the dismissal must have been under r. 203 of the Rules of Court, or, if not, under r. 202. These rules read as follows:

"202. Where, on any day to which the hearing of-the suit is adjourned, the parties or any of them fail to appear, the court may proceed to dispose of the suit in one of the modes directed in that behalf by rules 108 to 126 of these Rules or make such other order as it thinks fit."

"203. Where any party to a suit to whom time has been granted fails to produce his evidence or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding such default, proceed to decide the suit forthwith."

I do not, however, think that either of these rules could have authorised the dismissal of the earlier suit in this case. As I have already pointed out, the plaintiff's advocate appeared for him on the occasion when the suit was dismissed, so it cannot be said that the plaintiff had failed to appear so as to bring the matter within r. 202. As to r. 203, there is no suggestion whatever that "time had been granted" to the plaintiff so as to bring the case within that rule.

The only remaining rule that can be applicable that I have been able to find (it was not cited to us by either advocate, but Mr. Sanghani, for the appellant, adopted it when it was mentioned by the court) is r. 178 of the Rules of Court. It reads as follows:

"178. Where on the date fixed for the hearing of the suit either party fails without sufficient cause to produce the evidence on which he relies, the court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be

necessary for its decision upon such issues."

It seems to me that that rule was directly applicable to the situation when the earlier suit came on for hearing on June 3, 1958. That was the date which had, on December 16, 1957, been "fixed for the hearing of the suit". The respondent duly appeared on that date by his advocate. As I have said, it is not suggested that his advocate had no instructions. When called to give evidence, however, the respondent was not there. That, it seems to me, was a failure to produce the evidence on which he relied. There does not seem to have been any inquiry whether there was "sufficient cause" for the failure, but the respondent's advocate did not suggest there was any, and, as I have said, there was no appeal against the dismissal. I think it must be taken that the court was acting under r. 178 when it dismissed the earlier suit; and this is supported by the fact that a decree was issued. Had the dismissal been under r. 115 or under r. 202 (which refers back to r. 115), an "order" should have issued. It is true that under r. 203 a decree would issue, but, as I have already pointed out, that rule cannot apply since there is no question of time having been granted to the respondent.

It remains to consider the effect of dismissal under r. 178 of the Rules of Court in relation to s. 20 of the Civil Courts Ordinance. Sub-s. (1) of that section (which is substantially identical with s. 11 of the Indian Code of Civil Procedure, 1908) reads as follows:

> "20.(1) No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsuquently raised, and has been heard and finally decided by such court."

The points for consideration are (1) whether the matter "directly and substantially in issue" in the suit from which this appeal has been brought was directly and substantially in issue in the earlier suit; and (2) if so, whether such issue was "heard and finally decided" in the earlier suit. If these two questions are answered in the affirmative, s. 20 will apply and the later suit will be barred.

So far as the first of these two questions is concerned I think there can be no doubt that each suit depended on the question whether or not the appellant's tenancy was a valid one. It may be that the alleged cause of action was trespass, and a continuing one, but the basis of it was that the appellant was a trespasser because he did not have a valid tenancy. The appellant in each case pleaded that he had a valid tenancy, and the learned Chief Justice himself in the judgment appealed from stated the issue in the case to be whether the appellant had acquired a valid tenancy. I have no doubt that the matter directly and substantially in issue in the second suit was also directly and substantially in issue in the former suit. The vital question is whether the matter was "heard and finally decided".

The rule of the Indian Civil Procedure Rules which corresponds to r. 178 of the Rules of Court is r. 4 of O. XV, which, though not identical, is substantially the same. I have been unable to discover any direct authority on the question whether dismissal under O. XV, r. 4, of the Indian Rules operates as res judicata under s. 11 of the Indian Code. There is authority, however, on the effect of dismissal under O. XVII, r. 3, of the Indian Rules, and that rule corresponds to r. 203 of the Rules of Court. I am unable to see any difference in principle between a dismissal under r. 178 (O. XV, r. 4 of the Indian Rules) and a dismissal under r. 203 (O. XVII, r. 3 of the Indian Rules). In each case the dismissal may be on failure to produce evidence. I think therefore that the cases relating to O. XVII, r. 3, of the Indian Rules can afford

guidance in considering the effect of dismissal under r. 178. It is established in India that a decision under O. XVII, r. 3, is a decision on the merits, that is to say, on consideration of such materials as may be available, and that if, in the case of a plaintiff, such materials fail to substantiate the claim, the suit is dismissed on that ground and not for the default committed by him. (Chitaley and Rao, Civil Procedure Code (6th Edn.), p. 2645; p. 446; and cases there cited.) In *Venkatachalam v. Mahalakshmamma* (2) (1887), 10 Mad. 272 at p. 277, the court said:

> "As to the plea of res judicata, it is urged in appeal that Original Suit No. 7 of 1872 was dismissed for default, and that unless there was in fact an adjudication of the merits, after full investigation, the claim could not be treated as res judicata. The plea no doubt ordinarily presupposes an adjudication on the merits as contradistinguished from an adjudication of which the effect consists in suspending the right of action until a certain event occurs or for some time. It appears to us that the learned counsel for the appellant overlooks the fact that there may be a statutory direction that in case the plaintiff neglects to produce evidence and to prove his claim as he is bound to do, the court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the plaintiff. We are of opinion that s. 148 of Act VIII of 1859 under which there was a decision against the appellant in Original Suit No. 7 of 1872 contained such direction. It was held in *Comalammal v. Rungasawmy Iyengar* (1) that the decision under s. 148 was a decree and open to appeal. The material words of the section are 'The court may, notwithstanding such default, proceed to decide the suit forthwith' and the intention which they suggest is that litigation should not be vexatiously prolonged. The ground of decision under that section is not simply that there was default, but that there were no merits proved."

Similarly in terms of O. XV, r. 4, of the Indian Rules if a plaintiff fails to produce evidence, the court can "pronounce judgment". It does not dismiss the suit for non-prosecution (Chitaley and Rao, Civil Procedure Code (6th Edn.), p. 2603; *Sahdeo Ram and Another v. Saligram* (3) (1929), A.I.R. All. 543). Equally, I think, when the court, acting under r. 178 of the Rules of Court "pronounces judgment" it must be a judgment on the merits on the material before it. The decree issued in the instant case substantiates that this was in fact so. The decree reads:

> "This suit coming for hearing on the 3rd June, 1958, before me Ralph Abercromby Campbell, Chief Justice, Aden, in the presence of Mr. M. A. Luqman, advocate for the plaintiff, and Mr. K. A. Gandhi, advocate for the defendants.
>
> > "It is hereby ordered and decreed that the suit be dismissed with costs; and that the plaintiff do pay to the defendants the sum of Shs. 60/- (Shillings Sixty) only being the costs of the suit as shown in the schedule given hereunder."

It is well settled in India that the dismissal of a claim under O. XVII, r. 3, on account of the plaintiff's default in producing evidence to substantiate his case has the same effect as a dismissal founded upon evidence, and that the subject matter of such a claim will be res judicata (Chitaley and Rao, Civil Procedure Code (6th Edn.), p. 446, and other cases there cited, including *Rama Rao v. Suriya Rao and Another* (4) (1876), 1 Mad. 84, and *Venkatachalam v. Mahalakshmamma* (2). Since the decision is deemed to be a decision on the merits, this is a logical conclusion. And it seems to me that a judgment

pronounced against a party under O. XV, r. 4, must, on the same principle, operate as res judicata. Though the case cited is not available, it is stated in Chitaley and Rao, Code Of Civil Procedure (6th Edn.) at p. 446, that it has been held in a Bombay case that a judgment pronounced against a party under O. X, r. 4 (2), upon the failure of the party to appear in person when so ordered operates as res judicata. I see no reason to differ from the Indian decisions on the effect of a decision under O. XVII, r. 3, and I think the same reasoning and conclusion applies equally to a "judgment pronounced" against a plaintiff under r. 178 of the Rules of Court; that such a judgment must be deemed to be a decision on the merits and must have the same effect as a dismissal upon evidence; that accordingly the matters in issue on the suit must be deemed to have been heard and determined; and that the decision operates as res judicata.

I have already expressed the view that the principal issue in each suit was whether the appellant had a valid tenancy. It follows from what I have said that I think the judgment pronounced in the earlier suit involved the determination of this issue in favour of the appellant, and that it was not open to the respondent to raise the same issue in a subsequent suit. For this reason I think that the appellant's plea that the instant suit was barred by reason of the dismissal of the earlier suit was sound.

I would allow the appeal with costs, and order that the judgment and decree of the Supreme Court be set aside and that the respondent's suit in the Supreme Court be dismissed with costs.

Appeal allowed.

Sir Kenneth O'Connor P: I agree and have nothing to add. There will be an order in the terms proposed by the learned Vice-President.

Gould JA: I also agree.

For the appellant:
P. K. Sanghani, Aden

For the respondent:
M. A. Luqman, Aden

C B Patel v Bhimji Jiwa & Sons and others
[1960] 1 EA 100 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	22 March 1960
Case Number:	93/1959
Before:	Sir Kenneth O'Connor, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court for Zanzibar – Mahon, C.J.

[1] Rent restriction – Possession – Application by landlord for possession for demolition and development – Insanitary condition of old premises – Hardship to tenants – Public interest – Notice – Reasonableness – Matters for consideration of Board – Rent Restriction Decree, 1953, *s.* 19 (*Z.*) – *The Towns Decree* (*Cap*. 100) (*Z.*).

Editor's Summary

The respondents were severally tenants of portions of a building at Pemba, in respect of which the appellant, as owner applied to the Rent Restriction Board for possession. The board found inter alia that the premises were insanitary and in poor condition, that the tenants would suffer no undue hardship if the application were granted and accordingly made an order for demolition and redevelopment of the site. On appeal to the High Court the order of the board was set aside, mainly on the grounds that there was insufficient evidence of insanitary condition, that there was no evidence that the owner had been required to demolish the premises and the notice to quit given to the tenants was not reasonable. On further appeal

Held –

(i) under s. 19 of the Rent Restriction Decree, 1953, the insanitary condition of premises is not per se a ground for eviction unless under s. 19 (1) (*k*) the condition constitutes a danger to the premises or the occupants.

(ii) the board had considered whether undue hardship to the tenant would result from the making of an order for possession, and also the availability of alternative accommodation, and it was implicit in the findings of the board that the reasonableness of making the order had been considered.

(iii) the board was also justified in taking into account the public interest when considering whether it was reasonable to make an order for possession.

(iv) since the board had under s. 19 (1) (*m*) of the Decree considered and found that the tenants had received sufficient notice to quit, it was not for an appellate court to substitute its own view, unless the board had either misdirected or misconducted itself.

Appeal allowed. Order of the Rent Restriction Board restored.

Cases referred to in judgment:

(1) *R. v. Brighton and Area Rent Tribunal*, [1950] 1 All E.R. 976; [1950] 2 K.B. 410.

(2) *R. v. London Rent Tribunal ex parte Honig*, [1951] 1 K.B. 641.

(3) *R. v. Sussex Confirming Authority*, [1937] 4 All E.R. 106.

(4) *Cresswell v. Hodgson*, [1951] 2 K.B. 92; [1951] 1 All E.R. 710.

(5) *Chronopoulos v. A. M. Kassim Meia and Others* (1954), 21 E.A.C.A. 177.

The following judgments were read:

Judgment

Gould JA: This second appeal has been brought from the judgment and decree of the High Court of Zanzibar allowing an appeal from an order of the Rent Restriction Board of Pemba for possession of building premises.

The seven appellants were severally tenants of portions of the building of which the respondent was owner and the applications against the appellants were consolidated before the board. The applications were based upon the following statement of facts which, on its face, indicates possible reliance upon s. 19 (1) (*f*), s. 19 (1) (*i*) or s. 19 (1) (*m*) of the Rent Restriction Decree, 1953:

> "The premises are considered by the Joint Building Authority to be insanitary and in a poor condition and the applicant is required to demolish the same and develop the plot. The applicant has given an undertaking to the authority to demolish the same and has prepared a scheme of re-development of the site. The respondent was informed of the position in May, 1957, and finally by a letter dated November 4, 1958, whereby the tenancy was terminated and respondent required to quit by December 31, 1958."

The sub-sections of section 19 referred to above read:

> "(*f*) the premises are reasonably required for the purposes of the execution of the statutory duties or powers of a local authority or statutory undertaking or for any purpose which, in the opinion of a board or the court, as the case may be, is in the public interest;
>
> "(*i*) the landlord requires possession of the premises to enable the reconstruction or rebuilding thereof to be carried out, in which case a board or the court, as the case may be, may include in any ejectment order for such purpose an order requiring the landlord to grant to the tenant a new tenancy of the reconstructed or rebuilt premises or part thereof on such terms as may be reasonably equivalent to the old tenancy and fixing a date for the completion of the new building and for its occupation by the tenant and imposing such reasonable conditions as the board or the court may think necessary;
>
> "(*m*) a local authority has approved a scheme of re-development of the site on which the premises stand and such scheme involves demolition of the premises and the tenant has been given such notice to quit as a board shall consider reasonable and is sufficient to enable the landlord to comply with any demolition order:
>
> Provided that, when any tenant has quitted the property under a notice to quit or an order of a court given or made under the provisions of this paragraph and the landlord occupies or permits any other person to occupy the property prior to its demolition, he shall be guilty of an offence and on conviction shall be liable to a fine not exceeding fifty shillings for each day on which the property is so occupied."

Sub-s. 2 of s. 19 is relevant to all three of the grounds above mentioned:

> "(2) In any case arising under sub-section (1) no order for the recovery of possession of premises or for permission to bring proceedings therefore shall be made unless a board or the court, as the case may be, considers it reasonable to make such an order."

In the written decision of the board the only specific reference to any portion of s. 19 is in the following passage which was the board's answer to one of a number of queries it had posed for its consideration:

> "(*f*) The board considered this aspect carefully, but came to the conclusion that the present case was not bound by the provisions of s. 19 (1) (*i*) of the Rent Restriction Decree, since the building was not being rebuilt or reconstructed, but that a totally new building

> was to be erected on the same site as the old, in other words, a replacement. The board welcomed the assistance of the applicant in assembling a list of vacant premises for the benefit of his tenants – an action which it did not consider him bound to take."

Counsel did not rely either in the High Court or before this court upon s. 19 (1) (*i*) and I do not therefore propose to consider it.

The learned Chief Justice devoted the bulk of his judgment to considering whether the order for possession should be supported under s. 19 (1) (*m*) of the Ordinance, but before doing so he dealt with the allegations in the first sentence of the "statement of facts" quoted above. His conclusions were:

> "In my opinion there was no sufficient evidence of the alleged insanitary condition of the building and none that the respondent had been required to demolish it and as there were the only two grounds upon which the order for possession was sought the applications should, I think, have been dismissed."

On my reading of s. 19 it does not appear that the insanitary condition of premises is per se a ground for eviction unless, under sub-s. (1) (*k*) it is such as to constitute a danger to the premises or the occupants. I am in agreement with the learned Chief Justice that there was no evidence that the landlord had been required to demolish the premises by the Joint Building Authority, but the board did not hold that there had been any such requirement. It will be convenient to set out the board's findings in extenso:

"(*a*) demolition at present is not necessary

(*b*) demolition is desirable on the following grounds

(i) the buildings comprising the block have been shown to be, at least in part, insanitary and therefore not in the best interests of the health and wellbeing of the occupants.

(ii) the building was constructed probably upwards of sixty years ago, and the standards of accommodation fall far short of present day desirability.

(iii) the buildings, as evidenced by the incipient collapsing of walls, have clearly had their best days, and should be replaced by better structures.

(iv) the buildings are in the middle of the main street of the capital town of the district, and are greatly outclassed by buildings constructed in the last twenty years. They are, in the opinion of the board, a disfringement (?disfigurement) to the town and incompatible with the improving amenities.

(v) the buildings are required to be demolished for replacement by a new building, the plan of which has been approved by the Town Planning. Authority and the Building Authority.

(vi) the above authorities and the Town Council have been anxious for some time to improve the town's main street buildings and considers it to be the duty of such authorities to assist the efforts of progressive house owners like the applicant. The board concurs with this view.

(*c*) The board considers that the tenants must be evicted in order that the development of the plot may take place as the owner desires.

(*d*) The board considers that all tenants have received sufficient notice to quit (5 1/2 months ago) and is satisfied that Mr. A. B. Jiwa's attitude probably sums up all the other tenants' attitude – that no attempt whatsoever has been made to move out.

(*e*) The board considers that no undue hardship will be involved in moving to the addresses of empty premises suggested by applicant. Mr. A. B. Jiwa uses his portion as a store only. Such need not be in the main street, it may be anywhere in the town, so he cannot possibly have any hardship. The houses suggested as alternative accommodation are not in any way outside the town, although agreed to be not as central as the present building. The 1958 clove season has been very poor indeed and ended months ago. The next season does not begin until August. A move at the present time is not therefore prejudicial to trade."

.

"(*g*) The board considers that the respondents' interests are not placed in jeopardy by the applicant's notice to them to quit his premises, and that their grounds to oppose an eviction order have little substance. It is the board's opinion that the respondents should wholly defray the costs of this case."

The board has, in such findings as are contained in (*b*) (ii), (iv) and (vi) to some extent at least, relied upon its own general knowledge of local affairs and conditions. There was some evidence before it of the policy of the Joint Building Authority and it can be assumed that the members either had inspected the building or were familiar with it. I do not think that the use by such a tribunal of knowledge of facts notorious within its area (e.g. the scarcity or plentitude of available accommodation) is objectionable, and indeed it is one of the advantages of the use of local tribunals that they frequently have such knowledge. In England the case of *R. v. Brighton and Area Rent Tribunal* (1), [1950] 2 K.B. 410, makes it quite clear that an English rent tribunal may act upon its own impression and knowledge. That case is not, however, fully applicable in Zanzibar, as the English tribunals are less formally constituted than the Rent Restriction Boards of this territory, which exercise certain powers which, in England, are exercised by the county courts. The English tribunals are not empowered to take evidence on oath and, as was said by Lord Goddard, C.J., in *R. v. London Rent Tribunal ex parte Honig* (2), [1951] 1 K.B. 641 at 646, they

"act on all kinds of evidence which no court of law would look at for a minute."

The Rent Restriction Boards on the other hand have power to administer oaths and their proceedings are deemed to be judicial proceedings – see s. 9 of the Rent Restriction Decree. The same section however, provides that a board may regulate its own procedure in so far as no or no sufficient provision is made by regulation, and while it must of course act on evidence, it may take into consideration any evidence which it considers relevant, notwithstanding that it would not be admissible under the law of evidence. It is given express power to inspect premises and, impliedly, may act upon the knowledge so acquired. A board is therefore, in matters of procedure and evidence, not so rigidly confined as is a court of law and I see no reason to hold that the board went beyond its powers in the present case.

When one eliminates from s. 19 (1) (*f*) of the Ordinance that part thereof which deals with the duties and powers of local authorities and statutory undertakings, there remains in the board, power to make an order for the recovery of possession,

"for any purpose which, in the opinion of a board . . . is in the public interest."

The board did not say upon what basis it made its order but perusal of the board's findings, in particular paragraphs (*b*) (iv) and (vi) indicates that it considered the demolition of the premises and their replacement by a new building to be in the public interest. It said the building was at least in part insanitary, and while I respectfully agree with the learned Chief Justice that there was little evidence on this point, there was some evidence of lack of lighting and ventilation. It found that the building was very old, provided an outmoded standard of accommodation, that incipient collapsing of walls indicated that the building should be replaced, that the building, being in the centre of the main street of the town, was a disfigurement in comparison with more modern buildings and that a plan for a new building had been approved by the local authorities concerned which were anxious to improve the main street buildings. Had the board stated specifically that it considered the purpose to be in the public interest (and provided of course that the question of the reasonableness of making the order had been properly investigated and disposed of) a court of appeal would have been unlikely to interfere, as the determining factor is "the opinion of the board". In *R. v. Sussex Confirming Authority* (3), [1937] 4 All E.R. 106 at 112 Du Parcq, J., said:

> "It is the function of the justices to decide whether the condition is proper in the interests of the public, and that is a function which ought not to usurp even if we would . . . It is fallacious to say that a condition is not in the public interest, or may not be in the public interest, if it is the case that a great many of those persons who constitute the public are not directly affected by it; and it is equally fallacious to say that a condition cannot be in the public interest if a great many members of the public neither know nor care anything about it."

That case concerned licensing justices and is far removed on the facts from the present circumstances, to which, nevertheless I think the passage quoted has some application.

The board of course, has not said expressly that it based itself upon s. 19 (1) (*f*) and I do not think it is necessary to consider further the question whether the board's decision should or could be supported under that sub-section, as it is not disputed that the proved or admitted circumstances fall within the opening portion of s. 19 (1) (*m*) i.e. a local authority had approved a scheme of re-development of the site and such scheme involved demolition of the premises. Those facts would provide a firm basis for the order, provided the requirements of the sub-section as to notice were also fulfilled and if, under s. 19 (2) the board considered it reasonable to make the order. Under s. 19 (1) (*f*) also, as I have mentioned, the board must have regard to s. 19 (2) and though notice to the tenants is not specifically mentioned in s. 19 (1) (*f*) it would, I think, in normal circumstances be imported as an element of reasonableness. The problem is therefore similar under either sub-section but I think it is right to approach it from the point of view of s. 19 (1) (*m*) as being the one which is clearly applicable – there are therefore two questions: (*a*) whether the board properly considered the question of reasonableness and considered it reasonable to make the order, and (*b*) whether the board properly considered the question of notice and considered the notice actually given to be reasonable.

The board did not make a finding on reasonableness in so many words but it is implicit in its discussion of hardship in the finding (*e*) above, and the further reference to the tenants' interests in (*g*) and also in its making of the order for possession, that the board did consider it reasonable to do so. With this opinion the learned Chief Justice disagreed, no doubt considering himself at liberty to do so as he was also of opinion that the board had misdirected itself by taking into account matters which should not properly have been considered. These matters he indicated in his judgment in the following sentence:

> "The fact that the building is considered to be a disfigure to the town and that house owners such as the respondent should be assisted are not, with respect, matters which fall for consideration in deciding whether it is reasonable to make an order for possession on the grounds relied upon in the applications."

In considering "reasonableness" a board must take into consideration all relevant circumstances as they exist at the date of hearing, but it is for the board, having done so, to attach such weight as it thinks fit to the various factors. It is not for a court of appeal to substitute its own opinion for that of the board unless the board has plainly taken into consideration some irrelevant matter or failed to take into consideration some relevant matter or has misdirected itself in some material way. Under s. 11 of the Ordinance no appeal lies upon a question of pure fact, but only upon a point of law or of mixed fact and law.

In the present case, the board considered that the making of the order would involve no undue hardship to the tenants. It took the case of Mr. A. B. Jiwa, as he was the only tenant who gave evidence, and said that there was no necessity for his store to be in the main street of the town. Apparently five out of the seven tenants used their premises for business only and would therefore be in the same position as Mr. Jiwa, while two used theirs both for business and residence. (The statement in the judgment of the learned Chief Justice that five tenants used the premises for residential and business purposes and two for residential purposes only does not appear to be correct, as can be seen from the defences filed read in conjunction with an affidavit of Mr. K. S. Talati filed in the appeal to the High Court). There is no evidence to show how many of the tenants in addition to Mr. Jiwa were engaged in the clove business but I understood Mr. Talati, who appeared before this court for all the tenants, that all would lose goodwill if they were dispossessed only three months before the commencement of the clove season. The board on the other hand considered that a move at that time would not be prejudicial to business, and that is a finding which I think must be accepted. As none of the tenants other than Mr. Jiwa thought fit to give evidence at the hearing of the consolidated applications, it must be accepted that they made no claim to particular circumstances in their own cases which might distinguish them from that of Mr. Jiwa.

The matter of alternative accommodation for the tenants is one which enters into the question of the reasonableness of the making of the order for possession, though the availability of such accommodation is not a sine qua non as in cases under s. 19 (1) (*e*) where the basis of the application is the landlord's requirement of the premises for his own use. In the present case, the availability or otherwise of alternative accommodation is merely one of a number of factors going to the question of reasonableness. There was evidence before the board on the matter, in that the landlord testified that he knew of some thirteen houses (which he specified) which were vacant. Mr. Jiwa gave evidence that he could not find any suitable similar accommodation in Wete; he said in cross-examination that none of the houses mentioned by the landlord suited him, but that he had not seen any of them. As can be seen from its finding at (*d*) above, the board was of the opinion that the tenants were not prepared to be co-operative in the matter. In an affidavit dated June 15, 1959, and filed in the appeal to the High Court, Mr. K. S. Talati deposed that during the hearing before the board he was informed by it that he need not lead evidence concerning any of the thirteen houses except two, which were specified, as the board did not consider the others as "reasonably equivalent". The chairman's notes do not contain any reference to this, but at the hearing of the appeal to the High Court, Mr. Patel who appeared there for the landlord agreed that the affidavit was correct. Mr. Talati at the hearing before this court submitted that the board's failure to take a note of this episode indicates that it did not apply

its mind to the question of alternative accommodation. I am unable to agree. The board said:

> "The houses suggested as alternative accommodation are not in any way outside the town, although agreed to be not as central as the present building."

Presumably the reference is to the two houses which the board specified and there is no evidence in the record to show whether or not they were big enough to accommodate all the tenants – it would appear that only two of them would require actually to reside in the new premises. It has not been suggested that the board has been guilty of bad faith in this matter, and I do not therefore see that it can be said that it failed to consider the matter of alternative accommodation. Whether the two houses were sufficient, either alone or taking into consideration the board's own knowledge of general availability of premises from time to time, was a matter for the board. As I have pointed out, the existence or otherwise of alternative accommodation is not the essential factor, but only one of a number of factors in determining reasonableness. The board has not been shown to have misdirected itself or to have neglected to consider this factor and there is, in my opinion, no ground for interfering with its order on this account.

I pass now to the matter which, in the view of the learned Chief Justice, the board wrongly took into account. With respect, the two matters he mentioned, disfigurement of the town and assistance of house owners such as the respondent, I think were only two considerations which, with a number of others, influenced the board in its approach to the question of the public interest. As I have indicated above, the board clearly took into consideration the state and age of the building, its poor standard of accommodation, its unsightly appearance in the centre of the town, the owner's desire to rebuild and the policy of the local authorities, as matters indicating that it was in the public interest that an order for possession should be made. There was evidence of the attitude of the Joint Building Authority towards the building in that it had refused a permit to repair a fallen wall and had subsequently granted it only upon a representation by the landlord that he intended to demolish half of the block and erect a new building. The question is whether the board was wrong in allowing its view of what was in the public interest to influence its consideration of, and finding upon, the question of reasonableness. In my view the board was not wrong but was, on the contrary, quite justified in doing so. In *Cresswell v. Hodgson* (4), [1951] 2 K.B. 92 at 97 Denning, L.J., said:

> "The Rent Acts put a restraint upon the exercise by a landlord of his common law right to possession. The restraint is not to be removed unless the county court judge thinks it reasonable. That means, I think, reasonable having regard to the interests of the parties concerned and also reasonable having regard to the interests of the public."

The interests of the public there considered were matters of policy and not town development, but I think that the dictum applies equally to the present circumstances. Particularly where the ground upon which an order for possession is sought is that a local authority has approved a scheme of re-development involving demolition of the premises does it appear logical to take into consideration, in ascertaining whether it is reasonable to make the order, the age, condition and appearance of the building to be demolished and the desire of the owner to erect a new building in lieu thereof. In *Chronopoulos v. A. M. Kassim Meia* and Others (5) (1954), 21 E.A.C.A. 177 at 181, Briggs, J.A., said:

> "The appellant attacks the finding that it was unreasonable to make an order on several grounds. In the two cases where he did make orders the

> learned trial judge was greatly influenced by finding that the premises were ‘very dilapidated’ and ‘in a dangerous condition’. Where the application is for the purpose of rebuilding this is clearly a very relevant circumstance; but I think it should have been remembered that, although the other three sets of premises were not themselves unduly dilapidated and certainly not dangerous, the rebuilding scheme required possession of all five and could not be carried out at all if only two of the five tenants were evicted. In all rebuilding cases involving several sets of premises the public interest must be a very important factor, and, if some of the premises are unfit for occupation, that may properly weigh heavily against the tenants of the others, if the scheme cannot be carried out piecemeal.”

Once it is accepted, as I do accept, that it was open to the board to take these matters into consideration, the weight to be attached to them is entirely for the board. In *Cresswell v. Hodgson* (4), Somervell, L.J., said at p. 96:

> “He may have given more weight than we should give, or more weight than another county court judge would give, to some matters, but that is not the question here.”

Singleton, L.J., said also at p. 96:

> “When there has been an appeal to this court on that question of reasonableness it has been said time and again that it is really a question of fact, and that unless the appellant can show that the judge has misdirected himself in some measure this court cannot interfere, for the decision on that question is for the county court judge. It is for him to consider whether he thinks it reasonable to make an order.”

For the reasons given I do not find myself able to agree with the learned Chief Justice that the board misdirected itself in the way he indicated, but I should refer nevertheless to what appears to have been one of the main reasons of the learned Chief Justice for arriving at his own conclusion that the order was unreasonable. In the earlier part of his judgment he said:

> “The position, as established by the evidence, seems to have been that the respondent wished to demolish the existing building and erect a new one in its place and that the plans of the new building have been approved but that he has no intention of doing so at once. Indeed, he stated that he did not wish to demolish for another five or ten years.”

Towards the end of his judgment the learned Chief Justice again adverted to this matter and said:

> “The respondent, however, was quite definite in his evidence that if he was given permission to repair the building he had no desire to demolish for five or ten years.”

The first of these two passages, in that it asserts that the landlord had no intention of demolishing the building and replacing it at once, is unsupported by the evidence. The second passage, though accurate, does not convey the full effect of the evidence. The note of the evidence of the landlord on cross-examination contains the following:

> “It can be repaired. If permission is granted to repair, I do not want to demolish, for five or ten years time. All the buildings require some repairs.”

The position was that in 1958 part of a wall behind one of the subdivisions of the building fell down. The landlord applied under The Towns Decree (Cap. 100) for leave to repair it and on June 4, 1958, the Joint Building Authority refused leave by letter stamped “Permission Refused. To allow of better development of

the area"; it also stated – "Reason for disapproval the building is insanitary and poor". Permission was, however, granted later, after the landlord had had a discussion with the Joint Building Authority and given an intimation in writing that he intended to rebuild one half of the premises. Subsequently another and much larger portion of the wall collapsed; according to Dr. M. A. Awadh, District Medical Officer (who is apparently an executive officer of the Joint Building Authority and Town Planning Authority) it is a wall which "takes in baths lavatories and kitchens". The landlord made no application to repair the wall on this occasion, but Dr. Awadh said in evidence:

> "I would not issue a permit for major repairs to this building. I would not approve repair of a foundation and whole wall."

He was not asked specifically whether he would have approved repair of the collapsed wall but it is a fair inference from his evidence that he would not – particularly now that approval has been given of plans for a new building replacing the whole block. Accepting that the landlord would not demolish for five or ten years if he could repair, I would have expected him to have applied, had he had the slightest expectation that he would be given leave. The whole weight of the evidence tends to show that the landlord has no other intention but to go on with his scheme for a new building. If the tenants are dispossessed the landlord, under the proviso to s. 19 (1) (*m*), commits a criminal offence if he occupies the premises or permits anyone else to do so prior to demolition; it is unlikely that he would leave them empty for five or ten years. I think it is wrong, on the evidence, to ascribe to the landlord an intention not to proceed with his scheme for that period.

There remains only the question of notice. Section 19 (1) (*m*) requires that a tenant must have been given "such notice to quit as a board shall consider reasonable". The board considered that the tenants had received "sufficient notice to quit (5 1/2 months ago)". The learned Chief Justice, also accepting the period as 5 1/2 months, and linking the question with that of alternative accommodation, held that the notice was not reasonable. I have already indicated my opinion that the question of alternative accommodation is one for the board; so also is that of notice. The section does not read that the tenant must have been given reasonable notice, but such notice as a board considers reasonable. Unless the board has misdirected or misconducted itself it is not for an appeal court to substitute its own view. A point was taken before this court by counsel for the tenants that the written notice actually given was for a period of just under two months, whereas it had been considered by the board and in the High Court as the period between the date of the notice and the hearing by the board, which was 5 1/2 months. The proceedings before the board and argument before the High Court having been conducted on the basis that 5 1/2 months was the relevant period, I think that it is now too late for counsel to take this point. The tenants have in any event remained in possession from April until the present time, when the close of another clove season is approaching, and it would be unrealistic to re-open the question of notice at this stage on a different basis. I therefore reject the argument without expressing any opinion as to its merit had it been taken at the proper time.

For these reasons I would allow the appeal with costs here and in the High Court, set aside the judgment and decree of the High Court and restore the order of the board.

Sir Kenneth O'Connor P: I agree. There will be an order as indicated by the learned Justice of Appeal.

Sir Alastair Forbes VP: I also agree.

Appeal allowed. Order of the Rent Restriction Board restored.

For the appellant:
Frazer Murray, Thornton & Co., Dar-es-Salaam
W. D. Fraser Murray

For the respondents:
Wiggins & Stephens, Zanzibar
P. S. Talati

The District Commissioner, Kiambu v R and others, Ex Parte Ethan Njau
[1960] 1 EA 109 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 March 1960
Case Number:	2/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd and Miles, JJ.

[1] Mandamus – Alleged refusal by administrative officer to alter land register – Register of native land unit – Whether mandamus lies – African Courts Ordinance, 1951, *s.* 12, *s.* 17 (*K.*) – *Native Lands Registration Ordinance*, 1959, *s.* 26, *s.* 32, *s.* 33, *s.* 36, *s.* 38, *s.* 39, *s.* 88, *s.* 89, *s.* 90 (*K.*) – *Public Officers Protection Ordinance* (*Cap.* 63) (*K.*) – *Kenya Native Land Tenure* (*Revocation*) *Rules*, 1959 (*K.*) – *African Courts* (*Suspension of Land Suits*) *Ordinance*, 1956 (*K.*) – *Native Land Tenure Rules*, 1956, *r.* 7, *r.* 9, *r.* 10, *r.* 12, *r.* 13, *r.* 14, *r.* 15, *r.* 16, *r.* 17, *r.* 18 (*K.*) – *Land Registration Act*, 1925, *s.* 82.

[2] Land registration – Rectification of register – Power of court to order cancellation of entry or amendment of register – Native Lands Registration Ordinance, 1959, *s.* 33, *s.* 89 (*K.*).

Editor's Summary

In the process of consolidation of African land and land titles in the Kiambaa area of the Kiambu District there were two persons to either of whom the committee appointed under the African Land Tenure Rules, 1956, could properly allocate one plot. The committee, having first ascertained and made up without objection the record of existing rights to land in the area, allocated this plot to Ethan Njau, and allocated another plot half a mile away to John Munge. After a certificate of allocation had been issued to Ethan Njau, John Munge complained that the allocation was unfair to him. This complaint was considered by the committee which purported, by a majority, to reverse its previous decision, after which the register was made up. Before the register was confirmed Ethan Njau complained that by virtue of the certificate issued to him he was the owner of the plot originally allocated to him. This complaint, which was treated as an objection under r. 17, was rejected by the committee, which proceeded to confirm the register as it stood. Ethan Njau then moved the Supreme Court of Kenya for an order of mandamus directed to the

appellant as the officer responsible under the Rules to register Ethan Njau as title holder. Before this application could be heard the Native Lands Registration Ordinance, 1959, came into force whereby the custody and control of the register was removed from the appellant and placed under the control of a registrar. On the hearing of the application the Supreme Court rejected a submission that the motion was barred by s. 12 of the African Courts Ordinance, 1951, held that since the committee had lawfully allocated the plot to Ethan Njau in the first instance, the action of the committee and other officers concerned in reversing that decision and re-allocating the plot to John Munge was ultra vires, and accordingly made the order sought. On appeal it was argued for the appellant, inter alia, that since the appellant had no power to amend the register an order for mandamus should not have been made.

Held –

(i) the application for an order of mandamus was not barred by s. 12 of the African Courts Ordinance, 1951.

(ii) a distinct demand for action and its refusal is, as a general rule, a prerequisite for the grant of an order of mandamus; in the present case it was doubtful if there had been a clear demand for the relief sought, but as the appellant was, in any event, without power to alter the register without an

order of the court, the case fell within an established exception to the general rule and the demand was not essential.

(iii) the committee's purported reversal of its first decision, as embodied in the certificate, was ultra vires and of no effect and the duty of the registration officer to act on the original certificate was not thereby affected.

(iv) the register concerned, though containing an erroneous entry, was a register which was prepared, conformed and maintained in accordance with the Native Land Tenure Rules, 1956, within the meaning of s. 33 (7) of the Native Lands Registration Ordinance, 1959.

(v) the entry with which the court was concerned became an entry of "the first registration of title" within the meaning of s. 89 (1) (*a*) of the Native Lands Registration Ordinance, 1959.

(vi) the order of mandamus prayed for could not be made against the District Commissioner as it would not be within his power to comply with it; nor could it be made against the Registrar of Native Lands as he was not a party to the proceedings and in any event it should not be made against him as such an order would offend against the letter and policy of the Native Lands Registration Ordinance, 1959, and as the Registrar was not the successor of the District Commissioner within the meaning of the authorities on that subject.

Appeal allowed. Order of the Supreme Court of Kenya set aside and order for the refusal of the application substituted.

Case referred to:

(1) *Farmers' Bus Services and Others v. The Transport Licensing Appeal Tribunal,* [1959] E.A. 779 (C.A.).

(2) *R. v. Port of London Authority ex parte Kynoch Ltd.,* [1919] 1 K.B. 176.

(3) *Smith v. East Elloe Rural District Council,* [1956] A.C. 736.

(4) *R. v. The Brecknock and Abergavenny Canal Co.,* 111 E.R. 395.

(5) *R. v. The Bristol and Exeter Railway Co.,* 114 E.R. 859.

(6) *R. v. Hanley Revising Barrister,* [1912] 3 K.B. 518.

(7) *The Town Clerk of Eastbourne, ex parte Keay* (1892), 66 L.T. 323.

(8) *R. v. Eastbourne Corporation* (1900), 83 L.T. 338.

(9) *In re Bristol and North Somerset Railway Co.* (1877), 3 Q.B.D. 10.

(10) *R. v. The Bishop of Ely,* 95 E.R. 610.

(11) *R. v. London and North Western Railway Co.,* 117 E.R. 1113.

(12) *R. v. Mayor of Rochester* (*In the Parish of Strood*), 119 E.R. 1490.

(13) *Mayor of Rochester v. R.* (*In the Parish of St. Nicholas*), 120 E.R. 791.

The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment of the Supreme Court of Kenya granting an order of mandamus directed to the District Commissioner, Kiambu, which order was drawn up in the following terms:

"Order

Before the Honourable Mr. Justice Rudd and
the Honourable Mr. Justice Miles.

"Upon reading the notice of motion on behalf of the applicant Ethan Njau s/o Leban Kiarie, dated the 2nd day of March, 1959, together with a statement lodged on the application for leave to issue the said notice of motion and the affidavit of the said Ethan Njau therein referred to filed in support of such motion.

> "And upon hearing Mr. H. P. Hearn of counsel for the said applicant and Mr. J. S. Rumbold of counsel for the respondent (the District Commissioner, Kiambu) and Mr. B. Georgiadis of counsel for the third party (John Munge), it is ordered that the said District Commissioner, Kiambu, do and he is hereby commanded forthwith to register the applicant's name as title holder of plot No. 352; in accordance with the certificate issued to the applicant under Rule 15 of the Native Land Tenure Rules, 1956."

The applicant for the order was one Ethan Njau (who will be referred to hereinafter as "the applicant") and the request in the notice of motion was for an order directed to the District Commissioner "to recognise the applicant's title" to a certain piece of land in the Kiambu District. The Supreme Court, having regard to the affidavit in support of the motion, construed this as a request for an order that the District Commissioner register the applicant's title to the land under r. 16 of the Native Land Tenure Rules, 1956. One John Munge in whose name this land was actually registered, was served with the notice of motion and was represented by counsel in the Supreme Court. In this court counsel for John Munge appeared only to say that he supported the appeal and would rely on the arguments to be advanced by counsel for the District Commissioner. He then obtained leave to withdraw.

The facts are set out in the judgment of the Supreme Court and, as there stated, were accepted by counsel on both sides. The relevant passage is as follows:

> "The motion arises from a dispute which had its origin in the process of the consolidation of African lands and land titles in or near Kiambaa under the Native Land Tenure Rules, 1956.
>
> "For convenience we shall refer to Ethan Njau as 'the applicant'.
>
> "The applicant is the son of one Leban Kiarie who was a relatively large owner of land in the area and who, some considerable time before consolidation was put in train, sold two contiguous parcels of land to persons who later disposed of their interest in those parcels of land to one John Munge. Shortly before consolidation was to take place and in contemplation of consolidation Leban Kiarie gave a portion of his remaining land to his son, the applicant. The ultimately remaining land belonging to Leban Kiarie was confirmed to him in the course of the consolidation and was demarcated and numbered as plot No. 51. The present dispute is in connection with a contiguous parcel of land which has been numbered as plot No. 352 and which is comprised, in the greater part, of land which, previous to consolidation, belonged to certain members of the same clan as Leban Kiarie and the applicant. These clansmen agreed to accept, upon consolidation, other land in order that plot 352 might be allocated to the applicant so as to create the position in which the applicant's land would be contiguous with that of his father Leban Kiarie. None of the land which was given to the applicant by his father was comprised in plot No. 352, but a small portion of this plot was a small part of the land which had originally belonged to Leban Kiarie and which John Munge had obtained from the persons who had bought or otherwise obtained it from Leban Kiarie.
>
> "The committee appointed under the African Land Tenure Rules, 1956, having first ascertained the extent of existing rights to land in the area and the record of those existing rights having been made up and confirmed without objection, proceeded to allocate plot No. 352 to the applicant and allocated another plot of land situated about half a mile away to John Munge instead of land which John Munge had acquired from those who had acquired it from Leban Kiarie. The committee could competently

> have allocated plot No. 352 either to the applicant or to John Munge and the allocation of the other, more distant, land to John Munge was competent and within the powers of the committee. After the record of existing rights had been accurately compiled, after plot No. 352 was given or allocated to the applicant and after a certificate to this effect had been issued and given to the applicant, John Munge complained that the allocation of plot No. 352 to the applicant was unfair and submitted that it should have been allocated to himself. This complaint was referred to the committee. There is some conflict upon the affidavits as to whether or not the applicant or Leban Kiarie, who appears to have acted in the earlier stages at least as an agent for the applicant, were present at all the meetings of the committee which took place in connection with this re-consideration, but eventually there is no doubt but that the committee, by a majority of its members, purported to reconsider its previous allocation and to allocate plot No. 352 to John Munge instead of the applicant. It also decided that the applicant should have the plot which the committee had previously allocated to John Munge even though that plot was slightly larger in area than plot No. 352. The register was made up and ultimately confirmed upon the basis that plot No. 352 was allocated to John Munge and that the other somewhat distant plot was allocated to the applicant. Before this confirmation of the register took place the applicant complained to the respondent that by virtue of the committee's original allocation and the issue of its original certificate to him, he was in law entitled to plot No. 352 and that John Munge was a trespasser so far as that plot was concerned. This complaint appears to have been treated as an objection to the register under r. 17. It was referred to the committee under that rule, but the applicant's complaint was rejected and he was ultimately informed that the register had been confirmed and that the matter could not be re-opened."

In their judgment the learned judges of the Supreme Court then went on to consider and reject arguments that the motion was barred (*a*) by certain provisions of the Public Officers' Protection Ordinance (Cap. 63) and (*b*) by provisions of the African Courts Ordinance, 1951. The rejection of the submission under the last mentioned Ordinance, but not the former, has been made one of the grounds of appeal. The Supreme Court then proceeded to consider the merits and posed two questions upon the answers to which the result of the application, in its view, depended. They are:

> "(1) Did the committee lawfully allocate plot No. 352 to the applicant? and
>
> "(2) If so, was the committee or any other authority in the circumstances competent to reconsider the matter and to set aside the previous decision of the committee and allocate the plot to John Munge?"

These questions having been answered in a sense favourable to the applicant the order was made.

The grounds of appeal to this court as contained in the memorandum were:

> "1. The learned judges erred in holding that the application for an order of mandamus was not barred by the provisions of s. 12 of the African Courts Ordinance, 1951.
>
> "2. The learned judges erred in holding that an order of mandamus should issue in that
>
> (*a*) They failed to consider whether there had been a prior distinct demand by the applicant of that which he sought to enforce by mandamus and whether such demand had been met by a refusal on the part of the

District Commissioner or whether such demand and refusal were prerequisites for the granting of the order. Had the learned judges given due consideration to the matter they must have found that no such distinct demand and refusal had been made which in the circumstances was fatal to the application.

(*b*) The District Commissioner, Kiambu, has no power in law to amend the register as ordered.

(*c*) The effect of the order is such that there is an evasion or a contravention of the provisions of the Native Lands Registration Ordinance No. 27 of 1959.

(*d*) The order made by the learned judges is in effect an order to undo something which the District Commissioner has already done not to do something which he was bound to do and had not done.

(*e*) The decision of the learned judges was based on a finding of excess of jurisdiction on the part of the committee for which an order of certiorari was the appropriate remedy.

"3. The learned judges erred in holding that the actions of the committee and of the other officers concerned resulting in the attempted change of allocation of plots were ultra vires."

There is reference in para. 2 (*c*) of the Memorandum to the Native Lands Registration Ordinance No. 27 of 1959, which came into force on July 28, 1959, some six months after the original application for leave to apply for an order of mandamus was filed, but approximately two months before the motion was finally heard. We were informed that the Ordinance was mentioned in the court below, but its possible significance was not then realised and no argument was based upon it. Leave was requested of this court by counsel for the appellant to file a further affidavit sworn by the Assistant Registrar of Native Lands. Paragraph 4 thereof, which indicates the result of the passing of the Ordinance upon the register formerly kept under the Native Land Tenure Rules, 1956, is as follows:

"4. Between the date of confirmation of the said register as aforesaid and the 28th day of July, 1959, the said register was maintained in accordance with the Native Land Tenure Rules, 1956. Since the said 28th day of July, 1959, down to the present time the said register has been maintained in accordance with the provisions of the Native Lands Registration Ordinance No. 27 of 1959."

Counsel for the applicant did not oppose the filing of the affidavit and this court, having looked at the Ordinance referred to, took the view that para. 4 of the affidavit set out no more than would have been assumed in the absence of any indication to the contrary and accordingly granted the application.

I now proceed to the grounds of appeal. The first involves consideration of s. 12 of the African Courts Ordinance, 1951, in the form in which it existed at the date of the application. The relevant sub-sections are (1) and (2):

"12. (1) Subject to the provisions of this Ordinance, the civil jurisdiction of an African court shall extend to the trial of all civil suits and matters in which the cause of action arose or the defendant is ordinarily resident within the area of the jurisdiction of the African court.

"Provided that any civil proceedings relating to immovable property shall, unless a district officer otherwise directs, be taken in the African court within the area of the jurisdiction of which the property is situate.

> "(2) Notwithstanding anything to the contrary in any law for the time being in force in the Colony but subject to the provisions of this section, no civil proceedings in respect of –
>
> (*a*) native customary marriage or inheritance; and
>
> (*b*) immovable property situate within the native lands as defined in the Native Lands Trust Ordinance
>
> shall, unless a district officer otherwise directs, be commenced by any African in any court of the Colony other than an African court having jurisdiction."

African courts, as constituted by this Ordinance, are directed by s. 17 thereof to administer native law, certain orders and by-laws and the provisions of various Ordinances. The learned judges in the Supreme Court considered that the fact that no African court has jurisdiction to entertain proceedings for an order of mandamus supported their conclusion that s. 12 (2) of the African Courts Ordinance, 1951, did not bar the Supreme Court from doing so. It is permissible, I think, to attach some weight to this circumstance, as the legislature would be unlikely to have intended to prohibit resort to mandamus altogether; the question must nevertheless be resolved by consideration of what the legislature has said in s. 12 (2).

The Supreme Court also considered that s. 12 did not bind the Crown. I express no opinion on that question which does not appear to me to be strictly relevant. Section 12 (2) enjoins that no civil proceedings (in respect of certain specified matters) shall "be commenced by any African", in any court other than an African court having jurisdiction. The present proceedings were commenced in the Supreme Court, and if they were commenced by the Crown the prohibition in the section would obviously not apply. In my opinion, however, the proceedings were commenced by the applicant, who is an African, when he applied for leave to apply for an order of mandamus. Though the Crown is formally joined in all mandamus proceedings by reason of the origin of the particular process in the royal prerogative, that does not happen until leave to apply has been obtained by the originator of the proceedings. The ruling of this court in *Farmers' Bus Services and Others v. The Transport Licensing Appeal Tribunal* (1), [1959] E.A. 779 (C.A.), indicates the difference in the intituling of the proceedings at the two stages and shows that it is only after leave to apply has been granted that the Crown is joined. I think that the person who commenced the present proceedings was the applicant, who initiated them and who was the person aggrieved. If that is a correct view the question whether the section binds the Crown does not arise; in any event the matter does not affect the conclusion at which I have arrived and am about to express, based upon the wording of the section.

The important words in the sub-section are "civil proceedings in respect of immovable property". The question is whether they include within their scope the present proceedings for mandamus, having regard to the principle, well recognised and applied by the learned judges in the Supreme Court, that clear words are necessary before the remedy of mandamus is lost: per Scrutton, L.J., in *R. v. Port of London Authority ex parte Kynoch Ltd.* (2), [1919] 1 K.B. 176 at 188. There is also a principle, to which counsel for the appellant very properly drew the attention of the court, that courts will not lean towards a construction which will oust their jurisdiction, though they must of course give effect to plain words. Both aspects of the matter are emphasised in the following passage from the speech of Viscount Simonds in *Smith v. East Elloe Rural District Council* (3), [1956] A.C. 736 at 750-1:

> "My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction

> of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested."

The argument of counsel for the appellant was that the essence of the present proceedings was that they were called in aid to bring about an effect on the title to immovable property and that they were therefore "civil proceedings in respect of immovable property". He said that the substance and not the form should be looked at. I do not think it can be gainsaid that these are civil proceedings and counsel is perfectly correct as to their result. I do not, however, agree that the result is the essence of the matter. The primary purpose of the proceedings is to compel the appellant to perform an act which appertains to his office and which is in the nature of a public duty: that purpose is, in my opinion, of the essence, and the fact that the performance of that duty may have an effect upon title to land is only incidental. The words of the section appear to me apt to cover proceedings, the subject matter of which is immovable property, and in which the litigants seek to enforce or determine their rights to, or in respect of, that immovable property. That appears to me to be the natural meaning of the words. It is true that John Munge was served with the notice of motion and became a party to the present proceedings, but the issue therein was not whether the applicant or John Munge had any right or title to the property but whether the appellant had failed to perform a duty required of him, which was not, be it noted, a duty of deciding as between the applicant and John Munge, which of the two was entitled to the land. I think there is a distinction in substance between those two forms of proceeding, and, while the wording of s. 12 of the African Courts Ordinance, 1951, obviously relates to proceedings such as an action between claimants to determine their right to land, it does not clearly relate to the present proceedings by way of mandamus, which fall to be decided upon quite different issues. Having in mind the principles of construction above mentioned, I am therefore of opinion that proceedings by way of mandamus are not barred by the section.

The next ground of appeal relates to a subject which was not referred to in the judgment under appeal. Counsel for the appellant submitted that the evidence disclosed no distinct demand by the applicant for the action required by him or of refusal of it by the appellant. It was not in dispute between counsel that the law as a general rule requires such demand and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. The submission by counsel for the appellant was that in the present case there had been no clear demand. He relied on *R. v. The Brecknock and Abergavenny Canal Co.* (4), 111 E.R. 395, in which mandamus was refused because the party alleged to be under a duty had not given a clear refusal, but had signified its willingness to perform the act required, if it was indemnified against claims by third parties. The case is, I think, of little assistance in the task of deciding whether a clear demand was made in the present case. *R. v. The Bristol and Exeter Railway Co.* (5), 114 E.R. 859, was also relied upon as indicating that a general complaint was insufficient – a specific demand must be made.

Counsel for the applicant argued that specific demand had been made in this case, and that, if it had not, it fell within an exception in that the appellant had no power to accede to the demand without mandamus. For this exception there is authority in *R. v. The Bristol and Exeter Railway Co.* (5) and *R. v. Hanley Revising Barrister* (6), [1912] 3 K.B. 518. Examination of the record of correspondents and the affidavits, shows that although the applicant complained to the appellant when he became aware of the re-allocation of the land in favour of John Munge and there ensued a long correspondence between the applicant's advocates and the appellant, the requests made were that the

matter be re-opened and that there should be an opportunity for the applicant to present his case with witnesses. It was made quite clear that the applicant contested the title of John Munge but the demands made were not specifically that the applicant should himself amend the register, but that there should be further consultation and hearing. The advocates' attitude appears from the following two extracts from their letters of September 11, 1958, to the appellant, and of October 18, 1958, to the Provincial Commissioner respectively:

(1) "(*a*) That it cannot be accepted that, after the Land Consolidation Committee had awarded and caused to be demarcated the plot of land in favour of our client, it was within the power of any administrative officer to reverse their decision without granting a full hearing to the person affected, that is to say our client, and without referring the matter back to the said Consolidation Committee. Our instructions are that none of these conditions have been met. This goes clearly against s. 17 of the Native Land Tenure Rules of 1956."

(2) "We have taken pains to visit the site and to interview several of the witnesses herein named and we are satisfied that if the matter is properly investigated with all the evidence available, there can be no doubt that the status quo, as it existed at the time of consolidation, would be restored. We respectfully suggest that the matter can be dealt with either by reference to the Arbitration Board coming under your jurisdiction, or by reference to the Native Court with the consent of the District Commissioner; or by returning the case to the Land Consolidation Committee for re-adjudication."

The appellant's attitude as disclosed by the correspondence, was that the question had been fairly decided, and, particularly as the register had been confirmed and signed on July 7, 1958, under r. 18 (1) of the Native Land Tenure Rules, 1956, he was unwilling and unable to re-open the matter.

I think that, at the time, the applicant's advocates were of opinion that r. 17 of the Native Land Tenure Rules, 1956, could be invoked, and framed their demand accordingly. They did not, therefore, demand specifically the relief which is now claimed, though the appellant could have been left in no doubt that the applicant claimed to be entitled to be recognised as owner of the land. If the matter turned entirely upon this point I would be in some doubt as to whether there had been a sufficient demand. I think, however, that the submission of counsel for the applicant, that in the circumstances of the case a demand was unnecessary, is a valid one. Rule 17 is in the following terms:

"17. Any person named in or affected by the register who considers the register to be inaccurate or incomplete in any respect may, within thirty days of the date of completion thereof, inform the district officer, stating in what respect the register is alleged to be inaccurate or incomplete; and in any such case the district officer shall consider the matter with the committee and may, if he thinks the objection to be valid, amend the register accordingly, and he shall sign and date the amendment."

Rule 18 provides for confirmation of the register after thirty days from its completion or from determination of objections. This stage had been reached by July 7, 1958, and there was no other provision enabling the appellant to alter the register. It was not contested by counsel for the appellant that the wording of r. 17 was in any event too narrow to enable an objector, by virtue thereof, to contest the title of a person whose name was on the register, and to claim registration himself. In the circumstances the appellant was without power to alter the register without an order of the court. In *R. v. Hanley Revising Barrister* (6) Darling, J., said (at p. 526):

> ". . . It is next said that the court will not grant a mandamus because there had been no demand upon and refusal by the revising barrister to do what he is now called upon to do. It would be futile to make a demand upon the revising barrister to do that which he has no power to do except under an order of the court, for the mere purpose of obtaining his refusal to do that which he is willing to do if so ordered and which in fact he did in the exercise of his judicial discretion when he originally revised the lists."

In *R. v. The Bristol and Exeter Railway Co.* (5) which turned upon the question whether a sufficient demand had been made, Coleridge, J., said (at pp. 862-3):

> "The cases in which a charter day has passed without an officer being elected were different from this, because there was no longer any power to elect without a mandamus."

I think that the present case falls sufficiently within the exception indicated in the passages quoted, and that, though the demand made lacked particularity, perusal of the correspondence indicates clearly that had it been couched in the terms in which the claim is now made, it would equally have been refused. No injustice, I think, arises from my finding on the matter, and this ground of appeal in my opinion fails.

I will deal with grounds 2 (*b*), (*d*) and (*e*) together but it is first necessary to set out a number of the Native Land Tenure Rules. Those relevant are as follows:

> "7. Every committee appointed for a unit shall ascertain and determine the claim of any person to be a private right-holder of any piece of land within the unit.
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> "9.(1) There shall be prepared in respect of each unit a record of existing rights.
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> "10. When the record in respect of any unit has been completed, the district officer shall sign and date the same and shall give notice of the date of the completion thereof, and of the place at which the same can be inspected.
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> "12. After the expiration of thirty days from the completion of a record, or on the determination of all objections to a record in accordance with r. 11, whichever shall be the later, the record shall be deemed to be a true and complete record of all existing private right-holding in the unit to which the record relates, but no inaccuracy in, or omission of, any particular relating to any lease or licence shall in any way affect the validity of such lease or licence.
>
> "13(1) Subject to the provisions of r. 14, a demarcation officer, with the assistance of the committee or any member or members thereof, shall, at any time after the provisions of r. 12 have taken effect in respect of any record, demarcate, or cause to be demarcated, by such means or in such manner as he may direct, the boundaries of all pieces of land within the unit in accordance with the particulars contained in the record.
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>
>
> "14(1) Whenever it appears to a committee –
>
> (*a*) that any person is the private right-holder of more than one piece of land within the unit; or

(*b*) that any piece of land to which any private right-holder is entitled is so situated as to prevent or prejudice the proper use of that piece having regard to any other piece of land to which such private right-holder may be entitled; or

(*c*) that any boundary between any pieces of land is curved or irregular; or

(*d*) that any piece of land is surrounded by pieces of land of which other persons are the private right-holders; or

(*e*) that it is desirable to make provision for the present or future needs of the community,

then in any such case the committee may –

(i) consolidate all the pieces to which one private right-holder is entitled into one piece being approximately equivalent to the several pieces and allocate to such private right-holder such a piece by adjusting the pieces to which other private right-holders are entitled as may be necessary;

(ii) require a private right-holder to relinquish any piece to which he is entitled and to accept in place thereof another piece being approximately equivalent thereto;

(iii) adjust the boundary between any two pieces;

(iv) require any private right-holder to relinquish a portion of any piece to which he is entitled so as to create a right of way or to provide land for the present or future needs of the community.

"(2) If in the exercise of any of its powers under para. (1) of this rule, a committee is of the opinion that any compensation should be paid to a private right-holder by reason of any detriment suffered by him as a result of such exercise of its powers, the committee may require any other private right-holder or private right-holders to pay to such first-mentioned private right-holder such compensation as it may think proper; and such compensation shall be paid in money or in kind, and at such time or times, as the committee may direct.

"(3) Notwithstanding that no person has made any claim to be the private right-holder of any piece of land within a unit, the committee may, if satisfied that any person has a valid claim to be the private right-holder in respect of any such piece of land, declare that such person is the private right-holder of such piece of land.

"15(1) There shall be prepared in duplicate in respect of every private right-holding demarcated in accordance with r. 13 a certificate in the form set forth in the Schedule to these Rules.

"(2) The original of every certificate shall be delivered to the registration officer and the duplicate to the private right-holder of the piece of land to which the certificate relates.

"16(1) The registration officer shall prepare a register for each unit and all land within the unit shall be registered in the register.

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"(3) When the register in respect of any unit has been completed, the registration officer shall sign and date the same and shall give notice of the date of the completion thereof, and of the place at which the same can be inspected."

Rule 17 has been set out above and r. 18 is as follows:

> "18(1) After the expiration of thirty days from the completion of a register, or on the determination of all objections to a register in accordance with rule 17, whichever shall be the later, the District Commissioner shall confirm the register and shall sign and date a certificate therein to that effect.
>
> "(2) When the register in respect of any unit has been confirmed, the District Commissioner shall give notice of such confirmation."

The facts have been set out above but a further reference to them in the judgment of the court below may usefully be reproduced:

> "It is quite clear upon the affidavits that the committee originally decided that the applicant should have plot No. 352 and that John Munge should have another plot. Plot No. 352 was properly demarcated in accordance with r. 13 and a certificate in respect of it was issued to the applicant in accordance with r. 15 (1). The original of that certificate ought to have been delivered to the registration officer and the duplicate was issued to the applicant in accordance with r. 15 (2) before John Munge made any complaint. Thereafter John Munge's only right of complaint was that provided under r. 17, which only allows an objection to be made on the ground that the register is incorrect or incomplete; but there is no suggestion that the register would have been inaccurate or incomplete if it had been made up on the basis that plot No. 352 had been allocated to the applicant. John Munge's objection did not allege any inaccuracy or any incompleteness. It alleged unfairness which is a different thing altogether. In fact John Munge was in effect attempting to appeal from the previous decision under which the plot in question was allocated to the applicant. We think that there was no such right of objection or appeal on the ground that the allocation was unfair. There is nothing in the rule to authorise any appeal or review once a certificate has issued upon demarcation in accordance with r. 13 and r. 15 on any ground other than that the register was inaccurate or incomplete, though where the record is found to be incomplete or inaccurate the whole matter appears to be capable of being re-opened but not otherwise."

Before this court, counsel for the appellant argued that the registration officer was compelled to act in accordance with the finding of the committee and that finding was embodied in the amended certificate. It is clear, however, that the registration officer received the original certificate and could have registered it; instead he sent it back to the committee and later received it in its amended form. If the committee had no power to reverse the original finding the amendment was ultra vires the committee, and of no effect. In those circumstances the only duty of the registration officer was to have registered the original certificate.

Counsel argued, however, that the purpose of mandamus was not to correct an act performed in error but to compel the performance of an act left undone. He submitted also, on the authority of *The Town Clerk of Eastbourne, ex parte Keay* (7) (1892), 66 L.T. 323, that whether the committee had acted in excess of jurisdiction is irrelevant in proceedings for mandamus against the officer who acted on their certificate. In the case mentioned the facts were that it was the duty of the revising barrister to settle the lists for the burgess-rolls and it was then the duty of the town clerk to make out the rolls. Mistakes occurred in the lists and mandamus was sought against the town clerk to compel him to make the necessary alterations. In a brief judgment Smith, J., said, at p. 324:

> "This application must be refused. The mistake was not discovered in time. This is an application for a mandamus to compel the town clerk to do his duty according to law; but he has done all he can in accordance with the law. It was his duty to make out the burgess-roll in accordance with the revising barrister's directions and he has done so."

I think that the case quoted would have provided a parallel to the present one if in the latter, the registration officer had received from the committee the amended certificate and no other. That was not the case. He received first the certificate in its original form and it was at that point that he became subject to a duty to register it. Unless the committee had authority to take the certificate back and amend it, the registration officer was never relieved of the duty so imposed. The town clerk in the *Eastbourne* case (7) became subject to one duty only and he carried it out. As to counsel's point that mandamus does not lie to correct an error I think that the case of *R. v. Hanley Revising Barrister* (6) is authority for saying that if the failure to perform a duty has resulted in wrong entries being made in a register, mandamus will lie, though the result is to correct those wrong entries. In that case the revising barrister had delivered to the town clerk a list upon which were a number of names which ought to have been deleted. The town clerk completed the register therefrom. Mandamus was asked for against both the revising barrister and the town clerk and it was held that the proper course was for the revising barrister to expunge the names on a copy of the register and deliver the same to the town clerk and for the town clerk to make the necessary correction in the register. This case was also made the basis of a submission by counsel for the appellant that some form of action should have been taken against the committee as well as against the appellant in the same way as it had been against the revising barrister as well as the town clerk. The same distinction, however, as I have made with regard to the *Eastbourne* case (7) applies in my opinion to *R. v. Hanley Revising Barrister* (6). The town clerk had not failed in any duty and therefore it was necessary to bring in the revising barrister. In the present case, as I have pointed out, a duty had already devolved upon the registration officer and he was not absolved from carrying it out by any ultra vires action of the committee. That is the duty the carrying out of which it is now sought to compel.

I will deal at this point with ground 3 of the memorandum of appeal for the sake of proper sequence. Counsel for the appellant submitted that the action of the committee was not ultra vires. He said that the certificate issued under r. 15 was not a certificate of title but a certificate of a private right holding. I am, with respect, unable to see the significance of this on this particular ground – the point is that it was a certificate to which the registration officer was required to give effect. Counsel submitted further that demarcation under r. 13 and the completion of the certificate under r. 15 do not preclude the further operation of the committee pursuant to the powers of consolidation contained in r. 14. He pointed to the opening words: "Whenever it appears to a committee . . ." He submitted that the powers under r. 14 (1) (i), (ii), (iii) and (iv) could be exercised any number of times until the register was complete. He conceded, however, that he could not point to any evidence that in purporting to reconsider the earlier decision, the committee purported to act under r. 14. I do not think that those arguments have validity. Rule 13 is expressly made subject to the provisions of r. 14 which suggests that demarcation is to be postponed to the exercise of the committee's powers of consolidation under the last-mentioned rule. The certificate under r. 15 is obviously to be prepared after demarcation and the register can be seen to be based on the certificate. The sequence is therefore, after the procedure for the preparation of the record of existing rights has been gone through, first consolidation, then demarcation followed by the certificate and entry in the register.

The duties of the committee are complete when the certificate is prepared unless it is called upon again by the district officer under r. 17. As I see the position, the duties of the committee as to consolidation are only one link in a chain of events leading up to the preparation of the register. The next step is the demarcation, then the preparation of the certificate and then its embodiment in the register. The duties of the committee as to consolidation having been performed, that link has been forged and in the absence of express provision in the rules the committee has no power to recall the matter from some point further down the chain for the purpose of substituting a new link. I do not read the word "Whenever" with which r. 14 commences, as conferring any such power, but as being equivalent to "In any case in which", and relating to the variety of circumstances set out under the letters (*a*) to (*e*) in sub-r. (1) thereof. With regard to r. 17 the learned judges in the Supreme Court found:

> "We are clearly of the opinion that John Munge's complaint against the allocation of plot No. 352 to the applicant was not in any way founded upon any allegation of inaccuracy or of incompleteness in the compilation of the register. This complaint appears to have been founded only upon an allegation of unfairness, but there is no right of appeal or review nor is any right given to the committee to re-open the matter upon that ground."

With that expression of opinion I am in full agreement. I am therefore of opinion that the committee's purported reversal of its first decision as embodied in the certificate was ultra vires and of no effect and that the duty of the registration officer to act on the original certificate was unaffected thereby. I am for these reasons unable to find that any of the grounds of appeal so far discussed should be sustained.

The last ground in the memorandum is 2 (*c*) which raises the question of the effect of the Native Lands Registration Ordinance, 1959. As has been observed, this Ordinance came into effect during the pendency of these proceedings, and before the hearing in the Supreme Court. Counsel for the appellant has argued before this court that the order of mandamus sought would contravene its provisions and would amount to an order to do something contrary to or evasive of, the law. If the submission is a valid one I think no authority is needed for saying that this court would give effect to it even though it was not relied upon in the Supreme Court.

The heading of the Native Land Registration Ordinance, 1959, is as follows:

> "An Ordinance to provide for the ascertainment of rights and interests in, and for the consolidation of land in the native lands: for the registration of title to, and of transactions and devolutions affecting, such land and other land in the native lands: and for purposes connected therewith and incidental thereto."

The Ordinance provides a scheme in greater detail than, but otherwise on very much the same lines as that subsisting under the Native Land Tenure Rules, 1956, which were revoked by the Native Land Tenure (Revocation) Rules, 1959, dated November 25, 1959, and published in the *Gazette* of December 1, 1959. There is provision for the preparation of a record of existing rights, for consolidation, demarcation, the preparation of an adjudication register and, after that register has become final, the compilation from it of the register proper. It is of interest to note, by way of comparison with r. 17 of the Native Land Tenure Rules, 1956, that s. 26 of the Ordinance provides for objection to the adjudication register, not only by those who consider it to be "inaccurate or incomplete", but also by those who are "aggrieved by the allocation of land as entered" therein. Section 33 provides for the setting up of the register from the adjudication register, sub-s. (3) and sub-s. (7) thereof being as follows:

"(3) Subject to the provisions of sub-s. (4) and sub-s. (7) of this section and of s. 40, the register shall be compiled from the adjudication register as soon as the adjudication register becomes final in accordance with the provisions of s. 27; and every landowner named in the adjudication register, and the trust board where it is entered in the adjudication register as an owner of land, shall be registered in the register as the proprietor of the freehold title of the land concerned, and every other person named in the adjudication register shall be registered in the register as the person entitled to the benefit of any interest, lease, right of occupation, charge or other incumbrance affecting the land, in accordance with the entries in the adjudication register, subject in every case to any restriction of the power of the proprietor or of any such person as aforesaid to deal with the land or to any interest, lease, right of occupation, charge or incumbrance affecting the same."

"(7) If, on the date on which this Ordinance is enacted, the Native Land Tenure Rules, 1956, apply to any area of the native lands and a register has been prepared, confirmed and maintained in accordance with the said Rules, such register shall be deemed to be the register in respect of the registration district or registration section which comprises such area (as the case may be), and the provisions of this Ordinance shall apply accordingly."

Paragraph 4 of the affidavit dated January 26, 1960, referred to in the early part of this judgment, indicates that sub-s. (7) applies to the land and register with which the court is now concerned.

Section 36 of the Ordinance reads:

"36(1) Subject to the provisions of sub-s. (7) of s. 33, the first registration of the title to any land or charge shall be effected by an entry in the register in accordance with the provisions of the said section.

"(2) Every subsequent registration shall be effected by an entry in the register in such form as the registrar may from time to time direct."

The rights conferred by registration are dealt with in s. 38:

"38. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall be rights not liable to be defeated except as provided by any written law and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever but subject as follows, that is to say –

(*a*) subject to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register;

(*b*) unless the contrary is expressed in the register, subject to such liabilities, rights and interests as affect the same and are declared by s. 40 not to require registration.

"Provided that nothing in this section shall be deemed to relieve a proprietor from any duty or obligation to which he is subject as a trustee."

Section 39 deals with rights in respect of land acquired without valuable consideration. Later in the Ordinance the question of rectification of the register is dealt with; it is necessary to set out s. 88 and s. 89 and the first sub-section of s. 90:

"88. The registrar shall have power to rectify the register in the following cases:

(*a*) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor; and

(*b*) in any case and at any time with the consent of all persons interested.

"89(1) Subject to the provisions of sub-s. (2) of this section, a court may order rectification of the register –

(*a*) by directing that any registration entry or note in the register (other than the first registration of the title to any land made in accordance with the provisions of this Ordinance) be cancelled or amended if the court is satisfied –

(i) that the same has been obtained or made by omission, fraud or mistake and the court deems it just to rectify the register; or

(ii) that the same has been obtained in accordance with any consent purporting to have been granted under or by virtue of any written law rendering necessary the consent of any authority to any dealing with any land or charge and that such consent is invalid and the court deems it just to rectify the register; or

(*b*) by directing that any person who claims to have acquired a title to land by prescription be registered as the proprietor thereof.

"(2) The register shall not be rectified in any case falling within sub-para. (i) in para. (*a*) in sub-s. (1) of this section so as to affect the title of a proprietor who is in possession –

(*a*) unless such proprietor is a party or privy to the omission, fraud or mistake in consequence of which such rectification is sought, or has caused such omission, fraud or mistake or substantially contributed thereto by his act, neglect or default; or

(*b*) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.

"90(1) Subject to the provisions of this Ordinance, any person suffering loss by reason of –

(*a*) any rectification of the register under this Ordinance;

(*b*) any error or omission in the register which cannot be rectified under this Ordinance;

(*c*) any error in a copy or extract from the register or of or from any document or plan certified under the provisions of this Ordinance, shall be entitled to be indemnified by the Minister."

The argument of counsel for the appellant, in brief, is that s. 33 (7) makes the register prepared under the Native Land Tenure Rules, 1956, affecting the land in question, the register for the purpose of the Ordinance. It follows by virtue of s. 89 (1) that the court's power to rectify that register by directing cancellation or amendment of any registration or entry therein, is limited to registrations and entries other than the first registration of the title to the land in accordance with the provisions of the Ordinance. Counsel's submission was, that although the present proceedings take the form of an application for an order of mandamus, in substance and effect they were proceedings for the rectification of the register.

This submission poses a number of questions. The first is whether the register with which the court is now concerned, containing what is in my opinion an erroneous entry, is a register, "prepared confirmed and maintained in accordance with the said Rules" within the meaning of s. 33 (7) of the Ordinance. I think that question must be answered in the affirmative. The

sub-section is concerned with the identification of the register and not with the details of its contents – it means, in other words, a register which has come into being through the operation of the machinery provided by the Native Land Tenure Rules, 1956. The register in question falls within that description though it may contain a mistake or mistakes.

The next question, for the purpose of which I will assume that what is being sought is a rectification of the register, is whether the subject matter thereof is

> "the first registration of the title to any land made in accordance with the provisions of this Ordinance"

within the meaning of s. 89 (1) (*a*). The effect of sub-s. (7) of s. 33, to which sub-s. (3) of the same section is expressly subject, is to make the register with which the court is now concerned a portion of the register for the purposes of the Ordinance. At the moment when the Ordinance came into effect the register prepared under the Rules may have contained entries showing dealings in certain plots of land which may have taken place since the inception of the register, though that was not the case in the present instance. Section 36 (1) indicates what a "first registration" of title is. It is an entry made in the register in accordance with s. 33, of which the only sub-section which expressly direct such entries to be made are (3) and (4); but s. 36 (1), like s. 33 (3) is expressly made subject to s. 33 (7) and the effect of that reservation must be ascertained. There are three possibilities:

(*a*) that the first registration of title in that portion of the register having its origin in s. 33 (7) is the first registration shown in that register, or

(*b*) that the first registration is that of the person shown in the register as entitled at the time the Ordinance came into force, or

(*c*) that there is to be no "first registration" in the case of that portion of the register.

In my opinion the third of these alternatives may be discarded and, as the entry with which the court is now concerned was unchanged between the date of its making and the date of coming into force of the Ordinance, I do not need to arrive at any decision as between alternatives (*a*) and (*b*). I reject the third alternative for two reasons. In the first place I consider it an inherently unlikely meaning; the fact that s. 36 (1) is made subject to s. 33 (7) shows an intention to create an exception to the method of first registration indicated by the former. Section 33 (7) is a positive section and its tenor is more in conformity with an intention to create, not a mere negation, but a positive exception. The second reason is drawn from the wording of s. 38. In dealing with the rights of proprietors this section indicates that there are only three methods of becoming a proprietor "under this Ordinance", first registration, subsequent acquisition or order of the court. None of these methods is apt to include a person whose name has been placed on the register under the Native Land Tenure Rules, 1956, unless, when that register became portion of the register by virtue of the operation of s. 33 (7), either the original, or the then existing entries became entries of "the first registration of title". In my opinion therefore the entry with which the court is now concerned fell within the meaning of the words in brackets in s. 89 (1) (*a*).

The next question which arises is whether the present proceedings are correctly to be described as proceedings for the rectification of the register within the meaning of s. 89. I will ignore, for the moment, the fact that they are directed to the District Commissioner and not to the registrar appointed under the provisions of the Ordinance. I think that, upon the assumption that what is applied for is an order of mandamus addressed to the registrar, the proceedings are clearly for the rectification of the register. It is permissible

I think, to quote from the well-known text-book, Registration of Title throughout the empire (1920 Edn.) by Hogg, though the authorities relied upon are in the main unavailable here. At p. 367 is the following:

> "Rectification of the register, though sometimes denoting any alteration, properly means an alteration made in the register for the purpose of putting right an erroneous entry. As a vesting order is only required for the purpose of effecting a change in the registered ownership when a formal transfer cannot be obtained, so rectification is only required when some mistake in the register cannot otherwise be put right. Occasionally, the court, in deciding in favour of the person who claims rectification, will declare the registered owner a trustee for the claimant, in lieu of ordering the register to be actually altered. So the court will sometimes order the registered owner to transfer to the person rightfully entitled, instead of ordering the existing entries on the register to be cancelled.
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> "The right to rectification of the register is, so far as it is not conferred by enactments in the registration statutes themselves, based on the general powers exercised by the courts with respect to unregistered land, in pursuance of which mistakes in documents are set right and public officials compelled to do their duty. In the case of registered land, the right to rectification may be lost through the operation of the leading principle of registration of title – the conclusiveness of the register. The extent and limits of this conclusiveness generally, and as regards 'Mistake', are dealt with ante pp. 94, 129. The right to have the register rectified is confined to cases in which the register is not conclusive against the claimant for rectification.
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> "The powers of the courts, as regards rectification, though usually assumed to be ample, are necessarily limited by the statutory conclusiveness of the register, and it is the very circumstance of these limitations existing that has made it desirable in most jurisdictions to provide for the payment of indemnity as an alternative to rectification. Any power of rectifying the register itself necessarily extends to registered instruments."

In England by s. 82 of the Land Registration Act, 1925 (from which portions of s. 89 of the Ordinance are drawn), there is provision for rectification of the register in various circumstances, by courts of competent jurisdiction and by the registrar. Sub-s. 5 provides that the registrar shall obey the order of any competent court on being served with the order or a copy. The section is an empowering one and does not (with a minor exception) prescribe procedure or limit the form of the proceedings in which rectification may be sought. I think that mandamus to the registrar is certainly one method of putting right an erroneous entry in the register, and is peculiarly applicable when the fault is alleged to lie with the registrar. If that official refused to act under s. 88 of the Ordinance in circumstances in which he should act, mandamus would appear to be appropriate. There seems to be no reason why it should not lie in a case where it is necessary to invoke the wider powers of a court under s. 89. That, however, is not a complete answer to the present question, which perhaps I should re-frame as whether a rectification which is not authorised by s. 89 of the Ordinance can be effected by mandamus, as being a remedy of a special nature not requiring the authority of s. 89. That query appears to be answered by the principle that mandamus will not be granted if the performance of the act involves a breach of the law: *R. v. Eastbourne Corporation* (8) (1900), 83 L.T. 338. If rectification had been sought in an action brought by the applicant against John Munge it must have been refused, as the court would have no power to rectify a first registration of title. To effect the same result by an order of mandamus would be to contravene s. 38 of the Ordinance which provides that the rights of a proprietor "shall be rights not liable to be defeated

except as provided by any written law". The only relevant written law is s. 89. which expressly precludes relief in the case of a first registration.

For reasons which will appear, I have been considering the matter as if these proceedings were brought against the registrar appointed under the Native Lands Registration Ordinance, 1959. When the proceedings were in fact instituted no such officer existed and they were brought against the District Commissioner, who, it is not disputed, was the responsible officer under the Native Land Tenure Rules, 1956. There is no assumption or claim that the District Commissioner is also the registrar appointed under the Ordinance. It seems obvious therefore, that s. 33 (7) of the Ordinance has removed the register in question from the custody and control of the District Commissioner and placed it under the control of the registrar. If then mandamus goes to the District Commissioner he will be ordered to perform an act which he has no longer any power to do. Disobedience of an order is contempt of court and is punishable by attachment – Halsbury's Laws of England (3rd Edn.), Vol. 11, p. 78. *In re Bristol and North Somerset Railway Co.* (9) (1877), 3 Q.B.D. 10, the court refused to order the building of a bridge by a virtually defunct company, which had exhausted its power of raising money and was (not through its own default) without funds. Cockburn, C.J., said, at p. 12:

> "This court cannot put people in prison for not complying with an order when they have no means of doing so."

In *R. v. The Bishop of Ely* (10), 95 E.R. 610, the court refused to order the bishop to exercise powers when it was doubtful if he had the right to do so. In *R. v. London and North Western Railway Co.* (11), 117 E.R. 1113, the matter at issue was the completion of a road, which involves the acquisition of land. The company's powers of compulsory purchase had expired before the writ of mandamus issued or was applied for, and the court held that absence of power was a good return to the writ. There is a possible distinction between the present case and the one last mentioned in that in the present one the application was made while the act required was (if ordered by mandamus) within the power of the District Commissioner. On principle, the District Commissioner not being responsible for the change in the law, I think that the distinction is immaterial. The crux of the matter appears to be contained in the following sentence from the judgment of Lord Campbell, C.J., at p. 1120:

> "The power effectually to obey the command of the court having expired in July, 1849, ought we, in the Queen's name, to have given the command in April, 1850? On full consideration, we think not."

On the other hand there is a series of cases in which mandamus to public officials has been granted requiring them to perform acts which should have been performed notwithstanding that the time allowed by law for their performance had expired, and in some cases, that the person occupying the particular office had changed. The judgment in *R. v. Mayor of Rochester* (*In the Parish of Strood*) (12), 119 E.R. 1490, one of the earlier cases, contains the following passage at p. 1491:

> "The further objection is made that the mandatory part of the present writ cannot now be obeyed, because the mayor, who made default, is no longer in office. But the mandamus is directed to the mayor and assessors for the city of Rochester; and there always are such functionaries: although not a corporation they constitute a standing and perpetual tribunal within the city as much as the town council; and they are now competent to do what ought to have been done by the mayor and assessors on October 13, last."

The Court of Exchequer Chamber confirmed the judgment of the Court of Queen's Bench in another of the same series of cases, in *Mayor of Rochester v. R.* (*In the Parish of St. Nicholas*) (13), 120 E.R. 791, though the judges of the Court of Exchequer Chamber were divided three and two. In the judgment delivered by Martin, B., on behalf of himself and Pollock, C.B., who together with Willis, J., comprised the majority, is the following passage at pp. 793-4:

> "We are of opinion that the judgment of the Court of Queen's Bench was right, and ought to be affirmed. It seems to us that *Rex v. Sparrow* (2 Strange, 1123) and *Rex v. the Mayor of Norwich* (1 B. & Ad. 310) are authorities upon the point, and that the principle of those cases establishes the doctrine that the Court of Queen's Bench ought to compel the performance of a public duty by public officers, although the time prescribed by statute for the performance of them has passed; and, if the public officer to whom belongs the performance of that duty has in the meantime quitted his office and has been succeeded by another, we think it is the duty of the successor to obey the writ, and to do the acts (when required) which his predecessor has omitted to perform; and we think all statutes are to be read with reference to this known, acknowledged, recognized and established power of the Court of Queen's Bench to superintend and control inferior jurisdictions and authorities of every kind. So reading this statute, we think it sustains the judgment of the Court of Queen's Bench as much as if express words were found in it directing what that court has ordered."

This decision was relied upon in *R. v. Hanley Revising Barrister* (6) when, at p. 531, Channell, J., said:

> "There was therefore an omission by the revising barrister to do that which he ought to have done, namely, to expunge the names from the lists, and to deliver the lists with the names expunged to the town clerk. Owing to inadvertence that was not done. The town clerk did nothing wrong, because I assume that he printed the lists as received by him from the revising barrister. The mistake therefore arose in not delivering to the town clerk lists of voters as actually revised by the revising barrister in accordance with his judgments pronounced orally.
>
> "Those being the facts which I assume, a question of some difficulty arises as to whether that mistake can be set right. In my opinion it can, under a doctrine of this court, which is an extremely useful one, and which was established by a majority of the judges in the Court of Exchequer Chamber in *Mayor of Rochester v. R.* (E.B. & E. 1024). The principle laid down in that case is well established, and has to my knowledge been acted upon frequently. The principle is that a mandamus will lie to compel the performance of a public duty by a public officer although the time prescribed by statute for the performance of it has passed; and if the public officer to whom belongs the performance of that duty has in the meantime quitted his office and been succeeded by another person, the writ may be directed to the successor, and it is his duty to obey it; and where there is no successor, but the person who ought to have performed the duty has become functus officio, the latter may be ordered to perform it though the time within which he could of his own motion have performed it has passed. it is a most useful jurisdiction which enables this court to set right mistakes."

It does not appear that the present case falls completely within the bounds of either of these two lines of authority. Certainly the District Commissioner is functus officio, but that alone would not prevent the order going to him. But there is a great deal more. The register which he prepared has been removed from his control by legislation; it is not within his power to reclaim it and alter it; it has been transformed by law into something which it was not when it

was prepared by him; persons have acquired rights under it which are virtually declared to be indefeasible except by some written law; provision has been made for indemnity to any person who is damnified by the limitation of power to rectify the register in its new form. It would be futile and wrong to address an order to the District Commissioner when it is obvious that he would be unable to comply with it. In the case of *R. v. Hanley Revising Barrister* (6), a difficulty arose in that the original lists of voters which he had prepared could not be found. The court got around that by ordering him to correct a copy of the list compiled from the register. Then the duty fell upon the town clerk to correct the register accordingly. I do not think that any such expedient is available here. There is only one register and there is no question of correcting it from lists, or by any means other than a direct order to the person in charge of it, who is not the District Commissioner.

A question which arises, having regard to the reference in the passage quoted above from the judgment of Channell, J., in *R. v. Hanley Revising Barrister* (6), is whether the Registrar of Native Lands is a successor in office to the District Commissioner, and whether therefore the order could not be directed to him. One difficulty, and I think it is a very substantial one, is that he has not been made a party to the proceedings. If such a question were to be ventilated he should certainly have been joined. Apart from that he is certainly not a successor of the District Commissioner in the sense that the Mayor of Rochester in 1857 was successor to the Mayor of Rochester in 1856. The type of succession which the courts had in mind in the early cases was plainly that which would devolve upon John Doe if he followed John Brown in the office of District Commissioner. In a different and limited sense it can, however, be said that the Registrar of Native Lands succeeded the District Commissioner inasmuch as he took over the duty of maintaining the register prepared by the latter. As I have sought to show earlier, it would not be lawful for the court to order the registrar, in his capacity as such, to rectify the register. Should he be ordered to do so, nunc pro tunc, as the successor to one of the duties of the District Commissioner? I do not find the point to be covered by direct authority, but I think, even assuming that the registrar had been joined in the proceedings, that no such order should be made. The register, when taken over by the registrar, became invested forthwith with different characteristics. It became a register of title with particular protection for those who had “first registration”. Interference with those registrations is completely forbidden, except in immaterial matters or with the consent of all parties under s. 88 of the Ordinance. The change, so far as the District Commissioner’s register is concerned is specifically related by s. 33 (7) to “the date on which this Ordinance is enacted”. The provision in s. 90 (1) (*b*) for indemnity for errors which “cannot be rectified” shows that it was in contemplation that the rigidity of the enactment might result in such errors. The attention of the court was drawn to the African Courts (Suspension of Land Suits) Ordinance, 1956, the application of which is terminated by s. 32 (4) of the Native Lands Registration Ordinance, 1959, in respect of land included in a register prepared under the Native Land Tenure Rules, 1956, when the same is included in a registration district under the Ordinance. The African Courts (Suspension of Land Suits) Ordinance, 1956 placed a heavy clog on litigation concerning rights to native lands and the scheme of the legislation as a whole appears to have been to have rights decided by committees and other administrative means, including provision for objections, and administrative appeals, and then to embody the findings in registers in which, under the Ordinance, first registrations are not to be challenged.

In the result, my opinion is that no order of mandamus should be made against the District Commissioner as it would not be within his power to comply with it; that no order could be made against the Registrar of Native Lands as he is not a party to the proceedings; and that it should not in any event be made

against him as such an order would offend against the letter and policy of the Native Lands Registration Ordinance, 1959, and as the registrar is not the successor of the District Commissioner within the meaning of the authorities on that subject. No great injustice is being done to the applicant by this refusal as he has suffered no more than the enforced exchange of a plot of land for another which, he considers, is inferior. If he has been damnified he may, though I am not of course in a position to make any finding on the matter, have a remedy under section 90 of the Ordinance.

I would allow the appeal and set aside the order made in the court below, substituting an order for the refusal of the application. As the appellant has succeeded on appeal on a ground which was not taken in the court below I think that each party should pay his own costs of the appeal, and in the special circumstances, that each party should bear his own costs in the court below.

Sir Kenneth O'Connor P: I agree. The appeal will be allowed, the order of the Supreme Court set aside and an order refusing the application substituted. The orders for costs will be as proposed by the learned Justice of Appeal.

Sir Alistair Forbes VP: I also agree.

Appeal allowed. Order of the Supreme Court of Kenya set aside and order for the refusal of the application substituted.

For the appellant:
The Attorney-General, Kenya
J. S. Rumbold and *A. J. F. Simmance* (Crown Counsel, Kenya)

For the interested party:
Byron Georgiadis, Nairobi

For Ethan Njau:
H. P. Hearn, Nairobi

Jongo s/o Kego v R
[1960] 1 EA 130 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 March 1060
Case Number:	7/1960
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Lyon, J.

[1] Criminal law – Murder – Whether trespass to property can constitute provocation – Misdirection – Penal Code, s. 187 *and s.* 188 (*U.*) *– Penal Code, s.* 202 (*T.*).

Editor's Summary

The appellant had been in charge of one cow, the property of the deceased, which got lost. The deceased made a complaint in the court of the clan chief who with several other elders heard the case and ordered the appellant to return to the deceased one cow. After the expiration of the time for appeal, the clan chief and deceased went to a kraal near the appellant's home where the clan chief authorised the deceased to take away a bull as the only cow the appellant had was old and in poor condition. As the deceased was driving away the bull the appellant speared him to death. At the trial the appellant offered no evidence but in a statement to the police admitted the killing and stated "I killed Awiyo because I found him driving my cattle away". The trial judge, relying on the authority of *Yusufu alias Hema s/o Lesso v. R.* (1952), 19 E.A.C.A. 249 in his direction to the assessors said that it was "not open to them on the facts of the instant case to recommend a verdict of manslaughter". The appellant having been convicted of murder appealed.

Held –

(i) trespass to the property of an accused person may be provocation for the purpose of s. 188 of the Penal Code if that trespass can at the same time be considered as a wrongful act or insult done or offered by the deceased to the accused.

Marwa s/o Robi v. R., [1959] E.A. 660 (C.A.) applied; *Yusufu alias Hema s/o Lesso v. R.* (1952), 19 E.A.C.A. 249 disapproved.

(ii) the deceased's act in driving away the appellant's bull was not an act of provocation for the purpose of s. 187 and s. 188 of the Penal Code, nor could the killing be considered wholly or even partly justifiable as being an act in defence of property.

(iii) the trial judge's excusable misdirection on the law had occasioned no miscarriage of justice, and upon a proper direction neither he nor the assessors could, on the facts, have reasonably come to any other conclusion than that the appellant was guilty of murder.

Appeal dismissed.

Cases referred to in judgment:

(1) *Yusufu alias Hema s/o Lesso v. R.* (1952), 19 E.A.C.A. 249.

(2) *Marwa s/o Robi v. R.*, [1959] E.A. 660 (C.A.).

(3) *R. v. Murume* (1945), 12 E.A.C.A. 80.

Judgment

Windham JA, read the following judgment of the court: The appellant was convicted by the High Court of Uganda of the murder of one Kolonerio Awiyo by spearing him to the heart. The appellant offered no evidence, but in a statement to the police he had admitted the killing, stating

that – "I killed Awiyo because I found him driving my cattle away". The circumstances of the killing were established by unchallenged Crown evidence, and were described in the following words by the learned trial judge in his judgment:

> "The accused had been in charge of one cow, the property of the deceased. It was lost. Deceased made a complaint in the court of the clan chief who heard the case with several other elders. That court ordered the accused to return to the deceased one cow. The time for filing an appeal from that native court is limited to thirty days. On August 4 when that time had expired, Petero, clan chief, and deceased went to a kraal near the accused's home where there were several cattle enclosed, including one cow and one bull the property of the accused. The cow was an old one in poor condition and therefore Petero authorised Kolonerio to drive off the bull; and this Kolonerio began to do. While the chief was fastening the gate with his back turned to the man driving away the bull, he heard Kolonerio shout - 'I have been killed by Jonga'. On turning round he saw the accused running away with a spear; Kolonerio had fallen to the ground. He chased accused for a short distance but accused threatened him with the spear and he gave up the chase. When he returned to Kolonerio he was lying on his right side with a serious wound through his left ribs. That spear wound had gone in between the third and fourth ribs on the left side, had penetrated the left lung and lacerated the heart. That wound plainly caused his death."

The only question which in our view called for consideration on appeal was whether the learned trial judge correctly directed himself and the assessors as to whether the act of the deceased in driving away a head of cattle which belonged to the appellant could constitute grave and sudden provocation so as to reduce the appellant's killing to manslaughter. In dealing with this question the learned judge, after referring to s. 188 of the Penal Code, which defines provocation, cited a decision of this court, *Yusufu alias Hema s/o Lesso v. R.* (1) (1952), 19 E.A.C.A. 249, a case concerned with the interpretation of the identically worded definition in s. 202 of the Penal Code of Tanganyika. He quoted a passage from the judgment in that case, at p. 250, where this court said that

> "we think that this definition must be confined to wrongful acts done to the *person* and does not extend to wrongful acts done to *property*."

Relying, as he said, mainly on the authority of that case, the learned trial judge directed the assessors (and himself) that it was

> "not open to them on the facts of the instant case to recommend a verdict of manslaughter."

We would, however, refer to a more recent decision of this court, *Marwa s/o Robi v. R.* (2), [1959] E.A. 660 (C.A.), where the question was carefully considered to what extent (if any) an act of trespass to property, in that case just as here the driving off of cattle belonging to the accused, could be held to afford "provocation" to the accused so as to reduce his killing of the trespasser from murder to manslaughter. In that case, after considering *Yusufu's* case (1) and an earlier and differing decision which this court had reached in *R. v. Murume* (3) (1945), 12 E.A.C.A. 80, we said that we would not be prepared to hold that no act of trespass to property could ever amount to "a wrongful act or insult . . . done to . . . a person", and that each case must be judged on its own facts. On the facts of *Marwa's* case (2), in which, as in the present case, the deceased was speared to death, we decided that it could neither be held that the accused had acted upon grave and sudden provocation, nor that his act was excused or mitigated as being done in defence of property.

We adhere to the views that we expressed in *Marwa's* case (2). We consider that there may be circumstances in which trespass to the property of an accused person can be held to afford provocation for the purpose of s. 188 of the Penal Code. But we think it can only be so held if that trespass is of such a nature that it can at the same time be considered as a wrongful act or insult done or offered by the deceased to the accused. Only thus would it satisfy the definition in s. 188, which requires that the wrongful act or insult shall have been done or offered to another "person". The act done to the property may in itself, in some circumstances, be also an act or insult done or offered to the person.

Applying these considerations to the facts in the present case, however, we think, as we did on the not dissimilar facts in *Marwa's* case (2), that the deceased's act in driving away the appellant's bull was not such as would cause an ordinary person in the appellant's walk of life to run the deceased through with a spear before even asking him the reason why he was driving the bull away. It was, accordingly, not an act of provocation for the purpose of s. 187 and s. 188 of the Penal Code. Nor, in our view, can the killing be held to have been wholly or even partly justifiable as being an act in defence of property.

Notwithstanding, therefore, the learned judge's excusable misdirection on the law, we consider that it occasioned no miscarriage of justice, and that upon a proper direction neither he nor the assessors could, on the facts, have reasonably come to any other conclusion than that the appellant was guilty of murder. For these reasons we dismiss the appeal.

Appeal dismissed.

The appellant in person.

For the respondent:
The Attorney-General, Uganda
J. J. Dickie (Crown Counsel, Uganda)

R E W Pope v **R**
[1960] 1 EA 132 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	30 March 1960
Case Number:	170/1959
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Appeal from:	H.M. Supreme Court of Kenya – Farrell, J.

[1] Criminal law – Charge – Duplicity – Particulars alleging falsification or being "privy" to falsification of document – Penal Code (*Cap.* 24), *s.* 325 (*K.*) – *Criminal Procedure Code* (*Cap.* 27), *s.* 137 (*K.*).

[2] Criminal law – Evidence – Handwriting – Document alleged to be in handwriting of accused –

Quantum of proof – Indian Evidence Act, 1872, *s.* 73.

Editor's Summary

The appellant, an accountant employed by the Ministry of Works, was charged before a judge and jury on three counts with fraudulent false accounting, and on three counts with theft by a person employed in the public service. The charges concerned staff pay-sheets which had been made out to admittedly fictitious persons and purported to bear the appellant's signature as divisional accountant and paying officer. The evidence against the appellant in respect of one pay-sheet was that the handwriting thereon was his and that he drew the imprest cash to meet the sums shown as payable thereunder. The particulars of alleged fraudulent false accounting in respect of this pay-sheet read that the appellant "with intent to defraud, falsified a document, or was 'privy' to the falsifying of that document". On appeal against conviction on the charges relative to this pay-sheet it was submitted inter alia that the particulars were duplex, that the judge misdirected the jury upon the meaning of the word "privy", and failed to direct the jury on the standard of proof required under

s. 73 of the Indian Evidence Act before a document could be accepted as being in the handwriting of the appellant.

Held –

(i) the charge alleged one offence only, namely fraudulent false accounting and was in accordance with the form authorised by s. 137 of and the Second Schedule to the Criminal Procedure Code and to support a conviction of that offence it was sufficient to prove either limb of the particulars.

(ii) the trial judge had not directed the jury that mere knowledge of falsification constituted privity; he said that if the appellant, being divisional accountant in charge of the accounts department, took no steps to prevent a falsification of which he knew, then he was privy thereto; but since the case for the prosecution was throughout that the appellant had himself prepared the paysheet, the issue of privity was immaterial and did not arise.

(iii) since the evidence that the document alleged to be in the appellant's handwriting had not been challenged and the appellant had also tacitly admitted the fact, there had been no failure adequately to direct the jury thereon.

Appeal dismissed.

Case referred to:

(1) *R. v. Molloy*, [1921] 2 K.B. 364.

(2) *Cherere s/o Gukuli v. R.* (1955), 22 E.A.C.A. 478.

(3) *Harji K. Patel v. R.* (1955), 22 E.A.C.A. 536.

(4) *Jagat Singh v. R.* (1953), 20 E.A.C.A. 283.

(5) *Ashabhai and Another v. R.*, E.A.C.A. Criminal Appeals Nos. 970 and 971 of 1954 (unreported).

(6) *R. v. Butt* (1885), 51 L.T. 607.

(7) *Egan v. Cowan* (1858), 30 L.T. 223.

(8) *S. Phoodee Bibee v. Gobind Chunder Roy* (1874), 22 W.R. 272.

(9) *R. v. Smith*, 3 Cr. App. R. 87.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court**:** The appellant was charged on three counts of fraudulent false accounting contrary to s. 325 of the Penal Code and three counts of theft by a person employed in the public service contrary to s. 275 of the Penal Code. His trial took place before a judge of the Supreme Court of Kenya sitting with a jury, and he was convicted on one count of fraudulent false accounting and one count of theft by a person employed in the public service. He was sentenced to a term of one year's imprisonment on each count, the sentences to run concurrently. He has appealed to this court against his conviction.

The appellant at the material time was a divisional accountant in the Ministry of Works, stationed at Nakuru and in charge of the accounts department of the Ministry of Works at Nakuru. The charges

against him related to three out of a series of five pay-sheets made out to fictitious persons. It is necessary to set out briefly the system authorised for the payment of labour employed by the Ministry of Works. The system for the payment of such labour is as follows: First, muster rolls are kept recording the daily attendance of employees. From these muster rolls pay-sheets are prepared. These paysheets are signed by the clerk who prepares them and also if possible by a clerk whose duty it is to check them. The officer in charge of the persons named in the sheet then signs a certificate endorsed on the pay-sheet (which we will refer to as the first certificate) to the effect that the persons named on the paysheet have been employed for the period stated at the rates of wages specified, and that the specified total is due. The pay-sheet is then checked in the Labour Department as to the persons employed and rates of pay, and is signed by the

headquarters checking clerk. It then goes to the divisional accountant's office, is checked arithmetically and is signed by the divisional accountant. A further certificate endorsed on the pay-sheet to the effect that the amount is correct and authorised by departmental warrants is then signed by the divisional engineer, that is, the senior officer at a divisional office of the Ministry of Works. The divisional engineer, in consultation with the divisional accounts office, then appoints a paying officer or officers to pay the labour in question. The paying officer is given a cheque covering the total of the pay-sheets he is required to pay, which he cashes. Payment then takes place at a pay parade at which the paying officer, the section officer, and a witnessing officer are present. The duty of the section officer is to identify individuals. Each payment appearing on a pay-sheet is signed by the paying officer or witnessing officer as the payment is made. A certificate (which we will refer to as the third certificate) endorsed on the pay-sheet to the effect that the wages of the persons named have been paid to the proper persons is then signed by the paying officer and the witnessing officer. A further certificate (which we will refer to as the fourth certificate) endorsed on the pay-sheet to the effect that the payees' tickets have been examined and their agreement with the pay-sheet verified is also signed by the paying officer. Where any payee named on the pay-sheet does not appear to collect his wages, the particulars of the non-payments are entered in the appropriate place provided for the purpose on the pay-sheet and the amount is returned to the cashier. The pay-sheets are then returned to the Nairobi office.

It appears that this procedure, authorised by departmental regulations, was not always strictly followed in practice. In particular, unpaid amounts due to employees not present at a pay parade were sometimes kept in envelopes for the employee in question instead of being returned to the cashier.

The five pay-sheets which figured in the case against the appellant related to the months of September, October, November and December, 1957, and January, 1958. Each of these pay-sheets is made out to the same nine persons and is admittedly fictitious, the persons named not having been employed at the time and place indicated, though in the case of certain names persons of similar name had at one time or another been employed by the Ministry of Works at other places. The charges against the appellant related to the paysheets for October, November and December, 1957, and the charges in respect of which he was convicted related to the December, 1957, pay-sheet. There are important differences in the evidence relating to the different pay-sheets.

The most important features of the five pay-sheets are as follows: Each pay-sheet is made out to the same nine fictitious persons. In the case of each pay-sheet the first certificate purports to bear the signature of one E. D. Gould as officer in charge of works. Gould was, throughout the material time, an inspector of works stationed at Nakuru. In the case of each pay-sheet the third certificate purports to be signed by Gould as witnessing officer and by the appellant as paying officer. In the case of each pay-sheet the fourth certificate purports to be signed by the appellant as paying officer. Each pay-sheet purports to be signed by the appellant as divisional accountant, though in the case of the January pay-sheet the signature is impressed by means of a rubber stamp. The September and January pay-sheets purport to be signed by one Kutai as preparing clerk. A clerk by the name of Kutai was employed by the Ministry of Works at Nakuru at the material time, and he admits preparing and signing these two pay-sheets. The October and November pay-sheets purport to be signed by one Imbwaga as preparing clerk. A clerk of that name was employed by the Ministry of Works at Nakuru at the material time, and he admits preparing and signing these two pay-sheets. The signature which purports to be that of the preparing clerk on the December pay-sheet has not been identified as purporting to be that of any clerk employed by the Ministry of Works at Nakuru at the material time. There is no signature of a checking

clerk on the September, October and January pay-sheets. The signatures on the November and December pay-sheets purporting to be those of the checking clerk have not been identified as purporting to be those of any known clerk employed at the time. On none of the pay-sheets is any record entered of unpaid wages returned to the cashier.

The principal evidence regarding the September pay-sheet was given by Gould. His evidence was to the effect that in September, 1957, he spoke to the appellant about overtime pay which he felt ought to be paid to certain clerks who had been working overtime but who, because of their status, were not entitled to overtime pay; that the appellant said he would pay them out and that after discussion the appellant wrote nine names and numbers on a piece of paper; that he instructed the clerk Kutai to make out a pay-sheet from the list of names, giving the figures of pay to be entered after discussion with the appellant; that three men, including Kutai, were to be paid overtime, but that the total figure on the sheet was larger than the amount to be paid out at that time so as to provide a fund out of which overtime could be paid; that he signed the first certificate and third certificate, and that he and Kutai initialled the individual payments which purported to have been made; that the pay-sheet was returned to the appellant; that he (Gould) did not handle any of the money to which the pay-sheet related, but that he knew the clerks had received their overtime pay. The clerk Kutai in general confirmed what Gould alleged to have occurred, though there were certain discrepancies between the two versions, e.g. Kutai said it was the appellant who instructed him to prepare the pay-sheet. Kutai stated that the appellant handed him his overtime pay in an envelope. The appellant denied knowledge of the September pay-sheet and denied that the signature of the divisional accountant which purported to be his was in fact his. He agreed that Gould had spoken to him about overtime pay for clerks, but said he had referred Gould to the district engineer. He admitted his signature to the third and fourth certificates on the September pay-sheet. He said that five or six men reported that they wished to leave early and their tickets were produced by Kutai; that their money was passed to Imbwaga who passed it to Kutai; that Kutai placed the money in an envelope and sealed it; and that this was normal practice where only a small delay in payment was involved. A Mr. Nefdt, who has considerable experience of handwriting, was called to give expert evidence, and expressed the view that the signature appearing in the space for the divisional accountant’s signature was not the appellant’s signature but was a forgery.

The principal evidence relating to the October pay-sheet was given by the clerk Imbwaga. His evidence was to the effect that in October, 1957, the appellant brought a piece of paper to him with nine or eleven names and other details on it and instructed him to make out a pay-sheet from it; that he did so, and gave the pay-sheet to the appellant, having signed the pay-sheet as preparing clerk. Gould and Kutai denied all knowledge of the October paysheet. Mr. Nefdt, the handwriting expert, stated that all the signatures purporting to be those of Gould on the October pay-sheet were forgeries; and that all the signatures on it purporting to be those of the appellant were genuine. The appellant denied giving instructions to Imbwaga for the preparation of the pay-sheet. He admitted his signatures on the pay-sheet but had no recollection of signing. He said he would not have signed as divisional accountant if there had been no certificate from the labour department on it; and that as to his signature on the certificates, it was not unusual for him to miss signing such certificates at a pay parade and for the pay-sheet to be brought to him later for his signature, and that this sheet among others had been brought to him by a clerk, Dhanji, for completion a day or two after return from the various pay parades; that otherwise he knew nothing of the pay-sheet, and that he had not stolen the money involved.

The evidence regarding the November pay-sheet was substantially the same as that relating to the October pay-sheet. Imbwaga said he prepared and signed it on instructions given by the appellant. Gould and Kutai denied knowledge of it, and Mr. Nefdt was of the opinion that the signatures which purported to be Gould's were forgeries. The appellant, however, stated that this pay-sheet was brought to him by Kutai supported by a letter in Kutai's writing which purported to be signed by Gould requesting payment of employees who were present with Kutai; that he paid the men after referring to the divisional engineer, Mr. Thompson; that the men were present and checked in accordance with the pay-sheet; and that all signatures except his were already on the pay-sheet when it was brought to him.

The December pay-sheet concerned the charges on which the appellant was convicted. As in the case of the October and November pay-sheets, both Kutai and Gould denied knowledge of it, and Mr. Nefdt was of opinion that the signatures purporting to be Gould's were forgeries. Mr. Nefdt stated that in his opinion the writing on the December pay-sheet was in the same hand as a report, exhibit 18 at the trial, which was put forward by the prosecution as being in the appellant's handwriting. The evidence relating to exhibit 18 will be referred to subsequently. The appellant denied that the writing on the December pay-sheet was his. He also said he would not accept the signature of the divisional accountant as his, and Mr. Nefdt's opinion was that this signature was a clever forgery. The appellant said the pay-sheet must have come up on one of his pay parades since he had signed the third and fourth certificates. He stated that there was no shortage in his cash for December and that he had not stolen the money entered on the pay-sheet.

The evidence relating to the January pay-sheet was similar to that relating to the September pay-sheet. Gould said it was made out from the September pay-sheet by Kutai on his instructions after discussion with the appellant for the purpose of payment of overtime to certain of the clerks; that the signatures on it purporting to be his were genuine; that after a pay parade the appellant took the pay-sheet and upon his (Gould) stating the amounts due to the clerks Kutai, Mabia Sukhabhai and Kisanya, the money was handed to Kutai who put it in separate envelopes for the clerks named. Kutai's evidence was to the same effect. The appellant said Gould had approached him about overtime for the clerks, but that he had referred him to the divisional engineer; that the pay-sheet had come up at the pay parade, and at the end of the parade showed certain employees unpaid; that Kutai informed Gould that certain employees were on site but would be reporting shortly, and asked if their money could be collected; that work tickets were produced and checked and the money was handed over to Kutai who put it in envelopes; and that he was unaware of the fact that the names were fictitious.

A very considerable body of evidence was given in the course of the trial, but the gist of the case is sufficiently set out above, though certain other aspects of the evidence will require comment later. It may be mentioned that there was evidence given by Mr. O'Shea, Under-Secretary of Finance and Accounts in the Ministry of Works, and other witnesses, of an interview with the appellant in May, 1958, at which it was alleged that the appellant admitted agreeing with Gould that payment of overtime should be effected by means of fictitious pay-sheets. It may also be mentioned that a number of witnesses were called for the defence who gave evidence supporting certain aspects of the appellant's story, and that certain of these witnesses stated that the clerk, Dhanji, had openly boasted of and demonstrated his ability to copy the appellant's signature.

As has been mentioned, the appellant was charged on six counts, three of fraudulent false accounting and three of theft. One charge of fraudulent false accounting and one charge of theft related to each of the relevant pay-sheets

for October, November and December, 1957. The appellant was convicted on the two charges which related to the December pay-sheet.

Six grounds of appeal are set out in the memorandum of appeal and a further paragraph was added to ground 1 by a supplementary memorandum. Ground 1 relates to technical matters and it is convenient to deal with it first. As supplemented it reads as follows:

> "1. (*a*) That the conviction of the appellant on count 5 of the information was bad in law for duplicity.
>
> "(*b*) That the learned trial judge erred in law in failing to direct the jury that a conviction on any of the counts numbered 1, 3 and 5 of the information as framed would be bad for duplicity unless they returned a finding on each count as to whether the appellant himself falsified the pay-sheet concerned, or whether the appellant was privy to the falsification thereof.
>
> "(*c*) That the learned trial judge erred in law in directing the jury: 'There is no technical meaning about the word "privy" to it. If the accused knew all about it, and then in his position as divisional accountant in charge of the accounts department, he took no steps to prevent this falsification, still more if he in any way instigated the falsification, or procured the falsification, then he was "privy" to it' (p. 180 of the record)."

The section under which the appellant was charged in counts 1, 3 and 5 (s. 325 of the Penal Code) reads as follows:

> "325. Any person who, being a clerk or servant, or being employed or acting in the capacity of a clerk or servant, does any of the acts following with intent to defraud, that is to say:
>
> (*a*) destroys, alters, mutilates, or falsifies any book, document, valuable security or account which belongs to or is in the possession of his employer, or has been received by him on account of his employer, or any entry in such book, document or account, or is privy to any such act; or
>
> (*b*) makes, or is privy to making, any false entry in any such book, document or account; or
>
> (*c*) omits, or is privy to omitting, any material particular from any such book, document or account,
>
> is guilty of a felony, and is liable to imprisonment for seven years."

The count against the appellant under that section in respect of the December pay-sheet reads as follows:

> "Statement of Offence: Fifth Count Fraudulent False Accounting, contrary to s. 325 of the Penal Code.
>
> "Particulars of Offence: Fifth Count.
>
> "Robert Edward William Pope on a day unknown in the month of December, 1957, at Nakuru in the Rift Valley Province, being a servant to the Public Works Department, with intent to defraud, falsified a document, or was privy to the falsifying of that document, namely, a Public Works Department pay sheet for the month of December, 1957, belonging to the said Public Works Department, purporting to show that Shs. 2860/- were due to the nine persons named thereon."

As to grounds 1 (*a*) and 1 (*b*) of the memorandum of appeal, counsel for the appellant argued that the section creates two separate offences. He conceded that the form of the charge followed form 22 of the Second Schedule to the

Criminal Procedure Code, but submitted that that was not conclusive against him. He further submitted that even if the charge was not bad for duplicity because it was covered by statute, yet a general conviction under it would be bad unless the particular offence of which the appellant was convicted was made clear in the verdict. Counsel referred inter alia to *R. v. Molloy* (1), [1921] 2 K.B. 364; *Cherere s/o Gukuli v. R.* (2) (1955), 22 E.A.C.A. 478; *Harji K. Patel v. R.* (3) (1955), 22 E.A.C.A. 536; and *Jagat Singh v. R.* (4) (1953),20 E.A.C.A. 283.

It is well established that a count which charges two offences is bad for duplicity and that a conviction under it cannot stand – *Cherere v. R.* (2). In the instant case, however, we are of opinion that "falsifying or being privy to the falsifying . . . " of a document is one offence, and that form 22 of the Second Schedule is conclusive as to this. Counsel for the appellant referred to a passage in the judgment of the court in *R. v. Molloy* (1) where it was held that a count was bad for duplicity notwithstanding the fact that it followed a form given in Archbold's Criminal Pleading (25th Edn.), and suggested that this court might equally hold that a count is bad for duplicity although it follows the form in the Second Schedule to the Criminal Procedure Code. With respect, we do not agree that this is the case. The relevant passage in *R.* v. *Molloy* (1) reads as follows:

> "Reference has been made to the fact that this indictment has followed the form given in Archbold's Criminal Pleading (25th Edn.), p. 553. That is not one of the authorised forms. None of the authorised forms justifies the inclusion of two separate offences in the alternative in one count. Notwithstanding the general accuracy with which Archbold's Criminal Pleading has been prepared, we must say that on this occasion the form given at p. 553 is incorrect and must not be followed."

The "authorised forms" referred to are clearly the forms set out in the Appendix to the Rules contained in the First Schedule to the Indictments Act, 1915, which correspond to the forms set out in the Second Schedule to the Criminal Procedure Code. It is clear that the court did not contemplate any condemnation of the authorised forms. The court in fact said

> "none of the authorised forms justifies the inclusion of two separate offences in the alternative in one count."

It is to be noted that in form 25 of the authorised forms under the Indictments Act, 1915, which relates to falsification of accounts contrary to s. 1 of the falsification of Accounts Act, 1875, the charge is that the accused "made or concurred in making" a false entry. That section is substantially similar to s. 325 of the Penal Code except that the words "concurred in making" are used instead of "is privy to making."

As to counsel's argument that even if the statute authorises the form of charge used, yet the conviction is bad unless it specifies which limb of the charge has been held to be established, it appears to us that if the offence charged is one offence then a conviction of that offence is good although there may be alternative limbs of the offence. Counsel relied on the following dictum in *Harji K. Patel v. R.* (3):

> "We have pointed out in *Jagat Singh v. Reg*., 20 E.A.C.A. 283 and in Criminal Appeals No. 970 and No. 971 of 1954, *Ashabhai and Another v. The Queen* (unreported) that it is open to the prosecution in framing a charge under these sections to lay the offence as 'receiving or retaining', and that it is then the duty of the court to decide on the evidence which limb of the charge has been proved."

That case and the cases referred to in the passage cited all referred to an offence under s. 317 (1) of the Penal Code (or the corresponding section in the Penal Codes of other East African Territories) which relates to "receiving or retaining" stolen property. The passage is obiter since the point at issue was whether on a charge laid as receiving stolen property knowing it to have been stolen a conviction could ensue if the evidence merely established retention of the property with guilty knowledge and not receipt of the property with guilty knowledge. There is nothing in *Jagat Singh's* case (4) to support the dictum in the last three lines of the passage from *Harji Patel's* case (3) set out above. The point discussed in *Jagat Singh's* case (4) was similar to that which arose in *Harji Patel's* case (3). The court accepted that receiving or retaining stolen property constituted one offence and noted:

> "As already pointed out in the instant case the prosecution did not charge the appellant with 'receiving or retaining' so that it put a heavier burden on itself than was necessary, a burden which in fact it did not discharge."

The court did not state that if the charge was laid as "receiving or retaining" it was the duty of the court to find a verdict of guilty either of the receiving or of the retaining.

The dictum in *Harji Patel's* case (3) appears to be based on the following dictum in *Ashabhai and Another v. R.* (5), E.A.C.A. Criminal Appeals No. 970 and No. 971 of 1954 – (unreported):

> "As was pointed out in *Jagat Singh's* case, on the authority of the Indian decisions it is open to the prosecution under the section to charge the accused in the same count with both receiving and retaining, and for the court to strike out the alternative, which on the evidence before it becomes inapplicable."

This dictum also is obiter, since the point at issue in that case was the same as that which arose in *Jagat Singh's* case and *Harji Patel's* case; and, with respect, the latter part of the dictum is not supported by anything in the judgment in *Jagat Singh's* case. Neither do the Indian authorities appear to support the proposition that the court must strike out the alternative. Gour's Penal Law of India (4th Edn.), at p. 2184 states:

> "The question when the accused must have possessed the requisite guilty knowledge or belief is in view of the section immaterial. For the offence of receiving stolen property may, as here described, consist of equally whether the property is *received* or *retained* with such knowledge or belief. The use of this alternative expression 'dishonestly receives or retains' thus relieves the prosecutor of proving more than that the accused either received or retained the property dishonestly, that is to say the prosecutor need not prove that it was dishonestly received as distinct from dishonestly retained, or dishonestly retained as distinct from dishonestly received. It is enough to prove facts which justify the inference that the accused either dishonestly received the property, or having received it honestly, dishonestly retained it."

Ratanlal's Law of Crimes (17th Edn.), at p. 1025 sets out the same proposition in similar terms and adds, at p. 1026:

> "A similar use of the alternative expression is common throughout the Code in offences where a thing is said to be done 'with the intention of causing a specified effect' or with the knowledge that 'the effect is likely to be caused'. In such cases the prosecution need not prove and the court need not find the intention as distinct from the knowledge; it is sufficient to prove or to find one or the other to have existed."

Mention was made in the course of argument of the common form of charge of burglary and stealing – see form 9 of the Second Schedule to the Criminal Procedure Code. That form of charge, which charges two offences, is, however, an exception to the general rule against duplicity – see Archbold's Criminal Pleading Evidence and Practice (33rd Edn.), p. 667. It is to be noted that the offences are not alternative.

In the instant case we are satisfied that the charge as framed is in a form authorised by s. 137 and the Second Schedule to the Criminal Procedure Code; that one offence is charged, namely fraudulent false accounting; and that it is sufficient to support a conviction of that offence to prove either that an accused has falsified the document in question or that he has been privy to its falsification. It may be noted that in *R. v. Butt* (6) (1885), 51 L.T. 607 the prisoner had been charged under the Falsification of Accounts Act, 1875, that he made or concurred in making a false entry. Lord Coleridge, C.J., in the course of his judgment said:

> "This is clearly a false entry as far as Sheppard is concerned. It purports to represent receipts from the persons who have been entered as making payment of such receipts, and it seems to me clear that the prisoner either made it with the innocent hands of Elford, or concurred in the innocent hands of Elford making it. I am of opinion that this conviction was perfectly right, and must be upheld."

We think that grounds 1 (*a*) and 1 (*b*) must fail.

Ground 1 (*c*) complains that the learned judge misdirected the jury as to the meaning of the word "privy" in the charge. The learned judge directed the jury as follows:

> "You have got to be satisfied either that the accused himself falsified the document, or that he was privy to the falsification of it. Gentlemen, there is no technical meaning about the word being 'privy' to it. If the accused knew all about it, and then in his position as divisional accountant in charge of the accounts department, he took no steps to prevent this falsification, still more if he in any way instigated the falsification, or procured the falsification, then he was privy to it. Finally, and of very great importance, is the element that what was done was done with intent to defraud."

We agree that something more than mere knowledge is necessary for a person to be privy to a falsification within the meaning of the section, and that he must at least have concurred in or approved of the act. The Shorter Oxford Dictionary (3rd Edn.) gives as meanings of the word "privy":

> "Participating in the knowledge of something secret or private; in the secret; accessory to some secret transaction."

It is difficult to see how a person can have the intent to defraud necessary to constitute an offence under the section unless his "privy" goes beyond mere knowledge. But the learned judge did not direct the jury that mere knowledge of the falsification constituted privity. He said that if the appellant, being divisional accountant in charge of the accounts department, took no steps to prevent a falsification of which he knew, then he was privy to it. In this we think he was right. For the appellant was not in the position of a disinterested onlooker. It was his duty, as divisional accountant, to prevent or expose any falsification of which he became aware; and in not doing so, he must by reason of his position be presumed to be concurring in or approving of it, and thus to be privy to it. However, we do not find it necessary to decide the point. Even if the passage cited did constitute a misdirection, it was not material to

the charge on which the appellant was convicted. The learned judge made it very clear to the jury that the prosecution case in respect of the December pay-sheet rested entirely on the basis that the appellant had himself prepared it. He said:

> "The prosecution case on the December pay-sheet rests entirely on the basis that the handwriting on the face and parts of the reverse of the pay-sheet was the handwriting of the accused. Gentlemen, if it is, and if you are satisfied that the pay-sheet is false in the way I have explained, then there is no question that the accused is guilty of the charge. If it is not, there being no other evidence of the preparation of this pay-sheet, the accused is entitled to be acquitted on the charge."

In these circumstances the question of possible "privity" did not arise in respect of the December pay-sheet, and the misdirection, if there was one, was immaterial. We think that this ground of appeal must fail.

The remaining grounds of appeal are as follows:

"2. That the learned trial judge erred in failing to direct the jury, when considering the possibilities that prosecution witness No. 7 (Mr. E. D. Gould) was either a careless but otherwise honest witness, or else a dishonest witness (p. 197 and p. 198 of the record) that this witness had admitted that he had told an untruth in the subordinate court (p. 75 of the record) and that he was therefore a witness upon whose word the jury could place little or no reliance, particularly where his evidence conflicted with the evidence of other witnesses both for the prosecution and the defence, and even more particularly in view of the learned trial judge's direction to the jury that the evidence of this witness should be treated by the jury with care as though he were an accomplice to some part of the Crown case (p. 204 of the record).

"3. (*a*) That the learned trial judge erred in law in failing to direct the jury that before exhibit 18 (a report alleged to have been written by the appellant) could be relied upon for the purpose of comparison with the handwriting in exhibit 4 (the December pay-sheet concerned in the fifth count of the information) strict proof of the genuineness of exhibit 18 was required in order that no reasonable doubt thereof could remain.

"(*b*) The learned trial judge further erred in failing to direct the jury:

(i) that the said witness, P.W.7 (E. D. Gould) had at the preliminary inquiry in the subordinate court given the following evidence which was put to him in cross-examination at the trial as to the identification of exhibit 18 (numbered as exhibit 16 at the preliminary inquiry) namely:

'I know accused's writing very well. I would say exhibit 16 is the handwriting of accused. I am very familiar with accused's writing. He is familiar with my writing. I used to write every day. He used to sign my name on letters to get them away quickly. He did that once or twice. One was an audit query. I have seen accused sign my signature. He just signed E. Gould. In writing';

(ii) that the said witness's identification of exhibit 18 amounted to no more than the expression of an opinion;

(iii) that the said witness, P.W.7, had not seen exhibit 18 being written nor had it been admitted by the appellant to be in the appellant's handwriting;

(iv) that the said witness, P.W.7, in at least part of the passage quoted above committed perjury;

(v) that the said witness, P.W.7, in his evidence mistakenly identified other handwriting, for example the signature on exhibit 1 as being the handwriting of the appellant and that the reliability of his evidence as to exhibit 18 was on that account open to doubt.

"4. That the learned trial judge erred in failing to direct the jury on the effect of the evidence of defence witnesses, particularly defence witness No. 2 (J. M. Lillu) and defence witness No. 5 (R. D. Robinson) which, if believed, would have discredited or tended to discredit three of the main prosecution witnesses, namely P.W.7 (E. D. Gould), P.W.10 (Kutai) and P.W.23 (Dhanji) and showed or tended to show that certain of the prosecution witnesses were themselves concerned in the falsification of the pay-sheets including those concerned in the counts in the information; the learned trial judge erred further in failing to put to the jury the case for the defence in regard to the said evidence.

"5. That the verdict of the jury in convicting the appellant on count 5 of the information, notwithstanding having acquitted him on counts 1 to 4, was perverse and unreasonable.

"6. That the conviction of the appellant on count 6 of the information is not sustainable, if the conviction on count 5 of the information be quashed."

Counsel for the appellant argued grounds 2 and 3 together. The first matter complained of was the learned judge's direction as to the degree of proof that should be required before exhibit 18 (the report which was used by Mr. Nefdt for comparison with the writing on the December pay-sheet) was accepted as in the appellant's handwriting. Counsel referred to s. 73 of the Indian Evidence Act (which applies in Kenya) and to the commentaries on that section in Sarkar on Evidence (9th Edn.) and Woodroff's Law of Evidence (9th Edn.), and submitted that a very high standard of proof of a document is required before it can be made use of for purposes of comparison and that the learned judge should have directed the jury as to the necessity for strict proof and that they should disregard exhibit 18 if such proof were not forthcoming.

We think that s. 73 of the Evidence Act goes even further than counsel for the appellant contended. The relevant part of that section reads as follows:

> "In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal, has not been produced or proved for any other purpose."

It is to be noted that a writing which is to be used for purposes of comparison must be either "admitted" or "proved to the satisfaction of the court" to have been written by the person in question. In England comparison of two writings with each other in the course of a criminal case was first authorised in 1865 by the Act of 28 and 29 Vict.c.18. Section 8 of that Act provided that:

> "comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses; . . ."

Under that section the genuineness must be proved to the satisfaction, not of the jury, but of the judge (Taylor, Law of Evidence, (11th Edn.) p. 1242; *Egan v. Cowan* (7) (1858), 30 L.T. 223). "Court" in the Evidence Act is defined as including

> "all judges, and magistrates, and all persons, except arbitrators, legally authorised to take evidence."

The definition has been held in India not to be exhaustive, and that, in a trial by a judge and jury, "court" includes both the judge and the jury (Sarkar on Evidence, (9th Edn.), p. 19). So far as s. 73 of the Evidence Act is concerned, it appears to us that the section requires that both the judge and jury must be satisfied with the proof of the genuineness of the document which it is proposed to use for purposes of comparison, and that if the judge is not so satisfied he should withdraw the document from the consideration of the jury. In the instant case it does not appear that the learned judge applied his mind to this question. He merely left the issue to the jury, saying:

> "Now before I come to Mr. Nefdt's evidence I wish to deal with one point. This is, as you will remember, based on a comparison of the pay-sheet for December and exhibit 18, which is a report which is put forward by the prosecution as a report in the handwriting of the accused. It has been suggested by the defence that it has never been proved that this report is in the handwriting of the accused, and that therefore the whole basis of Mr. Nefdt's evidence is destroyed. Well, gentlemen, there is some evidence as to that report which I will put before you.
>
> "The first evidence given about it is by Mr. Gould who merely said,
>
> 'I see a report, exhibit 18. It is in the accused's handwriting.' But later Mr. Lawson was recalled to deal with this point and another one and he was shown exhibit 18 and he said, 'This is an inspection report . . . handed it to Mr. Cooper'. And then Mr. Cooper produced it.
>
> "Well, gentlemen, there was no cross-examination of either of those two witnesses on their statements that this was a document in the accused's handwriting, and the accused did not deny that it was in his handwriting. The question was never raised. Well that is the evidence you have before you. On that evidence you must decide whether you are satisfied that this is a report in the handwriting of the accused, and if so, you can accept it as the basis of the comparison made by Mr. Nefdt with the December pay-sheet."

Although it is not clear from the transcript, the learned judge presumably read to the jury the whole of the passage in Mr. Lawson's evidence which related to exhibit 18, and which reads as follows:

> "This is an inspection report by accused. It came into my in-tray sometime after May 12, 1958 – probably on the 20th as shown. I glanced at it and put it in pending basket. I was asked on May 28, 1958, if I had anything in the handwriting of accused – and handed it to Mr. Cooper."

Had the matter been solely one of proof of the handwriting in exhibit 18, we would have been inclined to the view that this approach was inadequate, and that the learned judge ought to have exercised his own independent judgment before putting the exhibit to the jury. The question arises, however, whether the conduct and evidence of the appellant at the trial was such as to amount to an admission that the writing on exhibit 18 was his. In *S. Phoodee Bibee v. Gobind Chunder Roy* (8) (1874), 22 W.R. 272, the court said:

> "Now, under ordinary circumstances, we ought we think to assume that this comparison took place in open court; and that a comparison having been made without any objection by the party affected by it, the signature in the vakalutnamah was in fact admitted."

That case, it is true was a civil case. Nevertheless we think that in a criminal case evidence given by an accused person may be of such a nature as to amount to a tacit admission of the identity of handwriting in a document. In the instant case evidence had been given that exhibit 18, a report signed by the appellant which had reached Mr. Lawson, the divisional engineer, in the ordinary course of office routine, was in the handwriting of the appellant; and a comparison between exhibit 18 and the December pay-sheet was carried out by Mr. Nefdt in open court on the basis that exhibit 18 was in the appellant's handwriting. As pointed out by the learned judge in the summing-up, there was no cross-examination on the statements of the two witnesses who said that exhibit 18 was in the appellant's handwriting; and the appellant himself, when he gave evidence on oath, did not deny that exhibit 18 was in his handwriting. He did not mention exhibit 18 in examination-in-chief, but in cross-examination he said:

> "I have heard the evidence of Mr. Nefdt about the December pay-sheet and that it was written in the same hand as exhibit 18. I say that I never wrote the December pay-sheet."

The case differs from one in which an accused does not give evidence on oath. In such a case the mere fact that the accused remained silent could not be taken to be a tacit admission for the purposes of s. 73 of the Evidence Act. In the circumstances of this case, however, we think there was clearly a tacit admission by the appellant that the handwriting on exhibit 18 was his, that the comparison between that exhibit and the December pay-sheet was properly left to the jury, and that the relevant passage in the summing-up, which is set out above, in fact erred in favour of the appellant.

The second matter complained of by counsel for the appellant under para. 2 and para. 3 of the memorandum of appeal was the treatment of Gould's evidence by the learned judge in his summing-up. Counsel submitted that the learned judge was over-indulgent in his treatment of Gould's evidence; that in particular he failed to mention an admission by Gould that he had uttered an untruth at the preliminary inquiry, namely, that he had there said that he had seen the appellant write his (Gould's) signature; that this was a blatant piece of perjury which ought to have been brought to the attention of the jury in the summing-up; and that this materially affected the value of Gould's evidence, in particular in regard to the identity of the writing on exhibit 18.

In view of our opinion that there was an admission that the writing on exhibit 18 was the appellant's, we do not think that this omission was a material non-direction so far as exhibit 18 was concerned. So far as the remainder of Gould's evidence is concerned we think that the omission could have had no effect on the verdict. It is to be noted that in his evidence before the trial court Gould had corrected the mis-statement he made at the preliminary inquiry; the jury were instructed to treat his evidence as being accomplice evidence, to be treated with care for that reason; and it is clear that the overriding factor which influenced the jury must have been their acceptance of the allegation that the December pay-sheet was in the appellant's writing. The learned judge's direction on the point, which is set out above, is explicit. If the December pay-sheet is in the appellant's handwriting, then, in view of his position, the fact that he was paying officer in respect of that pay-sheet, that he drew the imprest cash to meet, inter alia, the payments set out in that pay-sheet, which is admittedly a fictitious one, and that the money represented by the pay-sheet was not returned to the cashier, leads inevitably to the conclusion that the appellant is guilty in respect of that pay-sheet quite apart from Gould's evidence.

No point was made in argument before us as to the comparison of the writing on exhibit 18 and that on the December pay-sheet, but we have thought it

proper to make our own comparison of the writing on the two documents. An appellate court is in as good a position as the jury to judge a comparison of handwritings, *R. v. Smith* (9), 3 Cr. App. R. 87. However, nothing has emerged from our comparison of the documents which leads us to think we should interfere with the verdict of the jury. The comparison effected by Mr. Nefdt in exhibit 24 is a convincing one.

Ground 4 of the memorandum of appeal alleges non-directions in relation to the evidence of witnesses called for the defence. In view of what we have already said in relation to Gould's evidence, we do not think that any omissions in relation to the defence evidence amount to material non-directions.

Ground 5 of the memorandum of appeal alleges that the verdict was perverse in view of the verdict in relation to the October and November pay-sheets. We do not think that this is the case. The case against the appellant in respect of the October and November pay-sheets depended to a great extent on whether the evidence given by Imbwaga that he had prepared those pay-sheets on instructions given by the appellant was accepted. Clearly the jury were not prepared to accept Imbwaga's evidence, and therefore did not accept that the appellant had directed the preparation of those pay-sheets. The case on the December pay-sheet, however, rested on the physical evidence of the handwriting and not solely on the evidence of a witness who might well himself be implicated. We see no reason to intervene on this ground.

In the view we have taken, ground 6 of the memorandum of appeal does not arise.

For the reasons we have given we think the appeal must fail and it is accordingly dismissed.

Appeal dismissed.

For the appellant:
Lawrence Long & Todd, Nakuru
Bryan O'Donovan, Q.C., L. E. Long and *J. Gledhill*

For the respondent:
The Attorney-General, Kenya
F. de F. Stratton (Crown Counsel, Kenya)

Yolamu Arua v R
[1960] 1 EA 146 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 March 1960
Case Number:	9/1960
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Uganda – Lyon J.

[1] Criminal Law – Murder or manslaughter – Killing of deceased when in act of adultery – Provocation – Suspicion but no proof of adulterous association.

Editor's Summary

The deceased who was the appellant's step-brother lived with him and helped him on his shamba. The appellant who had two wives had for some time suspected his elder wife of adultery with deceased and that she was pregnant by him. Three days before the killing the appellant called a family council in order to get the deceased to leave the place. The deceased denied the appellant's allegation of adultery and the family council simply advised the appellant to bring a case. This angered the appellant who was heard to say that if he caught his wife and deceased together again he would kill either her or him. Subsequently when the appellant visited the house of his first wife he found the deceased there and after a struggle killed him with a stick which he had found there. In a statement to the police when he was charged with murder and cautioned, the appellant said "I found him lying with my wife". In his judgment convicting the appellant of murder the trial judge said:

> "The cases . . . establish the proposition that where a husband has prior knowledge that his wife has been committing adultery with some person and then later catches them in improper circumstances, that cannot amount to sudden provocation."

On appeal

Held –

(i) the appellant had maintained throughout that he caught the deceased and his wife in the act of adultery and the trial judge had not negatived this; it was upon that basis, therefore, that the case must be judged. *R. v. Jeck Jezelani* (1947), 14 E.A.C.A. 70, *R. v. Mkomba s/o Mkumbo* (1950), 17 E.A.C.A. 156 and *R. v. Milward* 23 Cr. App. R. 119 distinguished.

(ii) in the present case the evidence did not establish that the appellant had actual prior knowledge of his wife's adultery but of no more than suspicion; suspicion is not knowledge and to find his wife and the deceased in the act of adultery might well, notwithstanding prior suspicion, engender ungovernable rage and constitute grave and sudden provocation sufficient to reduce the killing to manslaughter. *R. v. Yafesi Nabende* (1948), 15 E.A.C.A. 71 distinguished.

Conviction of murder set aside and conviction of manslaughter substituted with sectence of four years' imprisonment.

Cases referred to in judgment:

(1) *R. v. Jeck Jezelani* (1947), 14 E.A.C.A. 70.

(2) *R. v. Mkomba s/o Mkumbo* (1950), 17 E.A.C.A. 156.

(3) *R. v. Milward*, 23 Cr. App. R. 119.

(4) *R. v. Yafesi Nabende* (1948), 15 E.A.C.A. 71.

Judgment

Sir Kenneth O'Connor P, read the following judgment of the court**:** The appellant was convicted on January 12, 1960, by the High Court of Uganda of the murder, on November 18, 1959, of one Daniel Drazu. He appealed to this court.

On March 15, 1960, we allowed the appeal to the extent that we quashed the conviction of murder and the death sentence and substituted a conviction of manslaughter and a sentence of four years' imprisonment. We now give our reasons –

We take the following statement of the facts from the judgment of the learned judge –

> "This man is charged that on November 18, 1959, at Kasenene Village, Bunyoro District, he murdered Daniel Drazu contrary to s. 183 of the Penal Code.
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> "The accused did kill Daniel on the evening of 18 November with a very heavy stick after a scuffle on the floor of his first wife's house. Accused, after having once been separated from Daniel, struck him on the head with a stick which has been produced, broke his skull and caused laceration of the brain on the right side. There were linear cracks on the left side and in the centre, all caused by the one blow, which must have been delivered with very great force. The accused had minor injuries, a bruise on the back of right hand and on the front of both knees, and is apparently normal.
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> "It is necessary to examine the relationship of the parties. About January 1959, the deceased came to stay with his step-brother, the accused, to help him on the shamba. Accused has two wives by native custom, one Agonyaro, who has been pregnant since about August 1959 and Ruta, a younger woman, who has only been married to the accused about a year. It is quite clear that rightly or wrongly accused did suspect Daniel of making love to his elder wife and indeed that he had made her pregnant. She had borne him no child during the eight years of their marriage and his suspicion may have been an honest one. He wanted Daniel to leave the compound and therefore on November 15, three days before the killing, he called a kind of family council. Although the witnesses were unintelligent as to what happened at that council, I am quite satisfied that accused did allege that Daniel had made his wife pregnant and that he wanted the family council to tell Daniel to leave. Daniel denied the allegation; and in the end the family council took no step but advised the accused to bring a case. This made the accused angry and on that same day he said – 'If I catch my wife and Daniel together again I will kill either her or him'. On the 18th, accused had been away all the afternoon to Nyantonzi village to try to arrange a lorry to fetch his tobacco for sale. It is reasonably clear that when he returned he at once went into Ruta's house: the deceased was also then there. Deceased left that house and went to Agonyaro's house in the same compound, accused followed him there after a short interval, and after a struggle killed him with a stick.
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> "From the first opportunity, that is to say, in his statement to the police, when he was charged with murder and cautioned, accused said 'I found him lying with my wife' meaning that Daniel was having sexual intercourse with her. But the whole of his statement to the police should be considered –
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> > 'I killed my brother Daniel. We are from the same father. He started making love with my wife in the seventh month. I reported this to Eliaba Nguunzi, Matatia Kalia and Sadraka. I cohabited with her for eight years. No child. I had no chance to catch him before. I caught him on the eighteenth day of the eleventh month in the year fifty-nine. I found

> him lying with my wife. I caught him and raised alarm three times. I threw him to the ground. He threw me to the ground. He wanted to run. I struck him with a stick. I struck him to death. I said to myself: as I had killed somebody I should go to the police. They should not arrest me. I ran of my own accord. I reported to the Mutongole chiefs of Kasenene and Nyantonzi. I said Kezekia should take me in his car to the police station . . .'
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> "The cases to which Mr. Maloney has referred me, establish the proposition that where a husband has prior knowledge that his wife has been committing adultery with some person and then later catches them in improper circumstances, that cannot amount to sudden provocation. I attach considerable importance to the words in his statement – 'I had no chance to catch him before'. When those words are considered with the threat uttered on November 15, – 'If I catch him again I will kill her or him' it seems clear to me that the circumstances of this case cannot amount to sudden provocation, even if he did in fact discover them having sexual intercourse or doing something slightly short of that. Even if he had lost his self-control he was separated from the deceased by the two witnesses who were called – Yoswa and Eliaba – but as one of the assessors put it he persisted in his attack on the deceased, went to get the stick and then broke deceased's skull with it."

The cases referred to by the learned judge are *R. v. Jeck Jezelani* (1) (1947), 14 E.A.C.A. 70; *R. v. Mkomba s/o Mkumbo* (2) (1950), 17 E.A.C.A. 156; *R. v. Milward* (3), 23 Cr. App R. 119; and *R. v. Yafesi Nabende* (4) (1948), 15 E.A.C.A. 71.

In *R. v. Jeck Jezelani* (1), the killing took place on the day following the discovery by the husband of the deceased's adultery with his wife, and the proximate cause of it was a statement by the wife that she wished to return to the deceased who had previously been her husband. This is not an authority on a killing done immediately on finding a wife in the act of adultery and is not, we think, of assistance in the present case. Neither, with respect, is *R. v. Mkomba s/o Mkumbo* (2). In that case the appellant did not find the wife of the deceased in the act of adultery. He arrived after the act had been committed. The killing was an act of punishment and was not done in the heat of passion.

Assuming the head-note to *R. v. Milward* (3), to be justified by the report (which seems doubtful), it is only to the effect that mere suspicion of adultery is not enough to reduce murder to manslaughter. In the present case the appellant has maintained throughout that he caught the deceased and his wife in the act and the judge does not negative this. It is upon that basis that the case must be judged.

Of the cases mentioned only *R. v. Yafesi Nabende* (4), bears any resemblance, on its facts, to the instant case. But in *Yafesi's* case (4), the husband had actual prior knowledge of his wife's adulterous association and went with others to a house at night where he knew that he would catch her and the deceased in an act of adultery, and, after a kind of trial, put the deceased to death. It was rightly held that the provocation in that case was not sudden and the killing premeditated.

In the present case the evidence did not extablish that the husband had actual prior knowledge of his wife's adultery: until the night in question it was no more than suspicion. The evidence is that at the family council to which the learned judge refers "the accused thought deceased was the father" of his wife's child . . ."accused said he suspected his wife and Daniel". Suspicion is not knowledge; and to find his wife and Daniel in an act of adultery might well, notwithstanding prior suspicion, engender ungovernable rage and constitute grave and sudden provocation sufficient to reduce the killing to manslaughter. It is to be noted

that the appellant had not taken a weapon with him. He fought Daniel unarmed and threw him down and then got a stick used for pounding maize which was lying in Agonyaro's house and struck him a single blow on the head fracturing the skull.

In our opinion, this was a case of manslaughter, not murder. The learned Director of Public Prosecutions, who appeared for the crown, did not support the conviction of murder and, as already stated, we set it aside and substituted a conviction of manslaughter and a sentence of imprisonment.

Conviction of murder set aside and conviction of manslaughter substituted with sentence of four years' imprisonment.

The appellant in person.

For the respondent:
The Attorney-General, Uganda
J. J. Dickie (Crown Counsel, Uganda)

Ntira s/o Magesa v R
[1960] 1 EA 149 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	22 February 1960
Case Number:	232/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Tanganyika – J. T. Williams, Resident Magistrate, exercising extended jurisdiction.

[1] Criminal law – Practice – Trial by magistrate exercising extended jurisdiction – Sentence of death requiring confirmation by High Court – Right of appeal direct from magistrate to Court of Appeal – Whether confirmation of conviction and sentence should be before or after disposal of appeal – Criminal Procedure Code (*Cap.* 20), *s.* 13, *s.* 15, *s.* 16, *s.* 17, *s.* 319, *s.* 325, *s.* 329 *and s.* 344 (*T.*).

Editor's Summary

The appellant was convicted of murder by a resident magistrate exercising extended jurisdiction under s. 13 of the Criminal Procedure Code. In accordance with s. 15 (1) the record of the trial was transmitted to a judge of the High Court for confirmation of the conviction and sentence, but as the appellant had in the meantime appealed to the Court of Appeal under s. 344 of the Code, the learned judge refused to make the order on the grounds that "where a memorandum of appeal has been forwarded by the prisoner . . . ,

no order in confirmation or revision should be made until the appeal is determined or withdrawn, for until then the matter is sub judice and no pronouncement on the merits should be made by any but the appellate tribunal in adjudication", and if he were to make an order in revision, the Court of Appeal might have no jurisdiction to entertain an appeal from it in view of s. 325 of the Code. On appeal

Held –

(i) the learned judge was wrong in refusing to consider whether an order in confirmation should be made and in doing so had failed to distinguish between cases in which appeal lies to the High Court and cases in which an appeal lies to the Court of Appeal. *Lobozi s/o Katabaro v. R.* (1956), 23 E.A.C.A. 583 distinguished.

(ii) it is clearly preferable that where an appeal lies to the High Court, a judge of the High Court should not exercise powers of confirmation until the time for appeal has elapsed or, if an appeal is lodged, the appeal has been heard; but in the case of any conviction in exercise of extended jurisdiction under s. 13 of the Code where an appeal lies, it is clearly wrong that a judge of the High Court should consider the question whether or not the conviction should stand after the matter had been dealt with by the appellate court, and practical considerations in such cases, therefore, require that the question of confirmation should be dealt with before the appeal is heard.

(iii) s. 17 of the Code clearly contemplates confirmation before appeal and the construction placed on the section by the learned judge was incorrect.

(iv) s. 325 of the Code has no application to an order made in confirmation under s. 15 (2) in view of the express provisions of s. 344.

(v) the proper practice under s. 15 of the Code was for the High Court to consider the question of confirmation before any appeal came to the Court of Appeal for, if the High Court decided that the conviction could not stand, that would be the end of the matter and the appeal would lapse.

Appeal dismissed.

Case referred to:

(1) *Lobozi s/o Katabaro v. R.* (1956), 23 E.A.C.A. 583.

Judgment

The following judgment was read by direction of the court:

This was an appeal from a conviction of murder, by the resident magistrate, Musoma, exercising extended jurisdiction under s. 13 of the Criminal Procedure Code (Cap. 20), (hereinafter referred to as the Code).

There were no merits in the appeal which we accordingly dismissed, but we undertook to give reasons in relation to a procedural matter which arose on the appeal.

As mentioned above, this was a conviction by a resident magistrate exercising extended jurisdiction under s. 13 of the Code. Sub-s. (1) of s. 15 of the Code provides as follows:

> "15(1) Every sentence of death, imprisonment exceeding two years, corporal punishment exceeding twelve strokes, or fine exceeding one thousand shillings imposed by a subordinate court exercising powers conferred upon it under s. 13 shall be subject to confirmation by the High Court, and, whenever such subordinate court imposes such a sentence, the record of the case, or a certified copy thereof, shall forthwith be transmitted to the High Court for confirmation; such sentence of death or corporal punishment shall not be carried out, and such fine shall not be levied, until the sentence has been confirmed."

Under sub-s. (2) of s. 15 the High Court is empowered to exercise the same powers in confirmation under the section as are conferred upon it in revision by Part X of the Code; such powers being, by virtue of s. 329, the same in the case of a conviction as may be exercised by the High Court on an appeal under s. 319, including power to order an acquittal. Section 344 of the Code confers a right of appeal to this court upon any person convicted by a subordinate court exercising extended powers by virtue of an order made

under s. 13. Section 16 of the Code provides:

> "16. When an accused person is sentenced to death by a subordinate court exercising powers conferred upon it under s. 13 the court shall forthwith inform him that he may appeal to the Court of Appeal for

> Eastern Africa by presenting a memorandum of appeal within thirty days of the date of the sentence to the subordinate court or to the officer in charge of the jail in which he is remanded for transmission to the deputy registrar of the said Court of Appeal."

In the instant case the learned judge to whom the record of the trial was transmitted in accordance with s. 15 (1) of the Code refused to make an order in confirmation pending the hearing of the appeal by this court, a memorandum of appeal having already at that stage been lodged by the appellant. The learned judge in an "Inspection Note" said:

> "On general principles I am of the opinion that where a memorandum of appeal has been forwarded by the prisoner, as has happened here, no order in confirmation or revision should be made until the appeal is determined or withdrawn, for until then the matter is sub-judice and no pronouncement on the merits should be made by any but the appellate tribunal in adjudication.
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> "This opinion is encouraged by the language of s. 17 of the Code, which provides that the confirmation judge shall 'as soon as may be' transmit the record to the Governor, where an appeal has either not been preferred or has been preferred and dismissed. This contemplates no intermediate step between confirmation and forwarding the record. If the sentence had to be confirmed before the appeal the confirming judge would hardly be the appropriate person to forward the record to the Governor.
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> "I derive still stronger encouragement from the language of Sir Robert Hamilton, C.J., quoted in *Lobozi s/o Katabaro v. R.* (1956), 23 E.A.C.A. 583, 585:
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> > 'The practice of this court hitherto has been to postpone making orders in confirmation or revision where notice of appeal has been given . . .' "

With great respect we thought the learned judge was wrong in refusing to consider whether an order in confirmation should be made, and before hearing the appeal we remitted the case to the High Court for consideration whether such an order should be made. In the event the sentence had been confirmed by the High Court when we heard the appeal.

We think that the learned judge, in reaching his conclusion, failed to distinguish between cases in which appeal lies to the High Court, and cases in which appeal lies to this court. He may well have been misled to some extent by the case to which he referred, *Lobozi s/o Katabaro v. R.* (1) (1956), 23 E.A.C.A. 583. That was a Tanganyika case. The judgment states, inter alia, that it was a "second appeal", that the sentences imposed by the magistrate's court were subject to confirmation under s. 15 of the Code, that the papers were laid before a judge of the High Court six days after notice of appeal had been given, that in exercise of the powers conferred by s. 15 (2) the sentences were enhanced, and that the appeal was subsequently considered by another judge of the High Court. The appeal to this court was against the decision of the judge who dealt with the appeal to the High Court. Apparently no point was raised on the appeal as to the propriety of the appeal having been lodged to the High Court in the first instance, and this court seems to have dealt with the case on the basis that this procedure was correct. Under the corresponding provisions of the Kenya law in force at that time the procedure would have been correct, the position there being that appeal from a subordinate court exercising extended jurisdiction lay to the High Court except in cases where the death sentence was passed, the appeal in such cases being

direct to this court. Section 344 of the Code, however, as already remarked, provides for appeal to this court by any person convicted either by the High Court or by a subordinate court exercising extended powers under s. 13. These provisions so far as they relate to a subordinate court had no counterpart in the Kenya Criminal Procedure Code. It would seem either that the reference to s. 15 of the Code is mistaken and should have been a reference to s. 7 and s. 11; or that the provisions of s. 344 of the Code were not brought to the attention of this court, and that the court, overlooking those provisions, accepted that the appeal to the High Court had been properly filed – that is, that this court dealt with the matter on the footing that the relevant law in Tanganyika was the same as in Kenya. This does not detract from the validity of the reasoning and conclusion of the court in *Lobozi's* case (1), but it must be borne in mind that they relate to cases where appeal lies to the High Court, e.g. cases falling under s. 7 of the Code. The difficulty that may arise in such cases is brought out in the following passage from the judgment in *Lobozi's* case (1) at p. 584:

> "Except in the case provided in sub-s. (5) of s. 329, the Code contains no prohibition against an order being made in revision during the pendency of an appeal. Nevertheless we think it a most undesirable practice that a revisional order enhancing sentence should be made before the period for giving notice of appeal has run out or, where such notice has been given, before the appeal has been heard and determined. A little reflection will show the disadvantages of such a practice. If the appeal subsequently comes on for hearing and determination by the judge who has made the revisional order (as may well happen in Mwanza or any other place where a single judge is stationed) it is clear that he has disqualified himself from hearing the appeal at least so far as it relates to the sentence. If the appeal comes before another judge or other judges of the same court he or they will be embarrassed, to say the least, if asked to interfere with the enhanced sentence, if indeed he or they have jurisdiction to do so."

In relation to such cases the court expressed the opinion that:

> ". . . save in cases where justice requires that an obviously improper conviction or illegal sentence be at once quashed or rectified, revisional powers should not be exercised before inquiry has been made whether an appeal has been or is likely to be lodged."

We fully agree with this view. It is clearly preferable that in a case in which appeal lies to the High Court, a judge of the High Court should not exercise powers of confirmation until the time for appeal has lapsed or, if an appeal is lodged, the appeal has been heard. These are practical considerations arising from the situation in such cases that the High Court would, in effect, be considering its own decision upon the appeal if confirmation has preceded the appeal.

Entirely different considerations apply in the case of a sentence of death passed by a subordinate court in Kenya and in the case of any conviction in exercise of extended jurisdiction under s. 13 of the Code in Tanganyika. In such cases the appeal is to this court, and confirmation by the High Court is, under s. 15 (1) essential before the sentence can be carried out. This court is not empowered to confirm the sentence in place of the High Court. The case therefore must go to the High Court for confirmation at some stage, except in a case where the appeal is allowed. But, as already pointed out, the High Court has power on confirmation to quash the conviction: that is if the matter goes to the High Court for confirmation after the appeal has been dismissed, the High Court still has power to order acquittal notwithstanding the dismissal of the appeal. It is clearly wrong that a judge of a High Court should be

required to consider the question whether or not the conviction should stand after the matter has been dealt with by this court. The practical considerations in a case where appeal lies to this court, therefore, require that the question of confirmation should be dealt with before the appeal is heard. As regards the first paragraph of the passage cited above from the learned judge's note, we can see no possible objection to a case under s. 15 of the Code being considered on confirmation by the High Court before the hearing of the appeal by this court. We can see very grave objection to the matter being reconsidered by the High Court after dismissal of the appeal by this court.

The learned judge referred to s. 17 of the Code and construed the section as contemplating "no intermediate step between confirmation and forwarding the record". With respect, we are unable to place this construction on the section. The material part of the section reads:

> "In every case where a sentence of death is confirmed by the High Court and no appeal against the sentence is preferred, or if preferred is dismissed, the judge confirming the sentence shall as soon as may be transmit the record of the case or a certified true copy thereof to the Governor together with a report . . ."

In our view this clearly contemplates confirmation before appeal, and states that the transmission of the record and report to the Governor is to be as soon as may be after the dismissal of the appeal, in a case where an appeal has been lodged.

The learned judge also suggested in his "Inspection Note" that if he

> "were to make an order in revision the Court of Appeal might have no jurisdiction to entertain an appeal from it (see s. 325 of the Criminal Procedure Code)."

That does not accord with the view expressed in *Lobozi's* case (1) where this court said:

> "We are disposed to agree with the view taken in both *Sironga's* and *Suleman Ahmed's* cases that an order confirming a sentence does not prevent consideration of the sentence in the course of an appeal. We think the same rule applies to an order confirming a conviction and we understand that this is the view generally taken and acted upon in the Superior Courts of the East African territories."

In any event s. 325 of the Code can have no application to an order made in confirmation under s. 15 (2) of the Code in view of the express provisions of s. 344, which provides, inter alia, for appeal against sentence, though leave is necessary for such an appeal.

We therefore think that the proper practice under s. 15 of the Code as it stands at present is for the High Court to consider the question of confirmation before the appeal comes to this court. Should the High Court decide that the conviction cannot stand, that will be an end of the matter and the appeal will lapse.

It may be noted that recent amendments to the corresponding section in the Kenya Criminal Procedure Ordinance have removed the necessity for confirmation in cases where an appeal to the Court of Appeal has been lodged.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
D. MacDonagh (Crown Counsel, Tanganyika)

C U Patel v S M and N M Patel
[1960] 1 EA 154 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	10 March 1960
Case Number:	96/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Tanganyika – Crawshaw, J.

[1] Arbitration – Practice – Award not filed in court – Whether proper procedure to set aside award is by suit or by petition – Arbitration Ordinance (*Cap.* 15), *s.* 2, *s.* 11 (2), *s.* 15 *and s.* 16 (*T.*) *– Arbitration Rules*, 1957, *r.* 3, *r.* 5, *r.* 7 *and r.* 8 (*T.*) *– Arbitration Act*, 1889, *s.* 11 (2) *– Act for determining differences by arbitration of* 1698 (9 *Will.* 3, *c.* 15).

Editor's Summary

In an action by the appellant to set aside an award which had not been filed in court the respondents took two preliminary objections, namely, that as the award of the arbitrators had not been filed no action could be taken on it and that the proper procedure was for the appellant to move the court by way of petition and not by instituting a suit. The trial judge while rejecting the first objection, upheld the second and accordingly dismissed the suit. On appeal counsel for the appellant submitted that in England prior to the enactment of legislation relating to arbitration the procedure to enforce or set aside an award was by action, that the procedure provided by statute was a summary procedure alternative to the procedure by action and that the position in Tanganyika was substantially the same as in England.

Held –

(i) while the summary procedure for enforcement of an award only applies to an award made on a written submission to arbitration, the provisions of s. 15 of the Arbitration Ordinance which relate to the setting aside of an award are not limited to awards on a written submission.

(ii) the power to set aside an award contained in s. 15 of the Ordinance is exclusive and an application to set aside an award in Tanganyika must be an application made under the Ordinance.

(iii) r. 5 of the Arbitration Rules applies to applications to set aside an award even though that award may not have been filed in court under the Ordinance.

Appeal dismissed.

Cases referred to in judgment:

(1) *Duff Development Co. Ltd. v. Government of Kelantan*, [1924] A.C. 797.

(2) *In re Boks & Co. and Peters, Rushton & Co. Ltd.*, [1919] 1 K.B. 491.

(3) *Heming v. Swinnerton*, 41 E.R. 872.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from a ruling and order, dated August 15, 1959, of the High Court of Tanganyika allowing a preliminary objection to a suit filed by the appellant, and dismissing the suit.

The appellant had at one time been in partnership with the first respondent. The partnership was dissolved in December, 1956, and thereafter disputes

arose between the appellant and the first respondent in relation to the partnership and to other matters. The disputes were referred to arbitration on a written submission. The arbitrators were the second respondent and one Abdulla Jivraj Bhojani. The arbitrators made an award on September 21, 1957, which was unfavourable to the appellant. The appellant filed a suit against the respondents praying that the award be set aside. The award has never been filed in court.

When the suit came on for hearing two preliminary objections were taken (1) that as the award had not been filed no action could be taken on it; and (2) that the proper procedure had not been followed in that the appellant should have moved the court by way of petition and not by instituting a suit.

As regards the first objection the learned judge held that a suit for enforcement or an application to set aside an award could be instituted notwithstanding the fact that the award had not been filed in court. There is no appeal against this decision.

The learned judge dealt with the second objection as follows:

> "It is agreed by the parties that the Second Schedule to the Civil Procedure Code does not apply as the reference to arbitration was not an order of the court. Mr. Lockhart-Smith maintains that the matter is therefore governed by the provisions of the Arbitration Ordinance, Cap. 15. Rule 5 of the Arbitration Rules, 1957, reads, 'Save as is otherwise provided all applications made under the Ordinance shall be made by way of petition'.
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> "Mr. Master has argued that he has the alternative of filing a suit if he so prefers, rather than take advantage of the more summary procedure in Cap. 15. Both he and Mr. Lockhart-Smith have long experience of legal practice in this territory and neither can recollect an instance where an application has been made by way of plaint to set aside an award, nor can I. This does not of course mean that it cannot be done. Mr. Master in support of his contention has referred me to Halsbury's Laws of England (3rd Edn.), Vol. 2, para. 113, and to the following cases: *Duff Development Co. v. Kelantan Government* [1924] A.C. 797; *In re Boks & Co. and Peters, Rushton & Co. Ltd.* [1919] 1 K.B. 491.
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> "With regard to the paragraph in Halsbury it is to be observed that it relates to the 'enforcement' of an award, and says in relation to an action for enforcement, 'In such an action if the defendant desires to set up that the award is bad because the arbitrator misconducted himself or the award was improperly procured, his proper course is to move in the action to set the award aside'. This was held to be the procedure in *Thorburn v. Barnes* (1867) L.R. 2 C.P. 384 which, be it noted, was prior to the Arbitration Act, 1889. A suit for enforcement is of course alternative to the more summary procedure under the Arbitration Act, but the procedure under the Act can only be used by leave of the court and, as is shown in the *Boks & Co*. case, the court will not always give its permission. Our equivalent s. 16 does not require leave of the court. The *Boks & Co.* and the *Duff Development Co.* cases relate to the enforcement of awards and are not I think relevant to the instant case, which is not seeking to enforce an award but to set it aside on the grounds inter alia of misconduct. I am not asked to decide whether under our law the enforcement of an award could be by suit, although from form No. 10 in Appendix "A" to the First Schedule of the Civil Procedure Code it would seem that such is contemplated, and for reasons given later I am of opinion that it could.
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> "I can find no authority however which recognises the right of a party to institute a suit to have an award remitted or set aside. Atkins'

> Encyclopaedia of Forms shows only procedure by motion. Russell on Arbitration (16th. Edn.), explains the alternative procedure for enforcement but under the heading 'Practice' for setting aside an award makes no mention of a suit. On p. 326 it says, 'An application to set aside an award must be, and an application to remit should normally be, made in the Queen's Bench Division to a single judge in court. The motion is entered in the special paper list. In the Chancery Division the application is made by motion in the ordinary way'. I do not however think it is necessary to look to the English authorities or practice, for our own is clearly laid down in r. 5 of the Arbitration Rules to which I have already referred. Mr. Master has referred to O. 7, r. 14, but it does not I think help him, for it merely describes the procedure in certain cases in filing a suit, and not when a suit may be filed.
>
> "As I see it, it is the difference in nature between the enforcement of an award and setting it aside which accounts for the difference in procedure. On consideration of the authorities Russell says at p. 273, 'The submission is an actual mutual promise to perform the award of the arbitrators. Thus non-performance of the award is a breach of the agreement under which the arbitration took place'. A suit for enforcement is a suit for breach of an agreement. An application to set aside an award is, on the other hand, more in the nature of an appeal to the court from a decision of a judicial tribunal, and a suit between parties is quite inappropriate. I must therefore allow the preliminary objection on this ground and I dismiss the suit."

The appeal is against this decision, the grounds of appeal which were argued being, in effect:

(*a*) that the learned judge was wrong in holding that a suit does not lie to set aside an award and that the appellant should have moved the court by way of petition; and

(*b*) alternatively, that the learned judge should have treated the plaint as a petition.

Before us Mr. Master for the appellant submitted that in England prior to the enactment of statutory provisions relating to arbitration the procedure to enforce or set aside an award was by action; that the procedure provided by statute was a summary procedure alternative to the procedure by action – *Duff Development Co. Ltd. v. Government of Kelantan* (1), [1924] A.C. 797 at p. 817 and p. 818; *In re Boks & Co. and Peters, Rushton & Co. Ltd.* (2), [1919] 1 K.B. 491 at p. 496; that though those cases related to the enforcement of an award, the principle applied equally to the setting aside of an award; and that the position in Tanganyika was substantially the same as in England.

I think there can be no doubt that the summary procedure to enforce an award provided by the Arbitration Ordinance (Cap. 15) (hereinafter referred to as the Ordinance) in Tanganyika is alternative to procedure by action for enforcement of an award. This is undoubtedly the case in England: *Duff Development Co. Ltd. v. Government of Kelantan* (1), Halsbury's Laws of England (3rd Edn.), Vol. 2, p. 51. It is true that in Tanganyika, under the relevant section of the Ordinance (s. 16), an award, on being filed in court in accordance with the provisions of the Ordinance, can be enforced as if it were a decree of the court; whereas in England an award can only be enforced as a judgment by leave of the High Court. However, the summary procedure provided in the Ordinance only applies where the award has been filed. Where there has been an oral submission to arbitration, the award cannot be filed (see s. 11 (2) and the definition of "submission" in s. 2 of the Ordinance), and in such case an action is the only available method of enforcing the award.

I agree with the learned trial judge, however, that the position is not necessarily the same as regards the setting aside of an award. It is to be noted that while the summary procedure for enforcement of an award only applies to an award made on a written submission to arbitration, the provisions of s. 15 of the Ordinance which relate to the setting aside of an award are not limited to awards on a written submission. Section 15 reads as follows:

> "15. Where an arbitrator or umpire has misconducted himself, or an arbitration or award has been improperly procured, the court may set aside the award."

This is substantially identical with s. 11 (2) of the Arbitration Act, 1889, as to which the following note appears in Halsbury's Laws of England (2nd Edn.), Vol. I at p. 674:

> "It is to be observed that whereas the statutory power of enforcing an award is confined to the cases where the award is an 'award on a submission' i.e. on a submission contained in a written agreement, the power to remit or set aside an award is given in all cases of reference to arbitration (per Bray, J., in *Forder v. Whittle*, April 18, 1907, unreported)."

A similar note appears in the Third Edition of Halsbury's Laws of England, Vol. 2 at p. 55.

This suggests that the statutory power to set aside an award is exclusive, and that accordingly any application to set aside an award must be an application made under the Ordinance. This view is supported by the decision in *Heming v. Swinnerton* (3), 41 E.R. 872. That was a decision on the "Act for determining differences by arbitration" of 1698 (9 Will.3, c. 15) which was subsequently repealed by the Arbitration Act, 1889. The relevant facts appear in the following extract from the report:

> "There being a suit pending in this court [i.e. the court of Chancery] between the plaintiff and defendant, they entered into an agreement, out of court, to refer all matters in difference between them in that suit to arbitration; and it was one of the terms of the agreement, that the reference, and the award to be made in pursuance of it, might, at the instance of either party, be made an order of this court.
>
> "After the award was delivered out, but before the submission had been made an order of the court, this bill was filed, alleging various defects in the award, and praying that it might be set aside, and that the defendant might be restrained by an injunction from proceeding to make the submission an order of the court."

After dealing with other points raised in the case, the Lord Chancellor said:

> "A third point was that, supposing the case to be within the statute, there was no reason why the jurisdiction to set aside the award should not be exercised in this form by bill: but it appears to me that the jurisdiction by bill is excluded by the statute; for it was evidently intended, if it is not done in express terms, to exclude any jurisdiction to interfere with the enforcement of an award, but that which is specially provided by the statute."

The text of the 1698 Act is not available to me, but if that Act excluded any jurisdiction to interfere with the enforcement of an award except that provided by the statute, the provisions of the 1889 Act for the remission or setting aside of an award must similarly be exclusive, the 1889 Act having repealed and replaced the 1698 Act. It may also be noted that, in Halsbury's Laws of England (3rd Edn.), Vol. 2, under the heading "Enforcement of the Award" which is at p. 50. there are sub-sections dealing with enforcement by way of

originating summons for leave to enforce, and enforcement by action. However, under the heading "Power of the court to remit or set aside the award" which is at p. 55, the only procedure mentioned for setting aside an award is by application to the court by motion.

I conclude therefore that the power to set aside an award contained in s. 15 of the Ordinance is exclusive, and that an application for setting aside an award in Tanganyika must be made under the Ordinance.

It remains to consider whether the Arbitration Rules, 1957 (hereinafter referred to as the Rules) apply to the award in the instant case, that award not having been filed in court. Rule 5 of the Rules provides:

> "5. Save as is otherwise provided, all applications made under the Ordinance shall be made by way of petition."

Rule 3 of the Rules, however, provides:

> "3. These rules shall apply to all awards filed under the Ordinance."

The question therefore arises whether, notwithstanding the general terms of r. 5, the Rules, and r. 5 in particular, apply only to applications relating to awards which have been filed under the Ordinance. I have come to the conclusion that this is not the case. Rule 3 provides, not merely that the Rules shall apply to awards filed under the Ordinance, but that they shall apply to "all" such awards. It will be remembered that enforcement of an award under the Ordinance is alternative to enforcement by action. It appears to me that the object of r.3 is to make procedure under the Ordinance and in accordance with the Rules exclusive once the award has been filed. I derive support for this view from the fact that r. 7 and r. 8 of the Rules clearly relate, inter alia, to applications before an award has been made and so cannot in terms apply to "awards filed under the Ordinance". Accordingly, I think that r. 5 of the Rules does apply to applications to set aside an award even though that award may not have been filed in court under the Ordinance.

For the reasons I have given I agree with the conclusion reached by the learned trial judge as to the proper procedure that ought to have been followed by the appellants for the purpose of setting aside the award. It was argued, however, that the learned trial judge, having reached the conclusion that the proper procedure was by way of petition, ought to have treated the plaint as a petition. It does not appear from the record that any application was made to the learned trial judge to treat the plaint as a petition, and in the circumstances I am not prepared to say that he ought to have done so, even if he had the power to do so.

I would accordingly dismiss the appeal with costs. If, as is suggested in the note of the argument in the High Court, the relevant period of limitation is three years from the date of the award, which is stated in the plaint to be September 21, 1957, it is still open to the appellant to petition the court to set aside the award.

Sir Kenneth O'Connor P: I agree. The appeal will be dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:
K. A. Master, *Q.C.*, and *J. B. Patel*, Dar-es-Salaam

For the respondents:
W. J. Lockhart-Smith, Dar-es-Salaam

Gabriel s/o Maholi v R
[1960] 1 EA 159 (CAN)

Division:	Court of Appeal at Nariobi
Date of judgment:	8 March 1960
Case Number:	15/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Windham JA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Tanganyika – Simmons, J.

[1] Criminal law – Murder – Onus of proof.

[2] Criminal law – Evidence – Murder – Child – Ability to understand nature of oath – Duty of court to record that child has sufficient intelligence and understands duty to tell truth – Oaths and Statutory Declarations Ordinance (*Cap.* 20), *s.* 19 (*K.*) – *Oaths and Statutory Declarations* (*Amendment*) *Ordinance*, 1954 (*K.*) – *Criminal Procedure Code*, *s.* 149 (3) (*U.*) – *Criminal Procedure Code* (*Amendment*) *Ordinance*, 1959 (*U.*) – *Indian Evidence Act*, 1872, *s.* 118.

Editor's Summary

At the trial of the appellant on a charge of murder material evidence was given by a child who was recorded by the trial judge as about nine years old. Whilst the trial judge satisfied himself and recorded that the child was sufficiently intelligent to give evidence he did not record that the child understood the difference between truth and falsehood. In his judgment convicting the appellant the trial judge stated that "the accused raises no defence to a powerful prima facie case" but later said that whatever the assessors' opinions, he would have had no reasonable doubt of the appellant's guilt.

Held –

(i) the court was satisfied that despite his reference to a prima facie case, the trial judge had applied the correct standard of proof and that his conclusion was fully justified by the evidence.

(ii) even in the absence of express statutory provision it is always the duty of the court to ascertain the competence of a child to give evidence; it is not sufficient to ascertain that a child has enough intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood; however,

(iii) in the instant case the conviction did not depend entirely on the evidence of the child and therefore the omission to ascertain whether the child understood the duty of speaking the truth did not

invalidate the conviction.

Appeal dismissed.

Cases referred to in judgment:

(1) *Wibiro alias Musa s/o Chamuliho v. R.*, [1960] E.A. 184 (C.A.).

(2) *Francis s/o Kagaruki v. R.*, E.A.C.A. Criminal Appeal No.1 of 1960 (unreported).

(3) *Erukana Kyakulagira v. Attorney-General of Uganda*, [1959] E.A. 152 (C.A.).

(4) *Nyasani s/o Bichana v. R.*, [1958] E.A. 190 (C.A.).

(5) *Kibangeny arap Kolil v. R.*, [1959] E.A. 92 (C.A.).

(6) *Oloo s/o Gai v. R.*, [1960] E.A. 86 (C.A.).

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant was on January 7, 1960, convicted of murder and sentenced to death by the High Court of Tanganyika sitting at Bukoba. On

the appeal to this court he did not appear and was not represented; but Crown counsel, who appeared for the respondent, though supporting the conviction, very properly drew our attention to certain aspects of the trial which could operate in favour of the appellant. After careful consideration of the matters raised we were of opinion that they were not such as to justify interference with the conviction, and we dismissed the appeal. We desire to comment shortly, however, on two aspects of the case. For this purpose it is not necessary to set out the facts.

In the first place the learned judge in the course of his judgment came close to misdirecting himself as to the onus of proof, when he stated that "the accused raises no credible defence to a powerful prima facie case". In two recent cases, *Wibiro alias Musa s/o Chamuliho v. R.* (1), [1960] E.A. 184 (C.A.), and *Francis s/o Kagaruki v. R.* (2), E.A.C.A. Criminal Appeal No. 1 of 1960 (unreported) this court has made it clear that a mere prima facie case is insufficient to support a conviction, which must be established beyond reasonable doubt. It is not necessary to repeat what was said in those cases. In the instant case, however, the learned judge in fact made it clear that he was satisfied of the guilt of the appellant beyond reasonable doubt. In the passage cited, he adds that the accused has not raised any reasonable doubt; and, towards the end of his judgment he says:

> "I am gratified to know that the assessors' opinions are the same as mine, but whatever theirs had been I could have been left in no reasonable doubt."

In the circumstances we were satisfied that, despite his reference to a prima facie case, the learned judge applied the correct standard of proof; we were further satisfied that his conclusion was fully justified by the evidence.

The second matter concerns the evidence given by a child, stated by the learned judge to be aged "about nine", who was an eye-witness of the murder. The learned judge's note of the proceedings before this child gave evidence is as follows:

> "Judge: I do not know my age. I live at Mukusunga. I am now (court) in Ngara. I came here at 2 o'clock (saa nane). I don't know what day of the week I came here. It was the day before yesterday. Question: How did you travel; did you walk? I came by motor-car. At my home I do work. I draw water. (Age about nine). Can give evidence."

In his judgment the learned judge comments:

> "Child was intelligent and unshaken and obviously describing something he had seen."

We are not aware of, and were informed by Crown counsel that there is not any provision in the Tanganyika law corresponding to s. 19 of the Kenya Oaths and Statutory Declarations Ordinance (Cap. 20) as amended by the Oaths and Statutory Declarations (Amendment) Ordinance, 1954, or s. 149 (3) of the Uganda Criminal Procedure Code (Cap. 24) as amended by the Criminal Procedure Code (Amendment) Ordinance, 1959, which permit the unsworn evidence of a child of tender years to be received

> "if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

Nevertheless we are of opinion that even in the absence of express statutory provision it is the duty of the court to ascertain not only that a child is of sufficient intelligence to justify the reception of the evidence, but also that the child understands the difference between truth and falsehood. In a Uganda

case which was decided before the enactment of the Criminal Procedure Code (Amendment) Ordinance, 1959 (*Erukana Kyakulagira v. Attorney-General of Uganda* (3), [1959] E.A. 152 (C.A.)) the learned president of this court said (at p. 155 of the report):

> "There is nothing in the record to show whether the learned judge did or did not consider the children, Nanteza and Monday Mukwaya, aged nine and seven respectively, to be worthy of credence, and there is no voir dire in respect of either of them. Neither child was sworn or affirmed. They may have been too young to understand the nature of an oath or affirmation. If an enquiry was made to ascertain this, there is nothing noted on the record. It seems that there is, as yet, no statutory provision in Uganda corresponding to s. 19 (1) of the Oaths and Statutory Declarations Ordinance (Cap. 20) of Kenya. It would seem very desirable that some such provision should be introduced. Notwithstanding that there may be no provision in Uganda dealing in detail with the evidence of children of tender years, it has been held in India under s. 118 of the Indian Evidence Act, corresponding to s. 116 of the Uganda Evidence Ordinance, that before a child of tender years is questioned, the court should test his capacity to understand and to give rational answers, and to understand the difference between truth and falsehood. Woodroffe and Amir Ali's Law of Evidence (9th Edn.) p. 920. This practice obtains in England also where it is a rule of considerable antiquity, and it should certainly be followed in Uganda."

Section 118 of the Indian Evidence Act is, of course, in force in Tanganyika and the above passage is equally applicable in that territory.

In the instant case the learned judge satisfied himself that the child tendered as a witness was sufficiently intelligent to give evidence, but did not, so far as appears from the record, satisfy himself that the child understood the difference between truth and falsehood. Such an omission could be fatal to a conviction in a case where the child's evidence was vital. We would refer to the judgments of this court in *Nyasani s/o Bichana v. R.* (4), [1958] E.A. 190 (C.A.), *Kibangeny arap Kolil v. R.* (5), [1959] E.A. 92 (C.A.) and *Oloo s/o Gai v. R.* (6), [1960] E.A. 86 (C.A.). The two latter cases refer to the omission of a trial court to ascertain that a child understands the nature of an oath before allowing the child to be sworn, but the principle is the same: the court's duty is to ascertain the child's competence to give evidence, either on oath or unsworn, before it receives the evidence. In the instant case the conviction did not depend entirely on the evidence of the child since there was another eye-witness of the murder, an adult, whose evidence was accepted. In the circumstances, we were of opinion that the omission to ascertain whether the child understood the duty of speaking the truth did not invalidate the conviction.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
D. MacDonagh (Crown Counsel, Tanganyika)

East African Leather Factory and Five others v Esmail Adam
[1960] 1 EA 162 (SCK)

Division: HM Supreme Court of Kenya at Nairobi

Date of judgment: 11 January 1960

Case Number: 46/1959

Before: Harley J

Sourced by: LawAfrica

[1] Rent Restriction – Landlord and tenant – Application by five tenants by single notice of motion for new tenancies – No evidence that the various existing tenancies commenced at same time or were of same terms – Whether misjoinder of parties – Whether proceedings under Landlord and Tenant (*Shops*) *Ordinance* 1956 *are a suit – Landlord and Tenant* (*Shops*) *Ordinance* 1956, *s.* 4, *s*. 8, *s*. 9, *s.* 10 (*K*.) *– Landlord and Tenant* (*Shops*) *Rules*, 1957, *r*. 7 (*K*.) *– Civil Procedure Ordinance* (*Cap*. 5), *s.* 89, *s.* 95, *s.* 97 *and s.* 100 (*K*.) *– Civil Procedure* (*Revised*) *Rules*, 1948, *O. I, r.* 1 (*K*.).

Editor's Summary

The appellants, who held separate tenancies, applied jointly to a resident magistrate for new tenancies under the Landlord and Tenant (Shops) Rules, 1957 by filing a single notice of motion. At the hearing the magistrate took the preliminary point that as there were in fact five different applicants and as there was nothing to indicate that their tenancies commenced at the same time or were on the same terms, they were different matters and therefore the appellants could not be joined within the terms of O. I, r. 1 of the Civil Procedure Rules. He also held that the proceedings were not a suit within O. I, and accordingly dismissed the motion. The appellants thereupon appealed and it was contended on their behalf that O.I was inapplicable to the case, that the magistrate was wrong in holding that there was a misjoinder of parties in the proceedings, and that he was wrong in dismissing the motion whether or not there was a misjoinder of parties.

Held –

(i) by virtue of r. 7 (3) of the Landlord and Tenant Rules, 1957, both the lower court and this court must treat the motion as a suit.

(ii) though in the instant case there might have been a misjoinder O. I, r. 9 must apply.

Appeal allowed. Judgment and decree set aside and case remitted to the resident magistrate's court for re-hearing.

Judgment

Harley J: The appellants herein appeal against the ruling of the learned magistrate dated July 20, 1959, by which the motion was dismissed whereby the appellants moved the court to fix the terms of new tenancies pursuant to s. 4 of the Landlord and Tenant (Shops) Ordinance, 1956. The grounds of this appeal are as follows:

1. That the learned magistrate was wrong in law and misdirected himself in holding that the proceedings were not a suit and that therefore O. I of the Civil Procedure Rules was inapplicable to the case.
2. That the learned magistrate was wrong in holding that there was a misjoinder of parties in the proceedings.
3. That the learned magistrate was wrong in dismissing the motion whether or not there was a misjoinder of parties.

I do not propose to rule on ground 2 of the memorandum. I am not prepared to hold that the learned resident magistrate was wrong in holding that there was a misjoinder of plaintiffs (appellants); such a decision depends to a great extent on considerations of fact. The Landlord and Tenant Ordinance certainly contemplates one instance of joinder (see s. 4 (4) (*c*)) which would not normally be permitted. Considering the terms and intention of the Ordinance generally, it may very well be argued, and perhaps correctly argued, where there are tenants of one landlord in one building, that a common question of law and fact normally arises, and that the tenants have a right to relief arising out of the same series of transaction. One of the reasons advanced by the learned resident magistrate for rejecting such argument was that the motion before him was not a suit within O. I, r. 1, of the Civil Procedure Rules.

This brings us to ground 1 of the memorandum of appeal.

With great respect to the learned resident magistrate I do not think that it was necessary to decide whether the motion before him was or was not a suit. Rule 7 (3) of the Landlord and Tenant Rules (L.N. 433 of 1957) in effect directs that a motion should be treated as if it were a suit. Therefore, in my view, the learned resident magistrate was wrong to hold that O. I of the Civil Procedure Rules was inapplicable to the motion. Both the lower court and this present court must treat the motion as a suit.

The final and most important point for determination is whether, supposing there was a misjoinder of parties, the learned resident magistrate was right in dismissing the motion, without apparently considering alternative courses. Reflection on this point entails a general appreciation of the Ordinance as well as of the Civil Procedure Rules. By s. 4 (1) of the Ordinance a tenant may apply for a new tenancy. Section 8 (1) makes the granting of a new tenancy mandatory subject to the provisions of the Ordinance. The tenant's time limit is governed by s. 8 (3):

> "No application under section 4 of this Ordinance for a new tenancy shall be entertained unless it is made not less than two nor more than four months after the giving of the landlord's notice under section 6 of this Ordinance."

Section 9 on top of s. 8 (1) makes it clear that the application for a new tenancy may only be opposed on grounds which indicate (generally speaking) that it would not be reasonable to grant such a tenancy. Section 10 again emphasises that a tenancy shall be refused only if the landlord is entitled to oppose it in accordance with s. 9. The whole object of the Ordinance is not to allow a tenant's claim to be defeated except for good reason.

Because a substantial claim is presented in such a way as to make it technically objectionable, is it to be out of hand and finally dismissed? The whole trend of the law is against dismissal on purely technical grounds. Moreover, is the result of such dismissal in the present case to be that all further consideration of the case on its merits is to be time-barred? Mr. J. J. Patel for the respondent has argued very ingeniously that at the present stage any amendment or filing of a fresh plaint cannot operate retrospectively – that it will constitute a new plaint filed out of time. I have considered the cases in the Code of Civil Procedure (Mulla) (12th Edn.), p. 493-495. I repeat that in the present case there may have been a misjoinder of plaintiffs; but in my view O. I, r. 9, must emphatically apply:

> "No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interest of the parties actually before it."

Accordingly I allow the appeal, set aside the judgment and decree and remit the case back to the lower court (to the same or to another resident magistrate) so as to enable directions to be given and for the case to be heard: (O. XLI, r. 21). The attention of the lower court is also drawn specifically to s. 89, s. 95, s. 97 and s. 100 of the Civil Procedure Ordinance.

Appeal allowed. Judgment and decree set aside and case remitted to the resident magistrate's court for re-hearing.

For the appellants:
H.P. Hearn, Nairobi

For the respondent:
J.J. & VM. Patel, Nairobi
J. J. Patel

Kamweli s/o Nguku v R
[1960] 1 EA 164 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 February 1960
Case Number:	229/1959
Before:	Forbes VP, Gould JA and Templeton J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Pelly Murphy, J.

[1] Criminal law – Evidence – Rape – Corroboration – Extra-judicial statements by co-accused – Indian Evidence Act, 1872, *s.* 17.

Editor's Summary

The appellant and two others were convicted by the Supreme Court of rape. In his summing up to the assessors, the trial judge said:

> "I pointed out to the assessors that, although the extra-judicial statements made by the 2nd and 3rd accused were corroborative, those statements had been retracted, and therefore corroboration of the contents of those statements was most desirable."

In his statement the second accused had said that he did have intercourse with the complainant but only because the appellant drew a knife and threatened to stab both him and the girl, and the third accused had said that at the point of a knife by which the appellant was threatening him, he lay on the girl and pretended to have intercourse but did not in fact do so. On appeal by the first accused from his conviction

Held –

(i) neither statement amounted to a confession of rape or of facts constituting that crime and therefore in neither case could it be considered against the appellant under s. 30 of the Indian Evidence Act.

(ii) had the strength of the case for the Crown been less than it was, the misdirection on the corroborative effect of the statements might have led to the quashing of the conviction; however, there was ample corroboration of the complainant's story quite apart from the statements and the court was satisfied that the misdirection had occasioned no miscarriage of justice.

Appeal dismissed.

Cases referred to in judgment:

(1) *Gopa and Others v. R.* (1953), 20 E.A.C.A. 318.

(2) *Swami v. R.*, [1939] 1 All E.R. 396.

The following judgment was read by direction of the court.

Judgment

The appellant was convicted by the Supreme Court of Kenya of the crime of rape. He appealed to this court against his conviction and sentence but when the appeal was called he said that he did not intend "to argue further with the Crown", but asked, in effect, for a reduction of sentence for reasons connected with the economic plight of his family. We dismissed the appeal both as against conviction and sentence, but as there was one aspect of the case which we felt called for comment, we indicated that we would give short reasons in writing.

The appellant was one of three men all of whom were charged with the offence of raping Peninah Wangoi, a girl whose age was found by the learned judge to be between eleven and fourteen years. The case for the Crown was, in outline, that the three men were in a motor-lorry driven by the appellant when they were requested by the complainant's father to give her a ride to her home. They promised to do so but instead, took her to a lonely and distant spot, where each of the accused committed the offence charged. This took place during the hours of darkness but the three men drove off leaving the complainant alone. She was seen by a passing lorry driver, to whom she made immediate complaint, and was taken to a police station.

The learned judge correctly directed the assessors and himself that it was dangerous to convict upon the uncorroborated evidence of the complainant and then went on to say:

> "I told them that the father's evidence was not corroboration of her evidence implicating the accused in the commission of the offence itself. If, however, corroboration were essential, which it is not – *Regina v. Adan Warsama*, Criminal Appeal 207 of 1957 (explaining *Njuguna v. R.* (1953), 20 E.A.C.A. 196) – in view of the denial of all three accused that they gave a lift to the girl, I would hold that the father's evidence is corroborative. I pointed out to the assessors that, although the extra-judicial statements made by the 2nd and 3rd accused were corroborative, those statements had been retracted, and therefore corroboration of the contents of those statements was most desirable. There is corroboration of the contents of those statements in the evidence of the girl and her father and in the evidence of Omar Mohamed (P.W.11). There is some small corroboration of the girl's evidence in the evidence of seminal stains on the clothing of all three accused. But in this case, even if there was no corroboration, having warned myself most strictly of the danger of acting on the evidence of the complainant alone, I would be, and am, fully satisfied that it is safe to accept and act upon her evidence that the three accused committed the offence with which they are charged."

What it is necessary to point out is that the statements of the second and third accused could not rightly have been considered as corroboration of the case against the appellant, whether or not they had been retracted. In order that a statement made by one of two or more persons jointly charged may be taken into consideration against a co-accused under s. 30 of the Indian Evidence Act, which applies in this territory, the statement must amount to a confession. Although, as was held by this court in *Gopa and Others v. R.* (1) (1953), 20 E.A.C.A. 318, an extra-judicial statement containing self-exculpatory matter can still be a confession, it is not one unless it admits in terms either the offence,

or at least substantially all the facts which constitute the offence: *Swami v. R.* (2), [1939] 1 All E.R. 396. In the present case in his extra-judicial statement, Ngia, the third accused, asserted that, at the point of a knife by which the appellant was threatening him, he lay on the girl and pretended to have intercourse, but did not in fact do so. That is, of course, not a confession of rape or the facts constituting that crime. Mbila, the second accused, in his statement, said that he did have intercourse with the complainant but only because the appellant drew a knife and threatened to stab both him and the girl. Having regard to the provisions of s. 17 of the Penal Code of Kenya this statement does not amount to a confession, and therefore in neither case could the statement be considered against the appellant under s. 30 of the Indian Evidence Act. It is possible that the learned judge intended to refer, in the passage above quoted, to the corroborative effect of the statements as against their respective makers, but he does not say so in terms, and, in delivering his opinion, one of the three assessors said:

> "I rely on statements made by second and third accused as against first accused because in those statements they incriminate themselves."

Had the strength of the case for the Crown been less than it was, this misdirection might have led to the quashing of the conviction. There was however, what appeared to us ample corroboration of the complainant's story quite apart from the statements of the second and third appellants. As to the fact of rape there was strong medical evidence as to the condition of her private parts and her clothing, and that she had a bruised eye. The lorry driver who found the complainant said that she was trembling and shaking and unable to speak and that her face was swollen. The complainant's evidence was that she had been slapped in the face. As to the identification of the three accused, the complainant's father identified them at an identification parade as the three men who were on the lorry when the complainant was given a ride at about 7.30 or 8 p.m.; she was next found at about 9.20 p.m. some thirty-six miles from Nairobi complaining of the rape. The employer of the three accused said that they all worked together on one of his lorries; that on the evening in question they failed to report to him and he next saw them the following day at about 11 a.m. There were seminal stains on the clothing of each of the three, though the learned judge rightly did not attach undue importance to this circumstance.

Apart from the question of corroboration, the learned judge had a very high opinion of the reliability of the evidence of the complainant (who also identified the three accused at a parade) as can be seen from the last sentence in the passage from the judgment above quoted. For all of these reasons we were quite satisfied that the misdirection had occasioned no miscarriage of justice and were of opinion that the conviction and sentence should stand.

Appeal dismissed.

The appellant in person.

For the respondent:
The Attorney-General, Kenya
J. P. Webber (Deputy Public Prosecutor, Kenya)

Govindji Popatlal Madhavji v Nasser Alibhai and another
[1960] 1 EA 167 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	29 February 1960
Case Number:	284/1954
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Execution – Application for execution more than a year after decree – Application to registrar to dispense with notice to show cause – Whether registrar has jurisdiction to grant such dispensation – Civil Procedure (*Revised*) *Rules*, 1948, *O. XXI, r.* 18, *r.* 20, *r.* 32 *and O. XLII, r.* 3 (*K.*).

Editor's Summary

The first defendant moved the Supreme Court to set aside an order made by the deputy registrar at Mombasa attaching certain of his properties by the issue of prohibitory orders. He also sought an order rejecting the plaintiff's application for execution of the decree. The plaintiff had filed an application for execution more than a year after the date of the decree. Order XXI, r. 18 provides that the court "shall issue a notice to the person against whom execution is applied for, requiring him to show cause on a date to be fixed, why the decree should not be executed against him". Sub-r. 2 of r. 18 provides that the court may dispense with such notice if the issue of such notice would cause unreasonable delay or would defeat the ends of justice. The plaintiff prayed for and stated his grounds for such dispensation in an affidavit and the deputy registrar granted the application. In the Supreme Court the substantial points argued for the first defendant were that the deputy registrar had no jurisdiction to entertain the application and that his order was therefore a nullity, and that, even if he had had jurisdiction, his failure to make an order upon the plaintiff's application to dispense with the notice to show cause under O. XXI, r. 18 rendered his order a nullity. Counsel for the plaintiff while joining issue on the contentions put forward, submitted that the first defendant should have proceeded by way of appeal and not by motion.

Held –

(i) the discretion to dispense with the issue of a warrant without notice contained in r. 32 (1) of O. XXI is vested in the court and the deputy registrar in assuming such jurisdiction had acted ultra vires; his order was, therefore, a nullity.

(ii) as the order in question purported to be an order of the Supreme Court, it could by virtue of its inherent powers set it aside upon the motion of the aggrieved party. *Ali bin Khamis v. Salim bin Khamis Kirobe and Others* (1956), 23 E.A.C.A. 195 applied.

Order of the deputy registrar set aside.

Case referred to:

(1) *Ali bin Khamis v. Salim bin Khamis Kirobe and Others* (1956), 23 E.A.C.A. 195.

Judgment

Edmonds J: The applicant/first defendant moves the court to set aside an order made by the learned deputy registrar at Mombasa on November 20, 1959, attaching certain properties of the first defendant, by the issue of prohibitory orders. The applicant further seeks an order rejecting the plaintiff's application for execution of his decree.

It is not contested that the plaintiff/respondent's application for execution, which was filed on November 19, 1959, was filed more than one year after the date of the operative decree, and that consequently the provisions of O. XXI, r. 18 apply. By this rule it is provided that in such circumstances the court executing the decree

> "shall issue a notice to the person against whom execution is applied for, requiring him to show cause on a date to be fixed, why the decree should not be executed against him."

By sub-r. (2) of r. 18, however, it is provided that the court may dispense with such notice

> "if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice."

In his written application for execution of his decree, the plaintiff prayed for such dispensation upon the grounds appearing from his affidavit which was annexed to his application. The learned deputy registrar thereupon made the following order:

> "Upon reading the application for execution of decree filed on November 19, 1959 by the advocates for the decree-holder, it is ordered that
>
> 1. Let all 800 shares in Kaj Hansen (1948) Limited registered in the name of Nasser Alibhai, defendant No. 1, and described in the said application be attached by issue of prohibitory order.
> 2. Let all 100 shares in Coastal Saw Mill Limited registered in the name of Nasser Alibhai, defendant No. 1 and described in the said application be attached by issue of prohibitory order.
> 3. Let all the four immovable properties, described in the said application be attached by issue of prohibitory order.
> 4. Let the terms and conditions of sale of the said immovable properties be settled before me on December 5, 1959 at 8.45 a.m."

The contention of Mr. Chohan for the first defendant is that the deputy registrar had no jurisdiction to entertain the application and that his order is therefore a nullity; that, even if he had jurisdiction, his failure to make any order upon the plaintiff's application to dispense with the notice to show cause under O. XXI, r. 18 renders his order a nullity; and that the order is further rendered of no valid effect because it purports to have been made in execution of a decree of the Supreme Court which had been superseded by a decree of the Court of Appeal for Eastern Africa.

Mr. Khanna for the plaintiff joins issue with Mr. Chohan on all these contentions but takes as his initial argument the submission that the applicant's procedure is misconceived in that he should have proceeded by way of appeal from the deputy registrar's order, and not by motion.

Before dealing with this last submission, it is necessary to consider whether the learned deputy registrar's order is at fault and, if it is, the nature and extent of the fault. Order XLVIII sets out what is termed in the title to the Order the "Special Powers of Registrars" and the effect of that order is to delegate to registrars certain functions of the court, and r. 3 of that order sets out in clear and unambiguous terms the extent to which registrars may act in connection with execution proceedings. That rule provides that

> "formal orders for attachment and sale of property and for the issue of notices to show cause on applications for arrest and imprisonment in

> execution of a decree of the Supreme Court may be made by the registrar. . .”

It was Mr. Khanna’s contention that O. XLVIII, r. 3 should be interpreted liberally so as to allow the registrar to take any intermediate step leading up to execution, so that, as the order gives a registrar power to sign formal applications for execution, it may reasonably be assumed that he has the power to deal with the intermediary step of considering the question of dispensation of notice under r. 18 (1) and (2).

It may be, though I do not decide the matter, that there can be no objection to a registrar ordering the issue of notice to show cause for which provision is made in O. XXI, r. 18 (1). Order XLVIII, r. 3 empowers a registrar to order the issue of such a notice in respect of applications for arrest and imprisonment, but there his jurisdiction ends; the discretion as to the issue of a warrant without notice vests in the court – O. XXI, r. 32 (1). In the same way, I have no doubt whatever that under O. XXI, r. 18 (2) the discretion therein provided is one that may be exercised only by the court. As the plaintiff’s application for execution contained a prayer for the exercise of that discretion by the dispensation of notice, it was the court only which had jurisdiction in the matter; and the registrar in assuming jurisdiction, acted *ultra vires*.

It is then submitted by Mr. Khanna that, even if the registrar had no jurisdiction to dispense with notice, his order for execution should not be vacated as all that is necessary now is for this court to call upon the first defendant to show cause against execution. It is further Mr. Khanna’s contention that the order of the registrar was not in fact an order in execution but merely an order as a step towards the process of execution. I cannot accept these submissions as having any substance. The deputy registrar has purported to make an order attaching the first defendant’s property by the issue of prohibitory orders, and by ordering a date upon which the terms and conditions of sale are to be settled before him. This is clearly all part of the “process for execution” to which O. XXI, r. 20 relates, and a necessary *preliminary* to those orders was a consideration of the question of notice to show cause or dispensation thereof. If the court were now to consider the prayer for dispensation, it might not accede to the prayer, in which case the registrar’s order would be of no effect. It is quite clear to me that the order of the registrar is a nullity for want of jurisdiction.

I will now consider Mr. Khanna’s submission that the applicant’s proper procedure was by way of appeal, and not by motion to this court, and I think I need do no more than quote the following extract from the judgment of Briggs, J.A., in *Ali bin Khamis v. Salim bin Khamis Kirobe & Others* (1) (1956), 23 E.A.C.A. 195 at 199:

> “On the appeal to us Mr. Khanna relied on *Craig v. Kanseen*, (1943) 1 A.E.R. 108, as showing that where an order is improperly made without serving a person known to be affected by it and having a statutory right to be served before it can be made, the order is a nullity in the sense that it must be set aside *ex debito justitiae*, and that in cases of nullity procedure is unimportant, since the court has inherent jurisdiction to set aside its own order. I accept these principles, as laid down by Lord Greene, M.R., at p. 113.
>
> “Those cases appear to me to establish that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. So far as the procedure for having it set aside is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order; and that an appeal from the order is not necessary. I say nothing on the question whether an appeal from

> the order, assuming that the appeal is made in proper time, would not be competent.
>
> "The question we have to deal with is whether the admitted failure to serve the summons upon which the order in this case was based was a mere irregularity, or whether it was something worse, which would give the defendant the right to have the order set aside. In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation. Apart from proper *ex parte* proceedings, the idea that an order can validly be made against a man who has had no notification of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity, and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."
>
> "As regards the procedure adopted by the appellant this decision is apparently confirmed by *Malkarjun v. Narhari*, 27 I.A. 216, which seems to show that where an error is a mere irregularity an appeal may be necessary, but if it renders the order a nullity this is not the case."

As I have already intimated, the order of the registrar was *ultra vires* his jurisdiction and is consequently a nullity. His order purported to be an order of this court and this court may in its inherent powers, upon the motion of the party aggrieved, set aside what in effect purported to be its own order.

It is necessary to deal briefly with a further submission by Mr. Chohan, namely, that the application for execution should be rejected as it seeks to obtain execution upon a decree of this court which has been superseded by a decree of the Court of Appeal for Eastern Africa. I do not think that a decision on that issue falls to be considered in the application presently before the court. I am concerned now only with the order made by the learned deputy registrar. I have ruled that his order is a nullity and must be set aside. That has the effect of leaving the application for execution still to be dealt with by me in Chambers should the plaintiff decide to pursue it.

The order of the learned deputy registrar of November 20, 1959 is accordingly set aside. The application by the first defendant thus succeeds and he will have all costs thrown away consequent upon this order.

Order of the deputy registrar set aside.

For the applicant/first defendant:
Doshi & Chohan, Mombasa
K. K. Chohan

For the respondent:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

Ali Bin Hassan alias Ali Ngwengwe v R
[1960] 1 EA 171 (HCZ)

Division: HM High Court of Zanzibar at Zanzibar

Date of judgment: 2 January 1960

Case Number: 63/1959

Before: Horsfall J

Sourced by: LawAfrica

[1] Criminal law – Evidence – Character of accused – Accused conducting own defence – Character first put in issue by accused – Cross-examination later as to bad character and convictions – Miscarriage of justice – Evidence Decree (*Cap.* 10), *s.* 167 (*Z.*) – *Criminal Procedure Code*, *s.* 151 (*f*) (*Z.*).

Editor's Summary

The appellant was convicted by a magistrate of aiding a prisoner to escape contrary to s. 114 (*a*) of the Penal Decree and of obstructing a police officer in the due execution of his duty contrary to s. 240 (*b*) of the Penal Decree. At his trial the appellant conducted his own defence and in cross-examination of a police constable elicited the answer: "Yes, I know that you have recently come out of jail where you were sent for being found in possession of a big quantity of date wine". The appellant also gave evidence and said that his work was to sell date wine. Later he was cross-examined as to his bad character and convictions. On appeal it was contended for the appellant that the magistrate had wrongly admitted such evidence.

Held –

(i) the magistrate should not have permitted the appellant to cross-examine the police constable in the way he did.

(ii) from the first it was obvious that the appellant was bringing his bad character into issue and at that stage his bad character was inadmissible evidence; the magistrate should have stopped him and warned him of the danger he ran in persisting in this line of questioning.

(iii) the line of cross-examination adopted by the police prosecutor was indefensible.

(iv) the failure of the magistrate to observe the rules of evidence had resulted in a substantial miscarriage of justice in that the appellant did not have a fair trial and the court could not be sure that the magistrate would, on the evidence properly admitted, without doubt, have convicted.

Appeal allowed. Order for a re-trial by another magistrate.

Case referred to:

(1) *Stirland v. Director of Public Prosecutions*, [1944] 2 All E.R. 13; [1944] A.C.315.

(2) *Vashanjee Liladhar Dossani v. R.* (1946), 13 E.A.C.A. 150.

Judgment

Horsfall J: This is an appeal from the order of the learned resident magistrate, Zanzibar, dated November 16, 1959, when he convicted the appellant of aiding a prisoner to escape contrary to s. 114 (*a*) of the Penal Decree and of obstructing a police officer in the due execution of his duty contrary to s. 240 (*b*) of the Penal Decree and sentenced the appellant to six months' imprisonment on each count to run

consecutively.

The brief facts of the case for the prosecution were that P.W.2 a policeman, when passing the house of the appellant, saw a number of persons outside. Having reason to believe that they were drinking date wine he arrested one with a glass in his hand. While taking his prisoner to the police station the

appellant came up and begged P.W.2. to release his man. When P.W.2 refused appellant caught hold of him and so enabled the man to escape. The defence of the appellant was an alibi, a denial that he was present.

Before the magistrate the accused was unrepresented and conducted his own defence. He cross-examined the police constable. His first question to the constable received the answer:

> "Yes I know that your business is to sell date wine. I know that you have recently come out of jail where you were sent for being found in possession of a big quantity of date wine."

After the prosecution had closed its case the appellant elected to give evidence and stated that he had one witness to call. In examination-in-chief he stated: "My work is to sell date wine." The appellant was cross-examined by the police prosecutor at some little length. I agree with Mr. Lakha, who represented the appellant at this appeal, that the effect of that cross-examination can be summarised as having the following effect:

(*a*) that the appellant had committed perjury upon his trial in certain criminal proceedings which were not connected with the present charge;

(*b*) that the appellant was the type of person who would commit perjury in answer to a charge even if it were true;

(*c*) that the appellant had previous convictions; and

(*d*) that the appellant is a person of bad character.

Crown counsel, while agreeing that most of this evidence was wrongly admitted, asked me to uphold the conviction on the ground that the magistrate must inevitably have convicted on the admissible evidence. He referred to s. 167 of the Evidence Decree (Cap. 10). To quote Viscount Simon, L.C., in *Stirland v. Director of Public Prosecutions* (1), [1944] A.C. 315 at p. 321.

> ". . . the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."

I consider that the root of the errors in this case consists in the magistrate permitting the appellant to cross-examine the police constable in the way he did. From the very first question it was obvious that the appellant was bringing his bad character into issue. At this stage his bad character was inadmissible in evidence and could have only become relevant in the unlikely event that it was essential to the appellant's defence that he should bring out his bad character. Immediately the magistrate should have stopped the accused and enquired of him what was his proposed defence and have warned him of the danger he ran in persisting in this line of questioning. The cross-examination of the appellant by the police prosecutor was only defensible if it complied with s. 151 (*f*) of the Criminal Procedure Code. This section supplies an accused with a shield. It provides that he must not be required to answer any question tending to show that, he had committed or been convicted or been charged with any offence other than that wherewith he was then charged, or was a bad character. An accused is only permitted to throwaway this shield in the case of the three exceptions specified in the sub-section. His remark in examination-in-chief "My work is to sell date wine" was not sufficient to bring any of the exceptions into play. He was in fact giving evidence of his own bad character. He never gave evidence of his own good character, or questioned any prosecution witness with a view to establishing his own good character. The nature or conduct of his defence was not such as to involve imputations on the character

of any prosecution witness. I consider that this line of cross-examination was indefensible.

I consider that the failure of the magistrate to observe these rules has resulted in a substantial miscarriage of justice in that the appellant has not had a fair trial. To secure a fair trial is the whole purpose of the rules which the law has hedged around criminal trials. Where these rules have been disregarded in the way they have been in this trial I cannot be sure that the magistrate must on the evidence properly admitted without doubt have convicted.

In view of the course which I propose to take I do not intend to discuss the evidence as I do not wish to bias in any way the mind of the magistrate to whom this case will be sent for a re-trial. There was evidence on the record which if the trial had been properly conducted might have led to a conviction. (See *Vashanjee Liladhar Dossani v. R.* (2) (1946), 13 E.A.C.A. 150).

I direct that the findings and sentences appealed from be reversed and that the accused be tried on the same charge by another magistrate. The appellant is ordered to be released from custody forthwith and to enter into a bond in such sureties as may be necessary to appear to stand his re-trial.

If the re-trial should result in a conviction it would seem proper that the period which the appellant has been in custody since his conviction on November 16, 1959, should be taken in account in assessing any sentence which the magistrate may see fit to impose.

Appeal allowed. Order for a re-trial by another magistrate.

For the appellant:
Lakha & Co., Zanzibar
A. A. Lakha

For the respondent:
The Attorney-General, Zanzibar
B. A. G. Target (Acting Attorney-General, Zanzibar)

R v Eria Sebwato
[1960] 1 EA 174 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	21 March 1960
Case Number:	37/1960
Before:	Lyon J
Sourced by:	LawAfrica

[1] Criminal law – Evidence – Standard of proof – Case against accused dependent wholly upon identification – Defence of alibi – Prosecution evidence comprising only oral testimony of complainant

and his wife – Penal Code, s. 273 (*U.*) *– Evidence Ordinance, s.* 155 (*U.*).

Editor's Summary

The accused was charged with robbery with violence contra s. 273 of the Penal Code. It was alleged that he and seven others broke into the house of one, Senkoto, to whom the accused was well known and stole money. It was also alleged that accused used personal violence against Senkoto and his wife. The accused denied the offence and set up an alibi. The prosecution evidence consisted only of the oral testimony of the complainant and his wife. Reliance was also placed upon statements made by the wife very soon after the offence was committed, implicating the accused. There were discrepancies between the evidence of the complainant and that of his wife as to the type and colour of clothes the accused was alleged to be wearing at the time of the offence.

Held – where the evidence alleged to implicate an accused is entirely of identification, that evidence must be absolutely watertight to justify a conviction.

Accused acquitted.

Judgment

Lyon J: This man is charged with robbery with violence contra section 273 of the Penal Code, and the particulars are that on December 16, 1959, at Buvunya village, Mengo district, he stole Shs. 900/-, a gramophone, a wall clock and a box containing clothes etc. valued at Shs. 1,500/-, the property of Yokana Senkoto and at or immediately before or immediately after such theft he used personal violence to the said Yokana Senkoto and his wife Anjerina.

It is necessary to examine the relationship between the parties. The complainant, Yokana, has a coffee shamba of about 60 acres, and for about a year before the alleged offence he used to sell his coffee to the accused. Indeed, the evidence is that the accused was well known to the complainant, and his wife, for about five years. At an early stage Mr. Haque put his client's character in issue. He is in fact a man of good character with a regular job. The uncontradicted evidence is that for three years he had been buying coffee for an Indian business man and at times had as much as Shs. 10,000/- in his possession for that purpose. The first point I make of that is that the accused well knew that if he went to that house to commit an offence he would be recognised. And as the offence was carried out by about eight men the accused could have expected little profit. Mr. Haque did not dispute that a robbery with violence was committed on that night in the complainant's house, nor did he dispute that the property as set out in the indictment was stolen, nor did he dispute that violence was used both against the complainant and his wife.

The defence, from the beginning of this trial, has been a denial and an alibi. Both the assessors would convict this man, although it is significant that they asked for twenty-four hours to consider the case. They both gave reasoned opinions to which I pay full respect.

What is the prosecution case? It consists only of the oral testimony of the complainant and his wife. And there are statements made by the wife very soon

after the offence was committed. I have often observed that s. 155 of the Evidence Ordinance is badly drafted. The word "corroborate" in that section is incorrect. Statements made by a witness at or about the time of the offence can only be used to show consistency, and they would not be admissible in England, unless they were made in the presence of the accused. And as far as I am concerned they carry very little weight. The complainant swore that about midnight these men broke into his back door, that they approached his bed where he was lying with his wife, pulled off the blankets and one of them, as I understand it, almost immediately cut him on the head with a panga; and complainant's own evidence is that from that time onwards, he could not see because of the blood. He, however, did testify that it was the accused who cut him. He continued, that the robbers had four torches, two showing a green light and two a white light. The prosecution evidence is that, of the eight men, the accused was the only one without a hat, and that is the reasonable excuse that Mr. Kulubya offers why these witnesses were only able to identify one of the eight. One of the robbers had a gun and two shots were fired, probably to dissuade people from answering the alarm. The wife at first crawled under the bed, but was dragged out, pushed up against the wall and one of the men said: "If you don't produce the money we shall kill you." She therefore got Shs. 900/- from within the mattress and handed it over. Soon after that the men left, one of them firing another round from the gun in the courtyard. First on the scene was a woman, Phoebe, and, almost at the same time, Clovis, the chief, arrived. The wife Anjerina said to both of them:

> "Yokana has been killed. Several men came to our house and one of them was Sebwato."

That does show consistency on the part of that witness, but it does not strengthen the affirmative value of her evidence. A good deal later on, the complainant himself mentioned the name of Sebwato to a police officer. In the lower court the complainant's wife said she recognised the accused at a very early stage. In this court she said she did not recognise him until she was handing over the money. The complainant testified that the accused was wearing a black shirt and black trousers, while his wife testified that he was in a khaki shirt and khaki shorts, and, in case there was any misunderstanding in the translation of the word "khaki", she was asked to point to the colour in court and she, in fact, pointed to a police officer's tunic, which is khaki-coloured. I consider that a very serious discrepancy. Either the wife was guessing or she made a mistake. Perhaps she was guessing about the identification of this accused. On the other hand her statement to the chief was very soon after the offence, and I take that into account. That eight men did commit the offence charged is quite clear. The only question for this court is, was the accused one of them?

The identification in a case of this kind has to be absolutely watertight before a conviction can be had. The defence is an alibi. Accused elected to give evidence on oath. He swore he was at home all the night of December 15/16, and that he never left the house. His wife confirmed that to a certain extent, but another man – Amisi – who was also present in the house, according to the accused, was not called. The next morning the accused was at his regular coffee stall in the market; his house had been searched by a police officer early on that morning of the 16th, but nothing was found of the stolen property. On arrest, and before the learned resident magistrate, accused said nothing, which has often been held ought not to be held against him – he is perfectly entitled to say nothing. That this accused, well known to the complainant, should go with seven other men to commit an organised robbery in a house where he was well known seems to me to be inexplicable. He must have known he was bound to be recognised, and that, in my view, casts doubt on the evidence of the complainant and his wife. I have reconsidered the opinions of the

assessors over the week-end; and I understand the reasons they gave. In fact I have been very anxious over this case since the last hearing; and that alone shows that I have some doubt in my mind; and it is a substantial doubt. The onus of proof in a case of this kind is very strict. I am not completely satisfied with the identification of this accused and he is therefore acquitted and will be released.

Accused acquitted.

For the Crown:
The Attorney-General, Uganda
S. K. Kulubya (Crown Counsel, Uganda)

For the accused:
Z. Haque, Kampala.

R v Aramanzani Muwanga
[1960] 1 EA 176 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	18 February 1960
Case Number:	4/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Prisoner released on licence – Subsequent conviction for breach of conditions of licence – Conviction on evidence applicable to a different offence – Whether conviction lawful – Prisons Ordinance (*Cap.* 59) *s.* 86 *and s.* 88 (*U.*) *– Prisons Ordinance* 1958, *s.* 77 (*U.*) *– Penal Code, s.* 78 (*U.*).

Editor's Summary

M.had been sentenced to 8 years' imprisonment for robbery on October 31, 1952, and on March 1, 1958, was released on a licence which expired on December 15, 1959. Under s. 86 (*b*) of the Prisons Ordinance (Cap. 59) M. had undertaken to abstain from any violation of the law. On November 13, 1959, M. was convicted of corruption contra s. 78 (2) of the Penal Code and was committed to prison for one month in default of payment of a fine of Shs. 200/-. On December 29, 1959, a magistrate sentenced M. to three months' imprisonment for breach of a condition of his licence, the breach relied on being the conviction of corruption, and also ordered that his licence be forfeited. Section 88 of the Prisons Ordinance provides a penalty (1) if the licence holder is guilty of an offence against an Ordinance and (2) if he fails to comply with the conditions of his licence by any act that is not in itself punishable in any law in force. On July 1, 1958, a new Prisons Ordinance came into force repealing Cap. 59. On representations from

the senior superintendent of Luzira prison questioning the legality of the sentence of three months' imprisonment.

Held –

(i) the date of the breach of the condition of the licence, which was before the licence expired, was the material date and not December 29, 1959, when the accused was sentenced;

(ii) the particulars of the offence with which the accused was charged fell under the second limb of s. 88 of the Prisons Ordinance whereas the evidence fell under the first limb;

(iii) there was nothing in the saving provisions of the Prisons Ordinance 1958 which saved licences issued under the former Ordinance (Cap. 59).

(iv) a prisoner released under the old Ordinance could not have his licence forfeited under it for breach of a condition committed after July 1, 1958 because, the Ordinance had by then been repealed, whilst the new Ordinance did not apply.

Conviction and sentence set aside.

Judgment

Sheridan J: This matter has come before the court as the result of a representation by the senior superintendent of Luzira prison questioning the legality of a sentence of three months' imprisonment with hard

labour which was passed on Aramanzani Muwanga on December 29, 1959, by a resident magistrate, Kampala, for breach of conditions of a licence contra s. 86 (*b*) and s. 88 of the Prisons Ordinance (Cap. 59). An order was also made for the licence to be forfeited.

These are the facts. On October 31, 1952, Muwanga was sentenced to eight years' imprisonment with hard labour for robbery. On March 1, 1958, he was released on licence to be at large after serving over five years of his sentence. The licence was due to expire on December 15, 1959. Under s. 86 (*b*) of the Ordinance Muwanga undertook to abstain from any violation of the law. On November 13, 1959, he was convicted on a charge of corruption of a public officer contra s. 78 (2) of the Penal Code and he was committed to prison for one month in default of payment of a fine of Shs. 200/-.

The query raised by the superintendent is that Muwanga's licence had already expired when he was sentenced for a breach of its conditions on December 29, 1959. The answer to that is that the material date is the date of the alleged breach of the condition of the licence which was November 13, 1959 – before the licence expired.

However there are two other grounds on which the conviction must be set aside. Section 88 of the Prisons Ordinance is in the following terms:

> "88. If the holder of a licence granted under the provisions of this Ordinance is guilty of any offence against any Ordinance or fails to comply with any of the conditions of such licence by any act that is not of itself punishable by any law in force, he shall be liable, on conviction before a magistrate, to imprisonment for a period not exceeding three months and to have his licence forfeited by the order of such magistrate."

In the instant case the breach of the condition relied on was the conviction of corruption of a public officer on November 13, 1959. The particulars alleged are that Muwanga failed "to comply with the conditions of his licence by violating the law". Section 88 provides a penalty in two sets of circumstances (1) if the licence holder is guilty of an offence against an Ordinance, as Muwanga was here when he violated s. 78 (2) of the Penal Code, (2) if he fails to comply with the conditions of his licence by any act that is not in itself punishable by any law in force. Here the particulars of offence fell under the second limb whereas the evidence fell under the first limb of the section and for that reason alone the conviction cannot be sustained.

Further the Prisons Ordinance was repealed by the Prisons Ordinance, 1958, which came into force on July 1, 1958. There is nothing in the saving provisions of the new Ordinance (s. 77) which saves licences issued under the old Ordinance. It is true that s. 77 (1) (*d*) provides that all prisoners subject to the provisions of that Ordinance shall be deemed to be subject to the provisions of the new Ordinance, but in s. 2 "prisoner" is defined as any person, whether convicted or not, under detention in any prison and a prisoner on licence such as Muwanga was not so detained on July 1, 1958. It follows that a prisoner who had been released under the old Ordinance cannot have his licence forfeited under it for a breach of conditions committed after July 1, 1958, because it has been repealed, nor under the new Ordinance because it does not apply to him. For this reason also I set aside the conviction and sentence.

In conclusion I should say that this order is based on the views of the Acting Director of Public Prosecutions who did not seek to support the conviction.

Conviction and sentence set aside.

Okeny Kamu s/o Okok v R
[1960] 1 EA 178 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	18 March 1960
Case Number:	201/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Sheridan, J

[1] Criminal law – Provocation – Misdirection – Murder or manslaughter – Fight between father and son ending in killing of son – Assault by son on father in presence of family – Whether there was time for passions to cool – Penal Code, s. 187 *and s.* 188 (*U.*).

Editor's Summary

After drinking beer, the appellant and his son, the deceased, had a trivial quarrel, and in the fight that ensued the appellant hit the deceased with a panga. The deceased then took the panga from the appellant and knocked him down whereupon they were separated. The deceased then followed the appellant outside with a piece of burning wood and again knocked him down, when they were again separated. There was no clear evidence as to the original assailant, but from the medical and other evidence it was clear that when the two were separated for the second time, the deceased went away smarting from a panga blow, while the appellant went away smarting from some minor injuries and the humiliation of having been before his family chased and knocked down twice by his own son. As the appellant left the place he was heard to say to the deceased "why are you waiting for me?", which was followed by the appellant spearing the deceased to death. When the fatal spearing took place, the deceased was carrying a stick, while the appellant had three spears. In summing up to the assessors the trial judge said that the appellant's injuries at the earlier fight could not amount to legal provocation if they believed that he was the instigator of it, and relied for this proposition on the penultimate paragraph of s. 188 of the Penal Code. The appellant was accordingly found guilty of murder and sentenced to death. On appeal

Held –

(i) there was no evidence, nor was it ever suggested that the appellant's original blow with a panga was delivered with the deliberate intention of inviting the retaliation from the deceased so as to enable the appellant to say he was "provoked" by it.

(ii) the trial judge erred in holding and in directing the assessors that, assuming the appellant to have instigated the earlier fight, the injuries which the deceased then inflicted on him could not amount to legal provocation by reason of the penultimate paragraph of s. 188 of the Penal Code; and the trial judge ought to have considered, and to have directed the assessors to consider the ante-penultimate paragraph of s. 188 ibid.

(iii) the further acts of assault of the deceased took place when his life and person had ceased to be in peril and as they were not done in self-defence, they were unlawful acts; accordingly, neither the penultimate nor the ante-penultimate paragraph of s. 188 applied to them so as to prevent them being considered as possible acts of grave and sudden provocation.

(iv) the trial judge ought to have considered whether the latter part of the deceased's retaliatory assault was grave or sudden enough to constitute provocation for the purpose of s. 187 and the first paragraph of s. 188 of the Penal Code.

(v) the trial judge should have made a finding whether there had been beyond reasonable doubt sufficient cooling time between the two assaults.

(vi) having regard to all the circumstances of the case and to the unsatisfactory and conflicting evidence as to the lapse of time between the end of the deceased's retaliatory assault and his death, the court was unable to say that upon a proper direction the assessors might not have advised that the appellant, when he speared the deceased, was still acting in the heat of passion upon grave and sudden provocation, or that the trial judge might not at least have held that there was a reasonable doubt.

Conviction of murder set aside. Conviction of manslaughter substituted with sentence of six years' imprisonment.

Judgment

Windham JA, read the following judgment of the court: The appellant was convicted by the High Court of Uganda of the murder of his son by spearing him in the left breast. The appellant and the deceased were aged about 60 and 22 years respectively. They lived in the same compound. At his trial the appellant admitted having killed the deceased as alleged, and the only defence which was raised, or which on the evidence could be seriously raised, was that in killing him the appellant acted under grave and sudden provocation.

The events which led up to the killing, and which were found as facts by the learned judge and not disputed by the appellant, were the following. After a beer party the appellant and the deceased had a trivial quarrel, the appellant objecting to the deceased giving to the dog milk which might more profitably have been sold. A fight ensued. The description of this fight given by the appellant in his sworn evidence differed somewhat from the version of the prosecution eyewitness, P.W.2, the deceased's brother. The learned trial judge accepted the latter's evidence, which was in the following words:

> "The deceased poured out milk for the dog. The accused objected. They fought. The accused took a panga and hit the deceased with it on the forehead. The deceased took it from him and knocked him down. My mother separated them. The deceased followed him outside with a piece of burning wood. The deceased knocked him down again. They were again separated. The deceased was sent to Besweri's home. The accused remained at home."

Pausing here, we think that the learned trial judge misread this evidence, or at least erred in interpreting adversely to the appellant an ambiguity in it, when he said in his judgment that P.W.2 had testified that

> "the accused became the assailant when he struck the deceased on the forehead with a panga."

What the witness said was: "They fought. The accused took a panga and hit the deceased . . ." It would have been more satisfactory if, in order to clarify the point, the witness had been asked whether or not he meant that it was the appellant's panga blow which began the fight, and if not, then which of them did begin the fight. But on the record it is not clear who was the original assailant. What is clear from the medical and other evidence is that, when the two were separated for the second time, the deceased went away smarting from a panga blow on the forehead which had cut him down to the skull, while the appellant went away smarting not only from bruises and scratches on his forehead, shoulder, elbow and knees, and a contusion on the chest, but also from the humiliation of having been, before the eyes of his family, chased and knocked down twice by his own son.

After their separation, the sequence of events leading to and including the fatal spearing of the deceased by the appellant was described by the learned trial judge in the following passage from his judgment:

> "The accused, as he admits, was still smarting under the treatment which had been meted out to him by the deceased, and he expressed the view that it would be better for the deceased's safety if he slept somewhere other than at his home until his (the accused's) anger had abated. The accused was empty-handed. Shortly after he left he was heard to utter the words 'Why are you waiting for me?' and then the spearing occurred. The deceased was found lying wounded on a path between his own home and that of Besweri which would indicate that for some reason he had not gone straight home. Obadia went as far as to say that the accused threatened to kill the deceased if he were not removed from his home. Before he could warn the deceased he heard the alarm and when he answered it he saw the accused wrench a spear out of the deceased's body as he was holding two other spears and then run away with the three spears."

The learned trial judge found as a fact, and with his finding we see no reason to disagree, that, when the fatal spearing occurred, the deceased was carrying nothing more than a stick, while the appellant was carrying three spears. The only two pieces of conduct on the deceased's part, therefore, which could possibly be argued to have constituted grave and sudden provocation to the appellant would be (*a*) the fact that the deceased, instead of keeping out of his way, was lying in wait for him, as suggested by the appellant's words: "Why are you waiting for me?"; and (*b*) the humiliating assault which the appellant had received at the deceased's hands during the earlier fight. With regard to the lying in wait for him, we do not think that this alone, unaccompanied as it was by any physical assault or threat or even by any insulting words on the deceased's part, could be held to have afforded provocation grave enough to reduce the appellant's fatal spear thrust from murder to manslaughter. With regard to the earlier assault by the deceased, however, considered as possible provocation, we think that the learned trial judge misdirected both himself and the assessors on the point, and that had it not been for this misdirection the assessors might well have advised, and he might well have found, that there was provocation sufficient to reduce the appellant's crime to manslaughter.

The misdirection of the learned trial judge to which we particularly refer, and which must be considered as having been addressed not only to the assessors but to himself, is contained in the following passage from his judgment:

> "In summing up to the assessors I ruled that the accused's injuries at the earlier fight could not amount to legal provocation if they believed that he was the instigator of it: see the penultimate paragraph to s. 188 of the Penal Code."

But the penultimate paragraph of section 188 of the Penal Code, which explains the meaning of the term "provocation", can have no application to the facts of this case. It reads thus:

> "An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault."

Where an initial blow is given by an accused person to another, followed by a retaliatory assault by that other, followed in its turn by a lethal blow by the accused, then the above paragraph of s. 188, as its wording makes clear, will only prevent the retaliatory assault from being considered as provocation if

the accused delivered his initial blow with the deliberate intention of inviting the retaliation so as to be able to say that he was "provoked" by it. That was not so here. There was no evidence, nor was it ever suggested, that the appellant's original blow with a panga, even assuming it to have been the first act of assault by either side, was delivered with any such deliberate intention. Accordingly the learned trial judge erred in holding, and in directing the assessors, that, assuming the appellant to have instigated the earlier fight, the injuries which the deceased then inflicted on him could not amount to legal provocation by reason of the penultimate paragraph of section 188. The paragraph whose application he ought rather to have considered, and to have directed the assessors to consider, was not the penultimate but the ante-penultimate paragraph of that section, which reads: "A lawful act is not provocation to any person for an assault." Now as we have seen earlier, the learned trial judge misdirected himself in holding that the witness P.W.2 had testified that it was the appellant's blow with a panga which started the fight; for his evidence on the point was equivocal. But assuming that it was the panga blow which started the fight, the blow was certainly one which endangered life; and the deceased was therefore no doubt acting within his lawful rights when he retaliated by knocking the appellant down and disarming him, since he may fairly be presumed to have been acting in self-defence. Up to that point, then, the deceased's retaliation may well have been a "lawful act", and as such the appellant was prevented by the paragraph from relying on it as "provocation". But the right of selfdefence only lasts until the immediate danger of death or grievous harm has been removed. The further acts of assault on the deceased's part, namely his following the disarmed appellant with a piece of burning wood and again knocking him down, took place when his life and person had ceased to be in peril. They were thus not done in self-defence, and were therefore unlawful acts. Accordingly neither the penultimate nor the ante-penultimate paragraph of s. 188 applied to them so as to prevent their being considered as possible acts of grave and sudden provocation.

The learned trial judge ought, therefore, to have considered these matters and put them to the assessors, and ought then to have gone on to consider whether this latter part of the deceased's retaliatory assault was grave or sudden enough to constitute provocation for the purpose of s. 187 and the first paragraph of s. 188 of the Penal Code. It might well have been held grave enough. With regard to whether it was sudden enough, the question would arise whether sufficient time elapsed between the deceased's assault and the appellant's lethal spear thrust to have allowed the appellant's passion to cool. This question of cooling time was considered by the learned trial judge, but only in a perfunctory way, since he had held (wrongly, as we have seen) that the appellant was precluded from contending that he had been legally provoked at all by the deceased. For the same reason he did not leave the question of cooling time to the assessors for their consideration, as he ought to have done. He merely said, in his judgment:

> "If the accused had been able to say that he had been legally provoked at the earlier fight I would have been inclined to say that there had been sufficient cooling time."

This was very far from a finding, beyond a reasonable doubt, that there had been sufficient cooling time.

Having regard to all the circumstances of the case, and to the unsatisfactory and conflicting evidence as to the lapse of time between the end of the deceased's retaliatory assault and his death at the appellant's hands, we are unable to say that upon a proper direction the assessors might not have advised that the appellant, when he speared the deceased, was still acting in the heat of passion

upon grave and sudden provocation, or that the learned judge might not at least have held that there was a reasonable doubt on the point, in which case the Crown would not have proved the charge of murder beyond a reasonable doubt and the proper verdict would have been manslaughter.

For these reasons we allow the appeal, quash the conviction for murder, substitute for it a conviction for manslaughter, and sentence the appellant to imprisonment for a term of six years.

Conviction of murder set aside. Conviction of manslaughter substituted with sentence of six years' imprisonment.

The appellant in person.

For the respondent:
The Attorney-General, Uganda
J. J. Dickie (Crown Counsel, Uganda)

R v Hussein Bin Habib
[1960] 1 EA 182 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	28 March 1960
Case Number:	3/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Sentence greater than maximum prescribed by law – Penal Code, s. 162 (3) *and s.* 163 (1) (*U.*).

Editor's Summary

The accused had pleaded guilty to the charge of contravening s. 162 (3) of the Penal Code, and having also admitted five previous convictions for various offences, one of which was for a contravention of s. 162, was sentenced to nine months' imprisonment. Section 163 of the Penal Code provides for a sentence of six months' imprisonment on a second conviction for contravening s. 162, and a sentence of one year on a third or subsequent conviction. In revision,

Held – a sentence of nine months' imprisonment was greater than the maximum prescribed by law and accordingly the sentence would be reduced to four months' imprisonment.

Sentence reduced.

Judgment

Sir Audley Mckisack CJ: The accused was charged with a contravention of s. 162 (3) of the Penal Code, which provides as follows –

> "162. The following persons –
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>
>
> "(3) every person playing at any game of chance for money or money's worth in any public place;
>
>
>
> shall be deemed idle and disorderly persons, and shall be liable to imprisonment for three months or to a fine not exceeding Shs. 200 or to both such imprisonment and fine".

The accused pleaded guilty and was convicted on his plea. He admitted five previous convictions for various offences, one of which was a contravention of s. 162 (3) Penal Code above cited. He was sentenced to nine months' imprisonment.

Section 163 of the Penal Code sets out a list of persons who

> "shall be deemed to be a rogue and vagabond, and shall be guilty of a misdemeanour, and shall be liable for the first offence to imprisonment for six months and for every subsequent offence to imprisonment for one year."

The persons referred to in this section include –

> "(1) every person convicted of an offence under the last preceding section after having been previously convicted as an idle and disorderly person".

Why the draftsman of the Penal Code should have thought it necessary to use the expressions "shall be deemed to be an idle and disorderly person" and "shall be deemed to be a rogue and vagabond" is not clear to me. Perhaps it was out of affection for the Vagrancy Act, 1824, in which those expressions occur. I think they might well have been omitted, and the draftsman might well have contented himself with a clearer statement of the penalties.

Be that as it may, I think the effect of the two sections is that a person, like the accused in the instant case, who has already one conviction for contravening s. 162 (and has thus, by virtue of that conviction, been deemed to be an idle and disorderly person) may, on his second conviction for contravening that section (by virtue of which conviction he is now deemed to be a rogue and vagabond), be sentenced to imprisonment for a maximum of six months and, on a third or subsequent conviction to imprisonment for a maximum of one year. In each sush case the charge should (as was done in the instant case) recite a contravention of s. 162, not a contravention of s. 163 (1); then, on a second or subsequent conviction, evidence will be led of the previous conviction or convictions to enable the court to determine the penalty provided for under s. 163.

From what I have said it will be clear that the sentence of nine months' imprisonment was greater than the maximum prescribed by law, and I accordingly reduce the term to four months' imprisonment.

Sentence reduced.

The accused in person.

For the Crown:

The Attorney-General, Uganda

S. K. Kulubya (Crown Counsel, Uganda)

Kiriri Cotton Co Ltd v Ranchhoddas K Dewani

[1960] 1 EA 188 (PC)

Division:	Privy Council
Date of judgment:	14 December 1959
Case Number:	32/1958

Before:	Lord Denning, Lord Jenkins and Mr LMD de Silva
Sourced by:	LawAfrica
Appeal from	E.A.C.A. Civil Appeal No. 85 of 1957 on appeal from H.M. High Court of Uganda – Lyon, J.

[1] Rent Restriction – Premium – Recovery – Whether premium paid for lease recoverable – Rent Restriction Ordinance (*Cap.* 115) *s.* 2 *and s.* 3 (2) (*U.*).

Editor's Summary

The respondent sued for the recovery of a premium of Shs. 10,000/- paid by him to the appellant company for a sub-lease of a residential flat for a term of seven years and one day. The respondent claimed that the payment of the premium was illegal, having regard to s. 3 (2) of the Rent Restriction Ordinance, and that he was entitled to recover it on the ground that he was not in pari delicto with the appellant company. The High Court of Uganda gave judgment for the respondent, which was approved by the Court of Appeal for Eastern Africa. The appellant company appealed again, contending that the premium could not be recovered because both parties were in pari delicto, the payment was made voluntarily under no mistake of fact and without any extortion, oppression or imposition.

Held –

(i) the duty of observing the law is, by the Rent Restriction Ordinance, placed firmly on the shoulders of the landlord for the protection of the tenant and a tenant who pays money may be an accomplice or an aider and abettor but he can hardly be said to be in pari delicto with the landlord.

(ii) the parties were not in pari delicto and the respondent was entitled to recover the premium by the common law and the omission of a statutory remedy did not, in cases of this kind, exclude the remedy by money had and received.

Appeal dismissed. Order of the Court of Appeal affirmed.

Cases referred to in judgment:

(1) *R. v. Godinho* (1950), 17 E.A.C.A. 132.

(2) *Hastelow v. Jackson* (1828), 8 B. & C. 221; 108 E.R. 1026.

(3) *Taylor v. Bowers* (1876), 1 Q.B.D. 291.

(4) *Petherpermal Chetty v. Muniandi Servai and Others* (1908), 35 I.A. 98.

(5) *Herman v. Jeuchner* (1885), 15 Q.B.D. 561.

(6) *Lowry v. Bourdieu* (1780), 2 Doug. K.B. 468; 99 E.R. 299.

(7) *Harse v. Pearl Life Assurance Co*., [1904] 1 K.B. 558.

(8) *Whiteley v. R*. (1909), 26 T.L.R. 19.

(9) *Evanson v. Crooks and Others* (1911), 28 T.L.R. 123.

(10) *Sharp Brothers & Knight v. Chant*, [1917] 1 K.B. 771.

(11) *Rogers v. Ingham* (1876), 3 Ch. D. 351.

(12) *Browning v. Morris*, [1778] 2 Cowp. 790; 98 E.R. 1364.

(13) *Smith v. Bromley* (1760), 2 Doug. E.L. Cas. 696; 44 E.R. 441.

(14) *Moses v. Macferlan*, 2 *Burr* 1005; 97 E.R. 676.

(15) *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32; [1942] 2 All E.R. 122.

(16) *Johnson v. Youden*, [1950] 1 K.B. 544; [1950] 1 All E.R. 300.

(17) *Green v. Portsmouth Stadium Ltd*., [1953] 1 W.L.R. 487; [1953] 2 Q.B. 190; [1953] 2 All E.R. 102.

Judgment

Lord Denning: The plaintiff Ranchhoddas Keshavji Dewani is an Indian merchant living at Kampala in Uganda. The defendant is the Kiriri Cotton Company Limited which owns a block of flats in Salisbury Road, Kampala. The plaintiff claims the sum of Shs. 10,000/- as money received by the defendant company for the use of the plaintiff. The High Court of Uganda (Lyon, J.) gave judgment for the plaintiff for that amount with costs. The Court of Appeal for Eastern Africa (O'connor, P., Forbes, J.A., Keatinge, J.) affirmed the decision. The defendant company appeals to Her Majesty in Council.

The facts are simple. The plaintiff came to Kampala in March, 1953, and looked for somewhere to live. At the end of May, 1953, he took a flat in Salisbury Road but he had to pay Shs. 10,000/- premium. He now says that this premium was illegal because it was in contravention of the Rent Restriction Ordinance, and he claims the return of it.

The oral evidence is so short that their lordships set it out in full. Only the plaintiff gave evidence. He said:

> "I came to Kampala, Uganda, in 1953 – March. I lived with a brother for 1 1/2 months. I took a flat but I had to pay key money. I was searching for sometime.
>
> "I got a flat at Kololo but after two to three days I had to leave as I had trouble with a co-tenant. Then I got in touch with C. B. Patel, after having difficulty. I borrowed Shs. 10,000/- from the company as my brother was a director.
>
> "Cross-examination: I paid the money by borrowing the money."

It is apparent from this evidence, as the trial judge said, that during the negotiations for the flat the plaintiff was at a disadvantage. He was having difficulty in obtaining accommodation – and he only got the flat by paying a premium of Shs. 10,000/-, which he borrowed for the purpose. He took it under a sub-lease dated September 17, 1953. This was prepared by lawyers. It contained provisions whereby the

defendant company, in consideration of the sum of Shs. 10,000/- paid by the plaintiff by way of premium, sub-leased to him flat No. 1 on the first floor for residence only, having three rooms, one kitchen, one bathroom and one lavatory. The term was seven years and one day from May 31, 1953. The rent was Shs. 300/- a month payable monthly in advance. And there were several covenants on either side.

Their lordships desire to point out at once that neither party thought they were doing anything illegal. The lease was for more than seven years and it was thought that, on a lease for that length of time, there was nothing wrong in asking for a premium or receiving it.

This was an easy mistake to make as will be seen if one reads s. 3 (1) and s. 3 (2) of the Rent Restriction Ordinance:

> "3.(1) No owner or lessee of a dwelling-house or premises shall let or sub-let such dwelling-house or premises at a rent which exceeds the standard rent.
>
> "(2) Any person whether the owner of the property or not who in consideration of the letting or sub-letting of a dwelling-house or premises to a person asks for, solicits or receives any sum of money other than rent or any thing of value whether such asking, soliciting or receiving is made before or after the grant of a tenancy shall be guilty of an offence and liable to a fine not exceeding Shs. 10,000/- or imprisonment for a period not exceeding six months or to both such fine and imprisonment:
>
> "Provided that a person acting bona fide as an agent for either party to an intended tenancy agreement shall be entitled to a reasonable commission for his services:
>
> "And provided further that nothing in this section shall be deemed to make unlawful the charging of a purchase price or premium on the sale, grant, assignment or renewal of a long lease of premises where the term or unexpired term is seven years or more."

Anyone reading the last proviso to that section – without more – might well think that a premium could be charged on the lease of this flat for seven years and one day. He would readily assume that the word "premises" included a flat. But he would be wrong. For if he took pains to look back to the definition s. 2 he would find that in this Ordinance, the word "premises" refers only to business premises and not to residential flats at all. And so this proviso does not apply to this flat – because by the very terms of the sub-lease it was let "for residence only". Their lordships ought perhaps to set out the material words of the definition clause which produces this result – it says that:

> "'dwelling-house' means any building or part of a building let for human habitation as a separate dwelling.
>
> "'premises' means any building or part of a building let for business, trade or professional purpose or for the public service."

It was owing to the failure of the lawyers to refer to those definitions – or at any rate to appreciate the importance of them – that the mistake arose.

Their lordships also think it right to point out that there was no evidence to show whether the premium of Shs. 10,000/- was extortionate or not. Their lordships were told that no standard rent had been fixed for this flat because it was a new flat. It is obvious that if the standard rent were to be fixed at, say, Shs. 450/- a month for seven years, there would be nothing extortionate in a premium of Shs. 10,000/- down and a rent of Shs. 300/- a month thereafter: for it would come in the long run to much about the same.

Nevertheless, no matter whether the mistake was excusable or inexcusable, or the premium fair or extortionate, the fact remains that the landlord received a premium contrary to the provisions of the Ordinance: and the question is whether the tenant can recover it back – remembering always that there is nothing in the Uganda Ordinance, comparable to the English Acts, enabling a premium to be recovered back.

This omission in the Ordinance was considered to be decisive by the Court of Appeal for Eastern Africa in a case a few years ago called *R v. Godinho* (1) (1950), 17 E.A.C.A. 132. The court was then differently constituted from what it is now. The judges argued in this wise:

> "We do not know the reason but the Uganda Legislature in its wisdom has included in the Ordinance no provision comparable to s. 8 (2) of the Rent Restriction Act of 1920 . . . Without this statutory right of recovery, the giver of the illegal premium is left in the position of one, who although he himself has committed no substantive offence, has aided and abetted the commission of an offence by another. In these circumstances he could not go to a Civil Court with clean hands and the principle stated by Lord Ellenborough in *Langton v. Hughes* 1 M. & S. 593-596 would have application 'What is done in contravention of an Act of Parliament cannot be made the subject-matter of an action'."

In considering the validity of this reasoning, their lordships would point out that the observation of Lord Ellebnorough was made in a case where a party was seeking the aid of the court in order positively to enforce an illegal contract. It should be confined to cases of that description. His observation has no application to cases such as the present where a party is seeking to recover money paid or property transferred under an illegal transaction. In such cases the general principle was stated by Littledale, J., in *Hastelow v. Jackson* (2) (1828), 8 B. & C. 221 at p. 226:

> "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards."

In accordance with this principle, so long as the illegal transaction has not been fully executed and carried out, the courts have in many cases shown themselves ready to entertain a suit for recovery of the money paid or property transferred. These were cases in which it appeared to the court that, even though the transaction was illegal, nevertheless it was better to allow the plaintiff to resile from it before it was completed, and to award restitution to him rather than to allow the defendant to remain in possession of his illegal gains, see *Taylor v. Bowers* (3) (1876), 1 Q.B.D. 291 which was approved by their lordships' board in *Petherpermal Chetty v. Muniandi Servai and Others* (4) (1908), 35 I.A. 98. But so soon as the illegal transaction has been fully executed and carried out the courts will not entertain a suit for recovery, see *Herman v. Jeuchner* (5) (1885), 15 Q.B.D. 561, unless it appears that the parties were not in pari delicto (see *Lowry v. Bourdieu* (6) (1780), 2 Doug. K.B. 468 at p. 472 by Lord Mansfield).

It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the plaintiff must show that he was not in pari delicto with the defendant. That was indeed the way he put his claim in the pleadings.

After setting out the lease, the payment of the premium and the entry into occupation, the statement of claim proceeded simply to say:

> "By virtue of the provisions of sub-s. (2) of s. 3 of the Rent Restriction Ordinance, the receipt of the said sum of Shs. 10,000/- by the defendant from the plaintiff . . . was illegal but the plaintiff is entitled to recover the same since he (the plaintiff) was not in pari delicto with the defendant.
>
> "The plaintiff claims the sum of Shs. 10,000/- as money received by the defendant for the use of the plaintiff."

The issue thus becomes – Was the plaintiff in pari delicto with the defendant? Mr. Elwyn-Jones for the appellant said they were both in pari delicto. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True it was paid under a mistake of law, but that was a mistake common to them both. They were both equally supposed to know the law. They both equally mistook it and were thus in pari delicto. In support of this argument the appellant referred to such well-known cases as *Harse v. Pearl Life Assurance Co.* (7), [1904] 1 K.B. 558; *Whiteley v. R.* (8) (1909), 26 T.L.R. 19; *Evanson v. Crooks and Others* (9) (1911), 28 T.L.R. 123, and particularly to *Sharp Brothers & Knight v. Chant* (10), [1917] 1 K.B. 771.

Their lordships cannot accept this argument. It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. Ignorantia juris neminem excusat. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. James, L.J., pointed that out in *Rogers v. Ingham* (11) (1876), 3 Ch. D. 351 at p. 355. If there is something more in addition to a mistake of law – if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake – then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other – it being imposed on him specially for the protection of the other – then they are not in pari delicto and the money can be recovered back, see *Browning v. Morris* (12), [1778] 2 Cowp. 790 at p. 792 by Lord Mansfield. Likewise if the responsibility for the mistake lies more on the one than the other – because he has misled the other when he ought to know better – then again they are not in pari delicto and the money can be recovered back, see *Harse v. Pearl Life Assurance* (7), at p. 564 by Romer, L.J. These propositions are in full accord with the principles laid down by Lord Mansfield relating to the action for money had and received. Their lordships have in mind particularly his judgment in *Smith v. Bromley* (13) (1760), 2 Doug. E.L. Cas. 696 in notis which he delivered when he sat at Guildhall in April, 1760: and his celebrated judgment three or four weeks later, on May 19, 1760, in *Moses v. Macferlan* (14), 2 Burr 1005 when he sat in banco. Their lordships were referred to some cases thirty or forty years ago where disparaging remarks were made about the action for money had and received: but their lordships venture to suggest that these were made under a misunderstanding of its origin. It is not an action on contract or imputed contract. If it were, none such could be imputed here, as their lordships readily agree. It is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. This was explained by Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* (15), [1943] A.C. 32 at p. 62, p. 63 and p. 64. All the particular heads of money had and received, such as money paid under a mistake of fact, money paid under a consideration that has wholly failed, money paid by one who is not in pari delicto with the defendant, are only instances where the law says the money ought to be returned.

In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant "key-money". Section 3 (2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the

"person who asks for, solicits or receives any sum of money" but not on the person who submits to the demand and pays the money. It may be that the tenant who pays money is an accomplice or an aider and abettor (see *Johnson v. Youden* (16), [1950] 1 K.B. 544 and s. 3 of the Rent Restriction (Amendment) Ordinance, 1954) but he can hardly be said to be in pari delicto with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to "jump the queue", or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.

Seeing then that the parties are not in pari delicto, the tenant is entitled to recover the premium by the common law: and it is not necessary to find a remedy given by the Ordinance, either expressly or by implication. The omission of a statutory remedy does not, in cases of this kind, exclude the remedy by money had and received. That is amply shown by the numerous cases to which their lordships were referred, such as those arising under the statutes against usury, lotteries and gaming, in which there was no remedy given by the statute but nevertheless it was held that an action lay for money had and received. It was accepted, too, by Parker, J., (as he then was) in his considered judgment in *Green v. Portsmouth Stadium Ltd.* (17), [1953] 1 W.L.R. 487: and his decision was only reversed by the Court of Appeal [1953] 2 Q.B. 190 because they thought the statute there was of a different kind. It was not intended to protect book-makers from the demands of race-course owners but was rather for the regulation of race-courses. There was nothing in that case to show that the plaintiff was not in pari delicto with the defendants.

Their lordships find themselves in full agreement with the judgment of the High Court of Uganda and of the Court of Appeal for Eastern Africa and will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs.

Appeal dismissed. Order of the Court of Appeal affirmed.

For the appellant:
Hale, Ringrose & Murrow, London
F. Elwyn-Jones, Q.C., E. P. Wallis-Jones (both of the English Bar), and *C. B. Patel*

For the respondent:
A. F. and *R. W. Tweedie*, London
L. C. Scarman, Q.C., and *C. F. Denn* (both of the English Bar)

W J Tame Ltd v Zagoritis Estates Ltd
[1960] 1 EA 194 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 11 January 1960

Case Number: 50/1959

Before: Spry Ag J

Sourced by: LawAfrica

[1] Conflict of laws – Arbitration – Limitation – Law applicable to question of limitation – Proper law of contract Tanganyika law – Arbitrators resident and sitting in Kenya – Arbitration Ordinance (*Cap.* 15) (*T.*).

[2] Arbitration – Specific question of law submitted to arbitrators – Error of law on face of award – Application to set aside – Whether court empowered to set aside award.

Editor's Summary

A contract between the petitioner and the respondent for the sale of a sisa estate in Tanganyika contained an arbitration clause. Disputes having arisen between the parties they did not invoke the arbitration clause, but prepared a separate submission to arbitration which stated that it was deemed to incorporate the Tanganyika Arbitration Ordinance. One of the questions which the arbitrators, who were resident in Kenya, were asked to decide was whether a particular claim was time barred. The arbitration was held in Kenya, and after taking legal advice, which they were entitled to do, the arbitrators held that they were bound by the rules of procedure of the Kenya Courts, that limitation of actions is procedural and not substantive law and, therefore, the Kenya law of limitation applied. The award was filed both in the Supreme Court of Kenya and in the High Court of Tanganyika, and later the petitioner applied to the High Court of Tanganyika to set aside the award on the grounds inter alia that there was, on the face of the award, an error of law.

Held –

(i) although arbitrators normally follow the rules of procedure of the country in which they sit, they are not absolutely bound by them, provided they do not disregard the substance of justice.

(ii) it is open to the parties to an arbitration to determine in the submission the procedure to be followed and the reference to the Tanganyika Arbitration Ordinance in the submission indicated that the parties intended Tanganyika procedure to apply.

(iii) since the parties intended that the law and procedure of the arbitration should be Tanganyikan, the relevant law of limitation was that of Tanganyika and accordingly there was an error of law on the face of the award.

(iv) as the error was on a point of law specifically referred to the arbitrators, the court had no power on that account to set aside the award.

Petition dismissed.

Cases referred to in judgment:

(1) *Oakland Metal Co. Ltd. v. D. Benaim & Co. Ltd.*, [1953] 2 Q.B. 261; [1953] 2 All E.R. 650.

(2) *Tyerman v. Smith* (1856), 25 L.J. Q.B. 359.

(3) *N. V. "Vulcaan" v. A/S Mowinckells*, [1938] 2 All E.R. 152.

(4) *Hodgkinson v. Fernie* (1857), 3 C.B. (N.S.) 189.

(5) *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railway Co. of London Ltd.*, [1912] A.C. 673.

(6) *King v. Duveen*, [1913] 2 K.B. 32.

(7) *F. R. Absalom Ltd. v. Great Western* (*London*) *Garden Village Society*, [1933] A.C. 592.

Judgment

Spry Ag J: A contract between the parties for the sale of a sisal estate contained an arbitration clause. Disputes arose between the parties but instead of invoking the arbitration clause they prepared a separate submission to arbitration. The arbitrators named were both resident in Kenya, one in Nairobi and one in Mombasa. They held their proceedings in Mombasa and eventually made their award there. The award has been filed both in the Supreme Court of Kenya and in this court. I am now asked to set that award aside.

The petitioning company relies on four propositions, with each of which I will deal in turn. These are –

(i) that the award was bad as being out of time;

(ii) that the arbitrators misconducted themselves in referring to an advocate the question whether the law of Kenya or Tanganyika on the limitation of actions should be applied and in accepting his advice;

(iii) that there is on the face of the award an error of law; and

(iv) that such error of law is a ground for setting the award aside.

As regards the first of these propositions, I think it is clear that where a submission to arbitration specifies a date by which the award is to be made, the jurisdiction of the arbitrator ends on that date but this general principle has to be qualified in two respects. First, it is, I think, always open to the parties to extend the time by agreement and, secondly, the court can always extend it, either before or after it has expired.

Mr. Dodd, for the respondent company, did not at the hearing ask the court to extend the time, a discretionary power which the court might have exercised, following *Oakland Metal Co. Ltd. v. D. Benaim & Co. Ltd.* (1), [1953] 2 Q.B. 261. Instead he relied on the preamble to the award and on an affidavit by a director of the respondent company as evidence that the time was in fact extended by the parties.

The award, which is dated May 21, 1959, begins with a recital in which it is stated that the parties "have mutually agreed to extend the time for making the award". The petition contains a statement that the time for making the award was extended by consent to February 28, 1959, and thus by implication denies that the time was extended beyond that date. No affidavit was filed in support of the petition. In the absence of any evidence to the contrary, I must and do presume the recital in the award to be true and that the time as extended by agreement had not expired when the award was made.

As I said earlier, an affidavit was put in on behalf of the respondent company. It is an inconclusive and unsatisfactory document but it does afford some slight confirmation that the time was so extended.

In this connection I should perhaps add that Mr. Dodd argued that nothing in the petition could be regarded as having any value as evidence and he suggested that the petition itself ought to have been verified in the manner required in the case of plaints. I agree with Mr. Dodd that the petition, which is not supported by affidavit, cannot be regarded as evidence, but I think with respect that he is wrong in saying that such petitions need verification. The contents of petitions are prescribed in the Arbitration Rules, 1957, and there is no suggestion in those rules that petitions need to be verified. (It may be noted that under the provisions of rule 12 a petition is, for the purpose of assessing fees, to be deemed to be a plaint and I think the clear inference is that a petition is not to be regarded as a plaint for any other

purpose).

Even if there was in fact no agreement to extend the time, I think the petitioning company is now estopped from denying it. I am strengthened in this opinion by the case of *Tyerman v. Smith* (2) (1856), 25 L.J. Q.B. 359. If the petitioning company considered that the arbitrators were delaying unduly or were neglecting their duties, its proper course was, I think, to apply to the court under s. 4 of the Arbitration Ordinance (Cap. 15) for leave to revoke its submission or, possibly, to apply to the court to remove the arbitrators on the ground of misconduct under s. 17. (There is in the Ordinance no express power to remove for failure to use all reasonable dispatch, as in s. 13 (3) of the English Arbitration Act, 1950). Far from taking any such action, the petitioning company never appears to have made any protest and appears to have co-operated throughout the proceedings and the award was actually filed in this court on the application of the petitioning company.

As regards the second proposition, Mr. Donaldson, for the petitioning company, conceded that the arbitrators had power to seek counsel's opinion on any matter before them, but he argued that the question whether the law of limitation of Kenya applied or that of Tanganyika was not a question that had been submitted to the arbitrators. I see no merit in this argument. The material parts of the submission are as follows –

> "All questions and matters in difference between the parties hereto with regard to the following matters, that is to say –
>
> A. Rails
>
>
>
> 8. Is the claim, if any, barred by limitation?
>
>
>
> are hereby referred
>
>
>
> 4.....The arbitrators shall be at liberty to take the opinion of any counsel and to act upon the opinion so taken"

I am not aware precisely what question was put to counsel. It is clear from the opinion given by Mr. Cleasby, the advocate whose advice was sought, that he was asked if the particular claim was time-barred. Whether he was asked which law applied or whether he considered this point of his own motion is not clear but it is, in my opinion, immaterial. It seems to me quite clear that no one could answer the question whether the claim was time-barred except in relation to a particular body of law and that if there was any doubt which body of law applied, it was an essential preliminary question to be determined. I have no hesitation therefore in disposing of the second proposition by saying that there was no misconduct on the part of the arbitrators in seeking and adopting the advice of counsel on the question of limitation, including the question of the law to be applied.

The third proposition is that there is on the face of the award an error of law, in that the arbitrators held that the law of limitation of Kenya applied in relation to part of the subject matter of the submission. The relevant part of the award reads as follows:

> "We are of the opinion and find
>
> (*a*) That according to law relating to limitation in force in Tanganyika the claim in respect of rails is time-barred.
>
> (*b*) That according to the law in force in Kenya the claim is not time-barred. We have referred the question of which law is applicable

> to a legal adviser whose opinion we accept and which opinion is annexed hereto and forms part of this award."

The opinion referred to was given by Mr. Cleasby, an advocate of Mombasa, and may be summed up as follows. The arbitrators were Kenya residents. At the time of making the submission, the parties did not consider where the proceedings were to take place but they later agreed that the proceedings should be and they were in fact held in Kenya. Consequently the arbitrators were subject to the jurisdiction of the Kenya court and Kenya rules both of evidence and of procedure applied. Questions of limitation would be governed by the lex fori and therefore the Kenya law of limitation applied.

Now, in the first place, if the parties to the submission had no clear idea of the place where the proceedings were to be held, no significance can be attached to the appointment of persons resident in Kenya. There was no necessity for the proceedings to have been held in Kenya. The arbitrators live more than three hundred miles apart from each other and it might well have been more convenient for them to have met and held their proceedings at the place where the property was situate rather than in Mombasa. In this connection, it is not irrelevant to note that there is a much freer interchange of people between Kenya and Tanganyika than is normal between separate countries.

Mr. Cleasby was clearly very much influenced by the case of N. V. "*Vulcaan*" *v. A/S Mowinckells* (3), [1938] 2 All E.R. 152 and I have heard much argument concerning it. I think, with respect, that perhaps too much importance has been attached to that case in these proceedings. In the first place the parties to that case chose to adopt arrangements for arbitration which would make them subject to English law for very good reasons, even though neither of the parties was resident in England and the contract was not to be performed there. The case is certainly not authority in my view for saying that the residence of arbitrators will necessarily determine the law of procedure to be followed. I find support for this view in the Comment on Rule 198, Sub-Rule 1 in Dicey's Conflict of Laws, (7th Edn.) at p. 1,061.

The present case can also be distinguished from the *Vulcaan* case in that in that case the submission provided that the arbitrators were to be persons resident in London, one to be named by each party: in the present case, the submission itself names the arbitrators, who were presumably chosen for their personal qualifications, and it may well be a matter of chance that they happen both to be resident in Kenya.

Again, the judgments in that case were concerned largely with the question whether the law of limitation should be applied in arbitration proceedings as suits. It was accepted that English law and procedure were to be applied and it was not suggested that there was any distinction between the proper law of the contract and the procedural law to be applied by the arbitrators. In the present case it is not disputed that the proper law of the original contract was that of Tanganyika. So far as the arbitration proceedings are concerned, one party was a company incorporated in Tanganyika and one a company incorporated in Zanzibar with a place of business in Tanganyika. The submission was concerned partly with damages for a breach of contract committed in Tanganyika and partly with the right to movable property situate in Tanganyika. The submission itself was drawn in Tanganyika and executed partly in Tanganyika and partly in Kenya and it is significant to note that it is expressly stated that it is deemed to incorporate the provisions of the Tanganyika Arbitration Ordinance. In these circumstances it seems to me that there is a very strong presumption that the law of the arbitration was to be Tanganyika law.

I have not overlooked the fact appearing in the award (embodying, as it does, the opinion of Mr. Cleasby) that the parties subsequent to the date of the submission agreed that the proceedings should be held in Mombasa but there is nothing whatever on the record to show, or even to suggest, that that decision

as to venue was intended in any way to affect the law or procedure of the arbitration. I do not think it was open to the parties at that stage to vary the law to be applied: I think they could have agreed to change the procedure, by a novation, but I do not think that in fact they did so and I am quite satisfied that no change of procedure would automatically have resulted from the decision as to venue.

It is quite true, as Mr. Cleasby said, that the arbitrators when sitting in Mombasa were personally outside the jurisdiction of this court and were subject to the jurisdiction of the Kenya court but that does not mean that the arbitrators were necessarily bound to apply either the substantive Kenya law or the Kenya law of procedure. A Kenya court would, I think, have applied the substantive law of Tanganyika, as being the proper law of the contract, and the procedural law of Kenya, as the lex fori, and, following the English practice, would probably have treated limitation as a matter of procedure, regardless of the question whether under Tanganyika law limitation is regarded as procedural or substantive.

In this respect, however, there is a great difference between a court, the jurisdiction of which is territorial, and individuals sitting as arbitrators. Arbitrators, although they normally follow the rules of procedure of the country in which they sit, are not absolutely bound by them provided they do not "disregard the substance of justice" (Halsbury's Laws of England (3rd Edn.), Vol. 2 at p. 35). Arbitrators derive their authority from the submission, and it is, in general, open to the parties to determine in the submission the procedure to be followed. In the present case, it seems to me clear from the reference to the Tanganyika Arbitration Ordinance that the parties intended Tanganyika procedure to apply.

On one point, I think, with respect, that Mr. Cleasby misdirected himself. He said –

> "there being in this case no question that Tanganyika Law of Limitation does not operate so as to effect a discharge of the contract but only bars the remedy."

Section 28 of the applied Indian Limitation Act provides in relation to suits for possession of property that at the determination of the period of limitation the right to the property is extinguished. In my opinion, therefore, the law of limitation in Tanganyika should be regarded as substantive and not procedural. It might perhaps be argued that it is only substantive when it relates to claims to property and that the particular issue in respect of which limitation was raised was not concerned with property. I do not think, however, that the law can be divided in such a way but must be considered as a whole to be either substantive or procedural. I do not think, however, that this point affects the issue.

If, then, as I find, the proper law of the contract was Tanganyika law and the parties intended that the law and procedure of the arbitration should be Tanganyika law and if the arbitrators were not (as a court would have been) bound by Kenya rules of procedure as being the lex fori, then I think that the arbitrators should have held that the relevant law of limitation was that of Tanganyika. I therefore hold that there is an error of law on the face of the award.

It remains to be considered whether this court can and should set aside the award on account of that error of law. It has been accepted ever since the case of *Hodgkinson v. Fernie* (4) (1857), 3 C.B. (N.S.) 189 that, as a general rule, the court has power to interfere where there is an error of law on the face of an award, although it may be noted that, even in that case, and certainly in all subsequent cases, there has been reluctance to interfere on this ground. The principle was upheld in the case of *British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railway Co. of London Ltd.* (5), [1912] A.C. 673, where the arbitrator stated a case for the opinion of the High Court. The House of

Lords decided that the opinion given by the High Court (from which, at that date, there was no appeal) was wrong and, since it had been adopted by the arbitrator and become part of his award, the award itself contained a patent error of law and should be set aside. On the other hand, two exceptions to the general principle have now been established. One is where the point of law is concerned with construction: that is not relevant to the present case. The other is where there was a specific reference of a question of law to the arbitrator. The leading case which established this exception is that of *King v. Duveen* (6), [1913] 2 K.B. 32, to which Mr. Donaldson very properly directed my attention. In that case Channell, J. said at p. 36:

> ". . . if a specific question of law is submitted to an arbitrator for his decision and he does decide it, the fact that the decision is erroneous does not make the award bad on its face so as to permit of its being set aside. Otherwise it would be futile ever to submit a question of law to an arbitrator."

This view has been followed in several cases of which I think it necessary only to refer to one. This is the case of *F. R. Absalom Ltd. v. Great Western* (*London*) *Garden Village Society* (7), [1933] A.C. 592, when Lord Wright, after speaking of the general rule, said at p. 615:

> "To be contrasted with such cases there is the special type of case where a different rule is in force, so that the Court will not interfere even though it is manifest on the face of the award that the arbitrator has gone wrong in law. This is so when what is referred to the arbitrator is not the whole question, whether involving both fact or law, but only some specific question of law in express terms as the separate question submitted; that is to say, where a point of law is submitted as such, that is, as a point of law, which is all that the arbitrator is required to decide, no fact being, quoad that submission, in dispute."

The present case presents some difficulties because it does not fall exactly into any of these classes. There was certainly a specific question of law put to the arbitrators but it was certainly not all that they were required to decide since it was only one of twenty-two questions, most of which dealt exclusively with matters of fact. I think it is proper also to take into account the fact that the arbitrators did not apply their own minds to the question but, after making findings as to the law of Kenya and the law of Tanganyika on the question of limitation, merely referred to and adopted the opinion given by the advocate whom they had consulted. It is tempting to follow the *British Westinghouse* case and to say that if arbitrators adopt the opinion of a legal adviser, that opinion being erroneous in law, the position is similar to that where the ruling on a case stated has been adopted. In the *British Westinghouse* (5) case, however, the submission to arbitration took the form of the usual arbitration clause in the main contract. The questions put to the arbitrator appear to have been concerned with the measure of damages for breach of contract and involved questions of mixed law and fact. In the present case the question whether the claim was time-barred which is one of law was specifically put in the submission and, since the parties have chosen to put such a specific question of law to lay arbitrators, giving them power to take legal advice, I think they must, on general principles, be bound by the award of the arbitrators, and that this court has no power to set the award aside.

The logic of the distinction is not easy to see, but I think it must be this, that where the parties to a submission consciously and deliberately put a question of law to the arbitrator, they are bound by his decision but that where the parties did not intend to put a question of law to the arbitrator or may not have realized

that they were in fact doing so, and the arbitrator errs in law on that question, the court will interfere.

I should perhaps add, for the sake of completeness, that the fact that the question is one of law and the arbitrator a layman is immaterial. This was, in fact, the situation in *King v. Duveen* (6).

To conclude, I hold:

(*a*) that the time for making the award was, or must be deemed to have been, extended by the parties and that the award is therefore not bad for lack of jurisdiction;

(*b*) that the arbitrators were not guilty of misconduct in referring to and accepting the advice of Mr. Cleasby;

(*c*) that there is an error of law on the face of the award; but

(*d*) that since the error is on a point of law specifically referred to the arbitrators, this court has no power on that account to set aside the award.

The petition is dismissed with costs.

Petition dismissed.

For the applicant:
Donaldson and Wood, Dar-es-Salaam
R. N. Donaldson

For the respondent:
Dodd and Company, Dar-es-Salaam.
H. G. Dodd

Msuri Muhhiddin v Nazzor Bin Seif El Kassaby and another
[1960] 1 EA 201 (CAZ)

Division:	Court of Appeal at Zanzibar
Date of judgment:	26 February 1960
Case Number:	108/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Zanzibar – Horsfall, J.

[1] Negligence – Res ipsa loquitur – Motor accident – Appellant injured as a result of motor bus overturning – Onus on bus owner and driver to disprove negligence – Accident due to tyre burst – Whether onus discharged.

Editor's Summary

The appellant sued the respondents for damages in respect of personal injuries suffered by him when a motor bus in which he was travelling which was owned by the first and driven by the second respondent overturned when both the offside rear tyres burst. Evidence was led for the appellant on the speed and control of a bus after a tyre burst, but no evidence on the state of the road, the bus, or of the burst tyres immediately after the accident. The trial judge accepted the evidence of the second respondent that he was not driving at an excessive speed and that he had satisfied himself, before driving, that the tyres were good with tread still on them, and applying the doctrine of res ipsa loquitur held that the second respondent had discharged the burden of showing how the accident could reasonably have happened without negligence on his part. On appeal it was contended for the appellant that (1) the trial judge had erred in disbelieving the appellant and his witnesses, and ought to have held that the accident was due to excessive speed and the failure of the second respondent, as driver, to keep a proper look-out, (2) the trial judge wrongly applied the doctrine of res ipsa loquitur by holding that the burden of proving how the tyre burst was on the appellant, and (3) the trial judge ought to have held that the onus to prove how the tyre burst was on the respondents and that on his failing to discharge that onus ought to have entered judgment against the respondents. Counsel for the respondents while supporting the decision of the trial judge, contended that as the trial judge had found that the probable cause of the accident was "rough solid stone under the road", the accident should have been found to be due to circumstances not within the respondents' control.

Held –

(i) as to the first ground of appeal, matters of credibility were peculiarly matters for the trial judge and in the absence of evidence as to the state of the tyres at the time of accident, the distance the bus travelled after the tyres burst and other relevant facts, it was quite impossible to say that the trial judge's conclusions of fact were wrong.

(ii) the respondents could avoid liability by showing either that there was no negligence on their part which contributed to the accident, or that there was a probable cause of the accident which did not connote negligence on their part, or that the accident was due to circumstances not within their control; and on the trial judge's findings of fact the respondents had succeeded in establishing these propositions.

(iii) the court could not accept the proposition that if the immediate cause of the burst tyre was the rough surface of the road, that in itself established that the accident was due to circumstances not within the respondents' control: the speed of a vehicle in relation to the particular road conditions was a most material factor and one which normally was within the control of the driver

of the vehicle, and there was certainly a duty on a driver to keep a proper look-out to ascertain the condition of the road and to adapt the speed of the vehicle to it.

Appeal dismissed.

Cases referred to in judgment:

(1) *Moore v. R. Fox & Sons*, [1956] 1 All E.R. 182.

(2) *Barkway v. South Wales Transport Co. Ltd.*, [1948] 2 All E.R. 460.

(3) *Woods v. Duncan*, [1946] A.C. 401.

(4) *Wing v. London General Omnibus Co.*, [1909] 2 K.B. 652.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the High Court of Zanzibar dated September 19, 1959, dismissing a suit by the appellant as plaintiff claiming damages in respect of personal injuries suffered by him when a motor bus in which he was travelling overturned. The first and second respondents, who were the defendants to the suit, were respectively the owner and the driver of the motor bus in question.

The evidence and findings of fact in the case appear in the following passage from the judgment of the learned trial judge:

> "The plaintiff, who sues as a poor person, claims Shs. 4,400/- as special damages and Shs. 10,000/- as general damages for personal injuries, pain and shock caused by the negligence of the second defendant while driving a bus belonging to the first defendant. It is not disputed that the plaintiff was a passenger in the bus when it overturned nor that the second defendant was at the time driving it as servant of the first defendant and in the course of his duties as such.
>
> "2. In his amended plaint the plaintiff relied on the following particulars of negligence: (1) that the second defendant drove the bus at excessive speed (2) that the second defendant failed to keep a proper look out and (3) that the second defendant failed in his statutory duty to provide sound off side rear tyres in the said bus contrary to the provisions of reg. 22 (6) of the Road Traffic Regulations and (4) in the alternative that second defendant committed a breach of his statutory duty by driving the said bus at a speed exceeding thirty miles contrary to reg. 51 (2) of the Road Traffic Regulations. By consent a fifth particular was added later (viz) that the second defendant was negligent in leaving the steering of the bus and in jumping off immediately after the tyres burst with the result that the bus was left uncontrolled and unattended.
>
> "3. In proof of that part of his case which dealt with the question of liability the plaintiff called himself and three other passengers, who were inside the bus and involved in the accident, as witnesses. He called a final witness Behari Joshi, a senior mechanic in the P.W.D. on the question of speed and controlling a bus after a tyre burst, but unfortunately he neglected to call any evidence of the state of the road or of the bus or of the burst tyres immediately after the accident. Such evidence was available, since I am informed that the police visited the scene immediately after the accident and that the bus itself was examined by one D. H. Nassor. Counsel for the plaintiff did not think it necessary to bring this man from Pemba to give evidence or to take his evidence on commission.

> "4. The plaintiff and his fellow passengers in the bus failed to impress me as having reasonable ability to gauge the speed at which the bus was travelling. One of them purported to have read the speedometer at 60 m.p.h. and another agreed in cross-examination that 60 m.p.h. would be a fair estimate. The other witnesses put it as a great speed. As one expressed it: 'Nothing except speed caused the accident'. I do not believe that one witness read the speedometer. I think that the circumstances surrounding the overturning and the blow out have caused the witnesses either intentionally or otherwise to exaggerate the speed at which the bus was travelling. There is no evidence of the distance the bus travelled after the blow out, no evidence of the violence of the impact of the wheel rim with the road surface after the tyre subsided, no evidence how far, if at all, the bus dragged on its side.
>
> "I don't accept the evidence that the second defendant jumped out nor that he failed to keep a proper look out. Mr. Chowdhary's submission on this last was that the second defendant stated in cross-examination to him that he approached the curve at about 25 m.p.h. and increased speed to 30 when rounding the bend. I am satisfied that the second defendant made an honest slip of the tongue in giving his answer and, when he realised it, he corrected it to a speed of about 30 m.p.h. when approaching the curve which he reduced to 25 m.p.h. when on the bend.
>
> "As to credibility I prefer the version of the accident as given by the second defendant. My finding of fact as to the accident is as follows: second defendant drove the bus on the tarmac road from Zanzibar to Ungujauku. At a left hand bend near mile 16 1/2 both tyres on the offside back wheel burst. His speed was around 30 m.p.h. The bus was full, containing some twenty-three passengers. The second defendant realised the tyres had burst and tried to control the bus but before the bus came straight the rim of the back wheel hit the road surface. The bus stopped. It rose and overturned on the off-side, where it lay. The second defendant was dazed and after two or three minutes he climbed out from the top side of the bus. I do not consider that any adverse inference of excessive speed against the defendant should be drawn from the fact that the bus rose and overturned."

The learned judge then proceeds in the judgment to deal with the application of the doctrine of res ipsa loquitur to the case, and for this purpose he relies on a statement of the principles of the doctrine which appears at p. 470 of the 9th Edn. of Salmond on The Law of Torts, which reads as follows:

> ". . . but where the thing is shown to be under the management of the defendant and his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. On the other hand, if the defendant produces a reasonable explanation, equally consistent with negligence and no negligence, the burden of proving the affirmative, that the defendant was negligent and that his negligence caused the accident, still remains on the plaintiff."

The learned judge then says:

> "7. Mr. Chowdry for the plaintiff has urged that if the evidence of the defendant that the tyres are good is believed he must give an explanation of how they burst. The very fact of their bursting shows that the tyres were bad. I have heard no evidence to suggest that in the conditions under which passenger buses are run in Zanzibar the high standard of regular inspection of tyres according to the routine practice of omnibus companies

in the United Kingdom must necessarily apply to Zanzibar. It is I think sufficient if the defendants have used reasonable care to secure the safety of their passengers having regard to conditions of operating buses prevailing in Zanzibar.

"The defendant's explanation is that this bus is new, some four or five months old. It is the ordinary Zanzibar type bus with double tyres on each rear wheel. The inner tubes have been changed but the tyres which burst had been used on the bus continually. He described the tyres as not new at the time of the accident but good tyres with the treads still on them. He had no reason to believe that there was any fault in them. The plaintiff has not led any evidence to show that the tyres on inspection after the accident were found worn smooth and thin and hence a warning to a reasonably careful bus operator that they were a potential danger. I am left with the evidence of the second defendant, which I accept, that he had no reason to believe that the tyres were not safe. He has done his duty of safety to the public by satisfying himself that they were good tyres with the treads still on them. I do not think that in present conditions in Zanzibar he is required to conduct a routine inspection for hidden weaknesses as was laid down in *Barkway's* case. *Barkway's* case is peculiar to the U.K. having regard to the evidence therein of what is the practice of other omnibus companies in regard to a system of tyre inspection.

"8. In my opinion the second defendant was not driving at an excessive speed having regard to the conditions and user of the road. There is evidence that bursts can be caused by sharp things on the road. It is quite probable that the rough solid stone under the road near where the tyres burst was the immediate cause. I have given serious thought to the fact that both tyres burst at the same time and whether I should not draw an inference adverse to the defendant. There is no evidence on the point to guide me. I assume that both tyres having been in use on the same side of the bus for equal periods would be equally worn and develop equal weaknesses. When the same cause of bursting operated on both I assume that there is no significance in both tyres bursting together. I consider that the defendant has discharged the burden of showing how the accident could reasonably happen without negligence on his part. It follows that the plaintiff fails on the question of liability."

As remarked by the learned judge, the appellant sued as a poor person, but he was represented in the proceedings in the High Court, an advocate having been assigned to him for the purpose. The appeal to this court was also in forma pauperis, but the appellant was unrepresented, no application having been made under r. 82 (5) of the Eastern African Court of Appeal Rules, 1954, for assignment of an advocate to him. It may be added that it would seem unlikely that an application for assignment of an advocate under that rule could have been successful.

The first three grounds of appeal complain that the learned judge erred in disbelieving the appellant and his witnesses and claim that he ought to have held that the accident was due to excessive speed and the failure of the second respondent as driver to keep a proper look-out. This also was the substance of appellant's address to the court.

As to this, it is sufficient to say that matters of credibility are peculiarly matters for the trial judge and that, in the absence of evidence as to the state of the tyres at the time of the accident, the distance the bus travelled after the blow out of the tyres, and other relevant facts noted by the learned judge in his judgment, it is quite impossible for this court to say that the learned judge's conclusions of fact were wrong. I think those grounds of appeal must fail.

The last two grounds of appeal read as follows:

> "4. That the learned judge wrongly applied the doctrine of 'res ipsa loquitur' by holding that the burden of proving how the tyre burst was in the appellant.
>
> "5. He ought to have held that the onus to prove how the tyre burst lies on the respondent and on his failing to discharge the onus ought to have entered judgment against the respondents."

Mr. Fraser Murray, who appeared for the respondents at the hearing of the appeal, very properly drew our attention to the case of *Moore v. R. Fox & Sons* (1), [1956] 1 All E.R. 182, and conceded that the passage from Salmond set out above can no longer be regarded as an accurate statement of the law, and that the obligation upon the respondents was not merely to produce an explanation equally consistent with negligence or no negligence, but to show a probability that the accident happened without negligence. He referred, inter alia, to *Barkway v. South Wales Transport Co. Ltd.* (2), [1948] 2 All E.R. 460, *Woods v. Duncan* (3), [1946] A.C. 401 and *Wing v. London General Omnibus Co.* (4), [1909] 2 K.B. 652, and argued that there would be no liability on the respondents if they could show either (*a*) absence of negligence, or (*b*) probability that the accident happened without negligence, or (*c*) that the accident was due to circumstances not within the respondents' control. He contended that the learned judge's findings of fact established each of these propositions in favour of the respondents.

The passage in the judgment of Sir Raymond Evershed, M.R., in *Moore v. R. Fox & Sons* (1) to which Mr. Fraser Murray referred is at p. 189 of the report, and reads as follows:

> "So, in *The Kite* Langton, J., said ((1933) P. at p. 168)
>
> > 'When they (the defendants) have given that explanation one has still to see whether negligence has been proved. The explanation may be disbelieved; the explanation may not at all exclude negligence, but the explanation may leave the matter still in some doubt as to exactly how the occurence did happen, but leave an equal possibility that it happened without negligence as with negligence.'
>
> "If, by the passage which I have last quoted, Langton, J., meant to lay it down that in a case of res ipsa loquitur, that is to say a case in which the onus has been cast on the defendants, it is sufficient to discharge that onus for them to show that the accident might have occurred for more than one reason some of which reasons are consistent with the absence of negligence, then it seems to me that the conclusion is not justified and is in conflict with the formulation of Asquith, L.J., in *Barkway v. South Wales Transport Co. Ltd.* and the language of Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corpn.* I must not be taken to be suggesting that *The Kite* was therefore wrongly decided. That was a case in which the plaintiffs, owners of cargo loaded in a barge, sued the owners of the tug which was towing the barge for negligent navigation on the part of the tug master since the barge containing the plaintiffs' goods had, in the course of the tow, come into collision with an arch of a railway bridge, and the goods were thereby damaged. The tug master gave evidence which the judge believed. The effect of that evidence was that, at the critical time, the barge containing the plaintiffs' goods swung outwards from the barge to which it should have been made fast, and that the collision was, in the tug master's view, due to that fact. It was accepted by the judge that the navigation by the tug master was in no sense careless and, if so, the swinging out of the barge containing the plaintiffs' goods was attributable

> to the fact that it had not been properly made fast to the adjacent barge, a circumstance which was wholly outside the tug master's control and for which, therefore, his company was in no sense responsible. In other words, as I follow the facts and findings in *The Kite*, the defendants there proved by the tug master's evidence, as was proved in *Woods v. Duncan* by the evidence of Lieutenant Woods, that, whatever in fact was the cause of the accident, there had been no fault or want of care on the part of the party sued."

In *Barkway v. South Wales Transport Co. Ltd.* (2), Asquith, L.J., at p. 471 of the report, said:

> "The position as to *onus* of proof in this case seems to me to be fairly summarised in the following short propositions. (i) If the defendants' omnibus leaves the road and falls down an embankment, and this without more is proved, then res ipsa loquitur, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst per se is a neutral event consistent, and equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down. This is the effect of the decision in *Laurie v. Raglan Building Co. Ltd*., where not a tyre-burst but a skid was involved. (iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either (*a*) that the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or (*b*) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres: *Woods v. Duncan*, *The Thetis*."

It may be noted that *Barkway's* case was considered by the learned judge in his judgment.

In *Woods v. Duncan* (3) at p. 439 of the report, Lord Simmonds said:

> "I will add first a few words upon the question of the liability of Lieutenant Woods. I will assume against him, though I doubt whether the assumption is justified that this is a case in which the principle of res ipsa loquitur may be applied. But to apply this principle is to do no more than shift the burden of proof. A prima facie case is assumed to be made out which throws upon him the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened: it is sufficient if he satisfies the court that he personally was not negligent. It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered: yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail."

The paragraph in *Wing v. London General Omnibus Co.* (4) relied on by Mr. Fraser Murray appears in the judgment of Fletcher Moulton, L.J., at p. 663 of the report:

> ". . .Without attempting to lay down any exhaustive classification of the cases in which the principle of res ipsa loquitur applies, it may

> generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a prima facie responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. Every vehicle has to adapt its own behaviour to the behaviour of other persons using the road, and over their actions those in charge of the vehicle have no control."

In the light of the dicta set out above I accept Mr. Fraser Murray's propositions that the respondents can avoid liability if they can show either that there was no negligence on their part which contributed to the accident; or that there was a probable cause of the accident which does not connote negligence on their part; or that the accident was due to circumstances not within their control. And I feel bound to agree that on the learned judge's findings of fact the respondents have succeeded in establishing these propositions. The learned judge found on the evidence that the tyres of the bus were good tyres with the tread still on them, that the second respondent had no reason to believe they were not safe, and that he had done his duty of safety to the public by satisfying himself that they were good tyres with the tread still on them. He found also that the speed of the bus at the time of the accident was around 30 m.p.h. It was not suggested at the trial that 30 m.p.h. was an excessive speed in the particular circumstances of the case: the appellant's case was that the speed of the bus was far in excess of 30 m.p.h., but that contention was not accepted. Finally, the learned judge found that a probable cause of the accident was "rough solid stone under the road". The evidence on this point had been that at the place of the accident

> "the sub-surface of road was solid stone which caused a bump in the surface of the road."

I do not accept Mr. Fraser Murray's proposition that the mere fact that the immediate cause of the burst tyres was the rough surface of the road established that the accident was due to circumstances not within the respondent's control. The speed of a vehicle in relation to the particular road conditions is a most material factor and one which normally is within the control of the driver of the vehicle, and there is certainly a duty on a driver to keep a proper look-out to ascertain the condition of the road and to adapt the speed of the vehicle to it. In the instant case, however, the learned judge expressly found that the second respondent was not driving at an excessive speed having regard to the conditions and user of the road.

For these reasons, and on the basis of the cases cited, I think the respondents have discharged the onus thrown on them by the application of the principle of res ipsa loquitur, and that the appeal must be dismissed.

Sir Kenneth O'Connor P: I agree. The appeal is dismissed. As the appellant has leave to appeal in forma pauperis, there will be no order as to costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:
Lakha & Co., Zanzibar

For the respondents:
Fraser Murray and *A. A. Lakha*.

Hansraj Ebji Walji Thakkar as Executor v The Vanik Mahajan

[1960] 1 EA 208 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	24 March 1960
Case Number:	17/1958
Before:	Horsfall J
Sourced by:	LawAfrica

[1] Boundary – Wall dividing two properties – Claim that wall owned by both parties as tenants in common – Windows opened in wall by one party without consent of the other – Mandatory injunction to block windows – Claim for infringement of interest in wall.

[2] Easement – Wall dividing two properties – Windows opened in wall by one party without consent of the other – Claim to right of privacy – Whether easement of prospect or privacy exists.

Editor's Summary

The plaintiff, a Hindu, owned a property at Zanzibar and the defendants, an incorporate body of Hindu persuasion, owned the immediately adjoining house. A wall divided the two properties, which the plaintiff claimed to be a party wall owned by both parties as tenants in common. In 1957 the defendants did considerable reconstruction to their property, including the opening of two windows in the wall on the ground floor and four windows on the first floor. Windows had not existed in the disputed wall before reconstruction and they were opened without the consent of the plaintiff. The plaintiff complained that the windows interfered with his privacy and that if they remained unblocked the defendants' property might obtain rights to light and air which might interfere with his future rebuilding plans.

Held –

(i) simply because the plaintiff had for years beyond recollection used a staircase at the side of the wall to get access to his first floor, he was not entitled to any right of support for it from the disputed wall, for if the disputed wall had never existed the stairs would have stood firm on their own foundations;

(ii) on the evidence the disputed wall was one of the main walls of the defendants' property and solely owned by them subject to a possible easement of support for the plaintiff's bathroom, and the positions of the windows did not interfere with the plaintiff's right of support, if any.

(iii) the plaintiff could not succeed on the claim for infringement of privacy as he neither pleaded nor proved that a custom of privacy exists among Hindus.

Gokal Prasad v. Radho (1888), 10 All. 358 considered.

Injunction refused. Judgment for the defendants.

Cases referred to in judgment:

(1) *Cubitt v. Porter*, 108 E.R. 1039.

(2) *Browne v. Flower*, [1911] 1 Ch. 219.

(3) *The Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co*. (1901), 1 Z.L.R. 105.

(4) *Gokal Prasad v. Radho* (1888), 10 All. 358.

Judgment

Horsfall J: The plaintiff is a Hindu and is the owner of houses 455A and 456 in Sokokoo Street, Zanzibar and the defendant is an incorporate body of Hindu persuasion which owns the immediately adjoining houses 456A and 457. Dividing the properties is what has been described in

this action as the disputed wall. It is admitted that in 1957 the defendants did considerable reconstruction on their property. They opened 2 windows in the disputed wall on the ground floor and 4 windows in the first floor reconstruction. These windows were opened without the consent of the plaintiff. Windows had not existed in the disputed wall before the reconstruction. They overlook the plaintiff's property. The plaintiff complains that they interfere with the privacy of his property and that if they remain unblocked the defendant's property may obtain rights to light and air from across his property which may seriously interfere with plans he may have for future rebuilding on his land.

The plaintiff bases his claim for a mandatory injunction to the defendant to block the said windows on the issue that the disputed wall is a party wall owned by both parties as tenants in common. If it is a party wall the defendant by opening windows in the wall without plaintiff's consent has infringed the plaintiff's interest in the wall.

Therefore the first question which the parties have asked me to decide is whether the wall in dispute is a party wall owned by the parties as tenants in common or whether it is a main wall of defendant's property No. 456A and consequently owned by him alone.

I find that before the reconstruction in 1957 there existed in 457 a go-down whose roof rested on independent walls. Alongside 457 is the plot 456A. Before the reconstruction there was a room on the ground floor in front and a room on top of it forming a first floor. On top of this room was a wired enclosure used by the defendants for preserving sick birds. On the ground floor behind the room was a long room which extended backwards on 456A to a point near where is situated a W.C. and bathroom belonging to the plaintiff on his side of the disputed wall. On top of this long room was a masonry terrace open to the sky and supported by borites or poles. These borites as well as supporting the open terrace formed the ceiling of the long room. These borites are embedded one end in the disputed wall and the other end in the parallel wall which supported the roof of the go-down on 457. In other words the weight of the defendant's terrace was carried on one side by poles embedded in the disputed wall and on the other embedded in the wall of the go-down on 457 which ran parallel. There were many borites, 50 or 60. Also on top of the disputed wall was, a parapet running alongside the plaintiff's property. On the open terrace was a cage used for housing sick birds. Beyond the masonry wall at the back of the long room was a small lean-to shed of corrugated iron sheets.

As the result of the reconstruction in 1957 the buildings shewn in plans marked exhibit 1 and exhibit 2 were erected. Briefly, a hall now stands on 457 whose roof is supported by the wall of the former go-down. On the roof is an open terrace. On 456A is now erected a two storey building, the disputed wall having been raised over part of its length to support a second storey built on what was formerly the terrace on top of the long room and over what was formerly occupied by the C.I. lean-to shed.

Mr. Talati admitted before the trial opened that the disputed wall in front up to the turn shown on the plan, exhibit A 1, is a party wall in the sense that plaintiff has a right of support. The disputed wall at this point forms one of the walls supporting the entrance porch into plaintiff's property 456.

After this turn on the plaintiff's side of the disputed wall is a masonry staircase running up the side of the disputed wall to a landing and then flying over the entrance passage to give access to the plaintiff's rooms on his first floor. I am satisfied beyond any shadow of a doubt that this staircase is of independent construction. It is not embedded in any way in the disputed wall. It is so built that if the disputed wall were removed it would stand firm on its own foundation and not collapse. Further along the disputed wall we come to the bathroom and W.C. These erections lean against the disputed wall. The C.I. sheets

and the poles supporting them are embedded in

the disputed wall. I am satisfied that the witness, Maharaj Bhawanji Ghellabhai, built the W.C. in 1922 and the bathroom in 1924. He did the work without any objection. He embedded the C.I. sheets to prevent rain water trickling down the wall inside the erections. Apart from the above no part of the plaintiff's buildings touches the disputed wall. The plaintiff has also regularly white-washed and done minor repairs to his side of the disputed wall.

Quoting the case of *Cubitt v. Porter* (1), 108 E.R. 1039, Mr. Chowdhary for the plaintiff has asked me to hold that common user of a wall separating adjoining lands belonging to different owners is prima facie evidence that the wall, and the land on which it stands, belongs to the owners of the adjoining lands in equal moieties as tenants in common. In the instant case the fact that the disputed wall supported the terrace on the top of the former long room existing on 456A between the parallel walls, the fact that the disputed wall supported a parapet, the fact that no part of the plaintiff's buildings except the W.C., bathroom and staircase have any contact with the disputed wall strongly point in my opinion to the inference that this wall is one of the main walls of the defendant's property. It is clear that the user of the staircase is independent of the disputed wall. Because plaintiff has been using the staircase to get access to his first floor for years beyond recollection he cannot claim any right of support for it from the disputed wall. If the disputed wall had never existed the stairs would have stood firm on their own foundation. The imbedding of the borites and C.I. sheets of the lean-to W.C. and lavatory is relevant as evidence of user to support the plaintiff's claim that the disputed wall is a party wall. The plaintiff has not pleaded any claim for an easement of support in respect of the W.C. and bathroom. I regard the acts of the plaintiff in whitewashing and doing minor repairs to the disputed wall as acts done to preserve the amenities of his property and not referable to acts asserting ownership of the disputed wall. These matters do not displace the inference which I draw from the purposes to which the defendant has put the disputed wall. I find on the whole of the evidence that the disputed wall is one of the main walls of the defendant's property and is solely owned by him subject to a possible easement of support in respect of the plaintiff's W.C. and bathroom, which does not limit his right to put windows in his own wall. The position of these six windows does not interfere with any right of support which plaintiff may have acquired for the W.C. and bathroom.

The plaintiff has an alternative claim that the disputed wall had been in existence for over sixty years as a blank wall facing the plaintiff's house and as such a right of privacy has been attached to the plaintiff's house from that side by prescription. It is clear from the case of *Browne v. Flower* (2), [1911] 1 Ch. 219 that English law does not recognise any easement of prospect or privacy. Mr. Chowdhary citing the well known case of *The Secretary of State for Foreign Affairs v. Charlesworth Pilling & Co.* (3) (1901), 1 Z.L.R. 105, urged that in the absence of any Decree in Zanzibar dealing with this subject matter the law applicable is Muslim law. He was unable to quote any Zanzibar authority that loss of a right of privacy does create a cause of action. However he referred me to the Indian Case of *Gokal Prasad v. Radho* (4), (1888) 10 All 358. This case is a monument to the industry of Sir John Adge, C.J. in reviewing every Indian Case on the right of privacy which was available to his notice in the law reports. I have read his long judgment with interest and instruction. The result of his researches can perhaps be summed up by quoting his own judgment at p. 387 of the report:

> "Having given the best consideration which I can to this question, I am of opinion that such a right of privacy as that to which I have already referred (he is referring to the purdah system) exists, and has existed in these provinces, apparently by usage, or, to use another word, by custom, and

> that substantial interference with such right of privacy where it exists, if the interference be without the consent of the owner of the dominant tenement, affords such owner a good cause of action."

In this instant case the plaintiff has admitted:

> "I am a Hindu. Hindus do not observe purdah. My property is occupied by Hindus for over forty years."

Quite apart from this admission, no custom of privacy has been pleaded and proved in this case. The report at p. 1 of Vol. 1 of the Zanzibar Law Reports is also relevant. The plaintiff's claim also fails on this alternative claim. In the result there will be judgment for the defendant with costs.

Injunction refused. Judgment for the defendants.

For the plaintiff:
S. M. Chowdhary, Zanzibar

For the defendants:
Wiggins & Stephens, Zanzibar
P. S. Talati

A. Savy v Jenny Sadrudin Tharani
[1960] 1 EA 211 (CAD)

Division:	Court Of Appeal at Dar-Es-Salaam
Date of judgment:	22 February 1960
Case Number:	102/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Tanganyika – Simmons J.

[1] Rent restriction – Notice to quit – Allegation of non-payment of rent – Onus probandi of payment – Promise to repair by landlord not fulfilled – Premises fit for habitation – Whether tenant may terminate tenancy forthwith – Meaning of deliver up possession "by" a certain date – Rent Restriction Ordinance (*Cap.* 301), *s.* 11 (1) *and s.* 29 (1) (T.).

Editor's Summary

The appellant, a tenant who was in arrears of his rent, received from the respondent, his landlord, a letter dated February 27, 1959, giving notice to quit the premises by March 31, 1959. The respondent later brought proceedings before the Rent Restriction Board to recover Shs. 250/- rent for February and Shs. 250/- for March, since the appellant had left the premises at the end of February without giving notice of

his intention to quit. The board dismissed the respondent's application on the grounds, firstly, that the respondent had failed to discharge the burden of proving non-payment of rent for the month of February, and, secondly, that the appellant was justified in leaving the premises without notice, as the respondent had not, as promised, carried out necessary repairs to the premises, nor was there a stipulation between the parties to give notice of termination of tenancy. On appeal by the respondent, the High Court reversed the board's decision on both grounds, holding that in a suit for rent where a tenancy was not denied, the onus probandi of payment of rent is on the tenant and the appellant had no right to terminate the tenancy forthwith as the promises of the respondent to effect repairs were bare promises, unsupported by consideration, and bearing no relation to the contract of tenancy. On further appeal.

Held –

(i) the view of the board as to the onus of proof was erroneous, but once it had considered the evidence given for both parties and accepted that of one of them, the question of onus was superfluous.

(ii) the lack of repair did not render the premises unfit for human habitation so as to amount to an allegation of breach of contract, nor was there any evidence of breach of covenant or condition of the tenancy, but in any event, the tenant was not entitled to treat the tenancy as at an end in the absence of express stipulation.

(iii) if the notice to quit were construed as an offer to agree to a determination of the tenancy at some date earlier than March 31, 1959, it was an offer which was at no time accepted; consequently the tenancy was not determined until the date mentioned in the notice to quit, March 31, 1959, and the respondent was entitled to rent for that month.

Appeal allowed in part.

Case referred to:

(1) *Robins v. National Trust Co.,* [1927] A.C. 515.

(2) *Summers v. Salford Corporation,* [1943] A.C. 283; [1943] 1 All E.R. 68.

(3) *Surplice v. Farnsworth,* 135 E.R. 232.

(4) *Eastaugh and Another v. MacPherson,* [1954] 3 All E.R. 214.

(5) *Dagger v. Shepherd,* [1946] 1 All E.R. 133.

The following judgments were read:

Judgment

Gould, JA: The appellant was formerly a monthly tenant of the respondent in respect of premises described as Plot 15, Block Y, John-Shaw Estate, Mwanza, at a rental of Shs. 250/- per month. The respondent brought proceedings before the Rent Restriction Board for Mwanza to recover the sum of Shs. 250/- as rent unpaid for the month of February, 1959, and a further Shs. 250/- for the month of March, 1959, upon the ground that the appellant had left the premises without giving notice terminating the tenancy. The board held that both claims failed but on appeal the High Court of Tanganyika reversed the board's decision. The present appeal has been brought from the decree of the High Court; it was argued by counsel for the appellant only, for, although notice of hearing was served upon the advocate for the respondent, he did not appear.

The board accepted that the appellant left the premises in question at the end of February, 1959. The respondent on February 27, 1959, gave notice to quit by an advocate's letter in the following terms:

27th February, 1959.

"Ref. No. 11J/59/303.

A. Savy, Esq.,

c/o M.S. Tanganyika Motors Ltd.,

P.O. Box 600, Mwanza.

Dear Sir,

Under instructions from Mrs. J. S. Tharani, your landlord, I have to give you this notice, which I hereby do that you are required to vacate and deliver up quiet and peaceful possession of my client's premises on plot No. 15, Block "Y" John Shaw Estate, Mwanza Townshhip by 31st day of March, 1959, used and occupied by you as her monthly tenant.

The reason to give you this notice is that you are in arrears of rent of the premises from 1st January, 1959, you are called upon to pay the

arrears of rent i.e. Shs. 500/- by 1st March, 1959, failing which legal action shall be filed.

If you desire to occupy the premises from 1st April, 1959, you are required to get a letter of guarantee from your employers, in respect of the rent of the premises.

Yours faithfully,

(Sgd.) V. N. UPADHYAYA."

There is no evidence as to the date when this letter was received by the appellant.

The appellant wrote an undated letter to the respondent as follows:

"Mr. J. S. Tharani,

Mwanza.

Dear Sir,

I herewith enclose a cheque for house rent & water for the month of February, 1959, and keys, as I have vacated your house on the 28/2/59. The reason I have left your house is: you have promised to have a gate put in the rear yard but up to now nothing done and also no window glass in the kitchen window. And you also said that you will have the house whitewashed yearly and even that you have neglected to do. And another thing, while I was in Dar-es-Salaam for a period of one month ten days, you have charged me for water which I never used.

So I find that the best way is to vacate your house. Please note that I entered your house on the 6th.

Yours faithfully,

for Mrs. A. A. Savy.

(Sgd.) ? ? ? "

The respondent said in evidence that he received this letter on March 10, 1959, but the board said that it appeared to have been posted on March 2.

The important portion of the ruling given by the board is contained in the following paragraphs:

"The tenant gave a circumstantial account of his paying Mr. Tharani the rent for December on January 5 this year and he said that he got no receipt for it. January's rent was paid by a friend of his on January 15. February's rent was paid early in March. Mr. Tharani had promised to build a gate at the back of the house and to white-wash the house but had done neither, nor had he replaced some broken window-panes in the kitchen as he had promised to do.

The tenant made a most favourable impression upon us and we prefer his evidence to that of Mr. Tharani. In any event we find that the latter has failed to discharge the burden of proving non-payment of February's rent. As to the claim for a month's rent in lieu of notice, we do not see our way to granting this. There was no stipulation to this effect between the parties and in view of the tenant's complaints against the landlord we consider that he was justified in leaving without notice. We order that the landlord keep a rent book in future.

This application is dismissed with costs."

Upon the issue of the payment of the rent for February, the learned judge in the High Court said that there was no evidence to support the board's finding that it had been paid. He found also that the board's statement that the respondent

"has failed to discharge the burden of proving non-payment of February's rent" wrongly placed the onus of proof upon the landlord. He found that the onus was on the tenant, that he had done nothing to discharge it, and on that ground he allowed the appeal on this issue.

Counsel for the appellant did not seek to contest the correctness in law of the learned judge's finding on the matter of onus. He accepted the statement in Woodroffe's Law of Evidence (9th Edn.) at p. 755, that if, in a suit for rent, the tenant does not deny the tenancy but pleads payment the onus probandi is on him. Counsel submitted, however, that there was evidence to support the board's finding that the rent for February had been paid, that the board had so found as a fact after weighing the evidence of both parties and accepting that of the appellant, and that the misdirection as to onus of proof was immaterial, inasmuch as the board had arrived at the conclusion as a result of its view of the comparative credibility of the witnesses and not by the application of its opinion on the question of onus. With all of these submissions I am in agreement.

As to the evidence of payment, the appellant said that he paid the December rent in cash "outside Lehmann's" and the rent for January was paid by a friend on January 15, 1959. It was common ground that a further month's rent was sent with the undated letter in the early part of March. The reference to payment on January 15, "by a friend" was of course no evidence but the respondent admitted receiving a month's rent on that date. He said that was the rent for December, whereas the appellant claimed to have paid the December rent about January 2. That is the only payment about which there is conflict of evidence, the appellant asserting and the respondent denying the payment. The board said that it preferred the evidence of the appellant and was most favourably impressed by him. I read that as a finding of fact in his favour based on comparative credibility. Furthermore, it is a finding of pure fact supported by evidence, and as such it would appear from section 11 (1) of the Rent Restriction Ordinance (Cap. 301), which provides for appeals from decisions of the board to the High Court, that no appeal lies from it.

The reference to onus in the board's ruling, as I read it, merely indicates that even if the board had not decided in favour of the appellant on the question of credibility, it would have done so by reason of its view as to the burden of proof. This view was erroneous, but once the board had considered the evidence given for both parties and accepted that of one of them, the question of ouns was superfluous. In *Robins v. National Trust Co.* (1), [1927] A.C. 515 at 520 their Lordships of the Privy Council said:

> "Onus is always on a person who asserts a proposition or fact which is not self-evident. To assert that a man who is alive was born requires no proof. The onus is not on the person making the assertion, because it is self-evident that he had been born. But to assert that he was born on a certain date, if the date is material, requires proof; the onus is on the person making the assertion. Now, in conducting any inquiry, the determining tribunal, be it judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts. But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence pro and con so evenly balanced that it can come to no such conclusion. Then the onus will determine the matter. But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered."

Counsel for the appellant quoted a number of other cases on this point but in my opinion the question is so well settled as to need no further discussion.

I am therefore of opinion that the finding of the board concerning the respondent's claim for the February rent should be sustained.

The claim for one month's rent in lieu of notice was resisted by the appellant on the ground that the respondent had promised to put a gate behind the house, to white-wash the premises and to replace a broken pane of glass in the kitchen, and had failed to do any of these things. The board rejected the claim but failed to indicate the legal basis for its decision. The learned judge in the High Court reversed the board's finding on the ground that none of the complaints amounted to an allegation of a breach of contract, but that the promises of the landlord were bare promises, unsupported by consideration, and bearing no relation to the contract of tenancy. I agree that the board's decision on this aspect of the matter cannot be sustained. There is no evidence that the promises of the respondent were made pursuant to a specific covenant to repair. Counsel called the attention of the court to s. 29 (1) of the Rent Restriction Ordinance under which "for the purposes of this Ordinance" a landlord is deemed obliged to maintain premises in a condition suitable for human habitation. I do not need to go into the question of possible limitations arising from the words in inverted commas. If the section applies at all I am satisfied that the lack of repair complained of in this case did not render the premises unfit for human habitation. The authority relied upon by counsel was *Summers v. Salford Corporation* (2), [1943] A.C. 283 in which injury was caused by the breaking of a faulty window sash-cord. Lord Atkin said at p. 289:

> "If the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life and limb or injury to health, then the house is not in all respects reasonably fit for human habitation."

I see no possible justification for fitting the present case into that description. In any event the general rule is that breach by a landlord of a covenant to repair does not confer a right upon the tenant to treat the tenancy as at an end in the absence of express stipulation. The position is clearly outlined in the following passage from the judgment of Tindal, C.J. in *Surplice v. Farnsworth* (3), 135 E.R. 232 at 235.

> "It seems to be admitted that this rule cannot be sustained, unless it is shown that the ground upon which it was obtained can be supported; namely that if the landlord is bound to repair the premises during the tenancy, there is an implied condition that should he fail in the performance of his contract, the tenant may throw up the tenancy. No authority has been cited to show that such a contract to repair implies such a condition. If the contract were under seal, the condition that the tenant upon the breach thereof might determine the tenancy, could not be implied. Where it is intended that a covenant shall operate as a condition, there is always an express covenant to that effect; as in the case of re-entry by the lessor for breach of covenant by the lessee. I am not aware of any legal principle, that an agreement by parole is in this respect to be construed differently from one under seal. Assuming, therefore, that there was an agreement in this case by the landlord to repair though none was actually proved – there is no principle of law to authorise the importing of the condition contended for. In such a case the tenant will have his remedy over against his landlord; but the relation of landlord and tenant still subsists between them."

It has never been suggested that the promises in question were made as warranties or conditions prior to the acceptance of the tenancy. In view of the fact that the appellant remained in possession for over a year they could not in any event be relied upon as such. I agree with the learned judge that there

was no evidence of breach of a covenant or condition of the tenancy and also am of opinion that if there had been it did not confer in the appellant a right to determine the tenancy forthwith.

Another submission made by counsel for the appellant was that the respondent could not claim rent for March in view of the wording of the notice to quit dated February 27, 1959, which is copied above. He drew attention to the use of the phrase "by 31st day of March, 1959", and to the case of *Eastaugh and Another v. MacPherson* (4), [1954] 3 All E.R. 214 which is authority for saying that the word "by" in such a context means "on or before". Reference was then made to *Dagger v. Shepherd* (5), [1946] 1 All E.R. 133 in which the words "on or before" in a notice to quit were considered. Questions posed by the court, as expressed in its judgment, at p. 135, were –

> ". . . Or does it contain an unequivocal statement to the tenant that on March 25, 1945, the rights and obligations of his tenancy, including his right to possession of the premises, will come to an end, at the same time giving to him an option to deliver up possession at some earlier date of his own choosing? And if some such option is given, is it one impliedly subject to the condition of the tenant's continuing under the obligations of the tenancy – such as payment of rent – until March 25, 1945? Or is it an option to bring the tenancy to an end for all purposes on the date when he in fact vacates the premises? In short, is the true interpretation, 'I give you notice that the tenancy will end on the named date, but, in case it suits you better to end it earlier, I here and now make you an offer to end it at any earlier date you like upon your accepting my offer'? – such offer being open to acceptance, presumably, by oral or written word or by conduct."

The following passage provides the answer:

> "In our judgment, and treating the matter as one of the construction of the document without reference to any authority, its true effect was first to give to the tenant notice that the landlord did hereby give an irrevocable notice to determine on March 25, 1945, and secondly to make to the tenant an offer to accept from him a determination of that relationship, on any earlier date (of the tenant's choice) on which the tenant should give up in fact possession of the premises."

Every such notice must of course be considered and construed as a whole, having regard to its particular wording. I do not, however, think that the intimation in the last paragraph of the notice now under discussion, to the effect that a new tenancy would be considered, takes it out of the principle in *Dagger v. Shepherd* (5). Nevertheless, I do not think that the appellant can derive any advantage from the wording of the notice. If it is to be construed as an offer to agree to a determination of the tenancy at some date earlier than March 31, 1959, it is an offer which the appellant at no time accepted. There is no evidence that he received the notice, but presumably he did so in the usual course of post. He made no reference to it in his letter of early March, in which he stated specifically that his reason for leaving was that the respondent had failed to do what he had promised with regard to the repairs to the premises. He may or may not have received the notice before he quitted the premises but I do not think that matters as he did not in any event act upon it and as he appears not to have had legal advice at the time it is in the highest degree unlikely that he appreciated its full purport. It may seem rather artificial to hold that, though the respondent had indicated willingness that the appellant should leave, and he did leave, he nevertheless remained liable for the rent. I think, however, that the matter must be decided upon principle and I know of none which permits a person to rely upon an offer which he has not accepted. The offer in the present case could probably have been accepted by conduct

but though the appellant performed the necessary act he did not do so with the intention of accepting the offer (of which, as I have said, he was almost certainly ignorant), but for his own reasons. There was therefore no consensus or mutuality between the respondent and the appellant and no concluded agreement or arrangement between.

Accordingly I would hold that the tenancy was not determined until the date mentioned in the notice to quit – March 31, 1959 – and that the respondent was entitled to his rent for that month.

For the foregoing reasons I am of opinion that this appeal should be allowed to the extent necessary to maintain the ruling of the board that the claim for the sum of Shs. 250/- as rent for February, 1959, be dismissed; I would uphold the reversal by the High Court of the second part of the claim. I think that the appellant should pay one half of the respondent's costs both before the board and on appeal to the High Court and that the respondent should pay one half of the appellant's costs of the appeal in this court. The decree of the High Court and the order of the board should be set aside and varied to the extent indicated.

Sir Kenneth O'Connor P: I agree. The appeal will be allowed to the extent indicated in the judgment of the learned justice of appeal and there will be orders as proposed by him.

Sir Alastair Forbes VP: I also agree.

Appeal allowed in part.

For the appellant:
Fraser Murray, Thornton & Co., Dar-es-Salaam
R. S. Thornton

For the respondent:
C. C. Patel & Ruparell, Mwanza
The respondent did not appear and was not represented.

Mwinyi Bin Zaid Mynagatwa v R
[1960] 1 EA 218 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	11 March 1960
Case Number:	4/1960
Sourced by:	LawAfrica
Before:	Horsfall J.

[1] Criminal law – Evidence – Appellant convicted of being in possession of Indian hemp and native liquor – No expert evidence called to prove the nature of these substances – Whether safe to convict on mere statement of ordinary witness – Dangerous Drugs Decree (*Cap.* 64), *s.* 9 *and s.* 34 (*Z.*) *– Native Liquor Decree* (*No.* 6 *of* 1942), *s.* 3 *and s. 9* (*Z.*).

Editor's Summary

The appellant had been convicted by the resident magistrate, Pemba, of being in possession of Indian hemp (bhang) and of native liquor (tende) and was sentenced to twelve months' imprisonment and to one month's imprisonment respectively, the sentences to run concurrently. He appealed against both conviction and sentence. The Attorney-General intimated in writing that he was unable to support the convictions as there was no evidence to prove that the substance handed over to a prosecution witness by the accused was bhang or that the liquor found in the bottle was tende. At the trial this witness had stated in evidence that he had asked the appellant to sell him bhang and the appellant did not challenge that what was produced in court was bhang.

Held –

(i) there was evidence in this case to make it safe for the trial magistrate to find that the substance was bhang. Gatheru s/o Njagwara v. R. (1954), 21 E.A.C.A. 384 considered.

(ii) as regards the liquid found in the bottle there was no evidence given as to what experience the witness had had in relation to native liquor.

(iii) s. 34 of the Dangerous Drugs Ordinance and s. 9 of the Native Liquor Decree merely prescribe a convenient way of proving the ingredients of a substance examined by a Government chemist without having to call him personally as a witness.

Appeal allowed in part. Sentence on the first count reduced to six months and conviction and sentence on the second count quashed.

Case referred to:

(1) *Gatheru s/o Njagwara v. R.* (1954), 21 E.A.C.A. 384.

Judgment

Horsfall J: This is an appeal against the conviction and sentence by the learned resident magistrate, Pemba, dated January 27, 1960, when he convicted the appellant of the offences of being in possession of Indian hemp (bhang) contrary to s. 9 of the Dangerous Drugs Decree (Cap. 64) and of being in possession of native liquor (tende) contrary to s. 3 (*a*) of the Native Liquor Decree (No. 6 of 1942) and sentenced him to twelve months' imprisonment and to one month's imprisonment respectively to run concurrently.

Though the Attorney-General was served with notice of the appeal he was unable to be represented in court but wrote:

> "With regard to Criminal Appeal No. 4 I cannot support the conviction. Apart from the statement of P.W. 1 who says that he knows bhang when

> he sees it, there is no evidence at all to prove that the substance handed over to him by the accused was bhang or that the liquor found in the bottle was tende. It is unfortunate because the rest of the evidence seems sufficient to convict. I realise that the learned magistrate has accepted that P.W. 1 knows what bhang is but in my submission this is not sufficient."

I think that this is an accurate summary of the evidence so far as it goes, but it should be added that P.W. 1 had asked the appellant to sell him bhang and also that appellant did not challenge that what was produced in court (exhibit A) was bhang. The appellant's defence has consistently been that it was a police plant on him engineered by a police sergeant who hated him. In saying this I bear in mind that the onus remained on the prosecution throughout of satisfying the magistrate beyond reasonable doubt that the appellant was in possession of bhang.

Section 34 of Cap. 64 and s. 9 of Decree No. 6 of 1942 are similarly worded:

> "In any proceedings under this Decree the production of a certificate purporting to be signed by a Government chemist stating the ingredients of any substance submitted for his examination shall be sufficient evidence of the facts therein stated."

It is probably the omission of the prosecution to produce such a certificate that has influenced the acting Attorney-General in his decision not to support this conviction. I agree that it is safer for the prosecution in drug and native liquor cases to make it a rule to produce such a certificate as part of its evidence and that failure to do so may well be fatal where it is disputed that the substance is a dangerous drug or native liquor. The question is one of science or art on which a court is being asked to form an opinion and s. 45 of the Evidence Decree is relevant.

I refer to *Gatheru s/o Njagwara v. R.* (1) (1954), 21 E.A.C.A. 384 which concerned the question whether a police inspector was competent to prove that a home-made rifle was a lethal barrelled weapon within the terms of the definition of firearm in the Kenya Emergency Regulations. It was held that in deciding in what category the weapon fell, the court must have the assistance of expert opinion. To quote from the last paragraph of the report:

> "It may well be that in the present circumstances in Kenya a police officer on operational or investigation works acquires a sufficient practical knowledge to qualify him to speak as an expert on the type of home-made weapon so frequently used by Mau Mau terrorists, but even so, his testimony as an expert should, as in all such cases, be shown before his testimony is properly admissible. In the instant case the officer in question merely describes himself as an inspector of police attached to the Criminal Investigation Department, Nanyuki. There was no evidence as to how long he had performed such duties or whether he had ever seen or examined any home-made weapon other than those seized in the course of the operation which led to the appellant's arrest."

See also para. 671 of Halsbury's Laws of England (2nd Edn.) Vol. 13.

It seems to me that s. 34 of Cap. 64 and s. 9 of Decree No. 6 of 1942 merely prescribe a convenient way of proving what are the ingredients of a substance examined by a Government chemist without having to put the Government chemist in person into the witness box. It is usually expensive, inconvenient and unnecessary to call the Government chemist, but should the issue be disputed as to what were the ingredients of the substance examined by him the court would in a fit case adjourn the trial for his attendance. My point is that these sections do not preclude other methods of proving whether a substance is a dangerous drug or a native liquor.

P.W. 1, P.C. 975 Shaaban Seif stated:

> "We opened the rolls of paper, all four of them. All of them contained bhang. I know bhang when I see it. I have dealt with many cases of bhang."

The witness does not say how long he has served in the police nor in how many cases has he recognised bhang but these are matters going to the weight of his evidence. In his judgment the magistrate stated:

> "Shaaban (P.W. 1) states that he knows bhang very well and can know it when he sees it, he having dealt with several cases. He was not cross-examined on the point and in any event I accept what Shaaban states as I do everything else he states in evidence."

I consider that there was evidence in this case to make it safe for the magistrate to find that the substance was bhang. As regards the liquid found in the bottle there is no evidence given as to what experience P.W. 1 has had in relation to native liquor. Reluctantly I quash the conviction on the second count.

There is no merit in any of the other grounds of appeal put forward by the appellant in his memorandum of appeal. The record shows that when he elected to give evidence in his defence he stated that he wished to call Sgt. Ahmed Sultan as his witness. This man was duly called and then before the close of the defence the appellant told the magistrate that he had no more witnesses.

The magistrate sentenced the appellant to the maximum term of imprisonment (twelve months) which is open to a magistrate to impose for this offence. There is nothing on the record to show that the appellant is a dealer in bhang. There is no evidence of the quantity found in appellant's possession. The available evidence is that appellant produced two rolls when requested and a further two rolls were found by the police. There is evidence that appellant sold the two rolls for Shs. 1/-. The inference I must draw is that appellant was in possession of only a small quantity. I appreciate the magistrate's remarks as to the evils of bhang, but a sentence must approximate to the crime and this is not a case which merits the maximum sentence of imprisonment. The sentence of twelve months' imprisonment on the first count is quashed. A sentence of six (6) months' imprisonment is substituted therefore which will commence to run as from March 4, 1960. The sentence of one month's imprisonment on the second count is also quashed.

Appeal allowed in part. Sentence on the first count reduced to six months and conviction and sentence on the second count quashed.

The appellant in person.

The respondent did not appear and was not represented.

Re Industrial Oil Products Corporation Limited

[1960] 1 EA 221 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	9 March 1960
Case Number:	11/1959
Before:	Sheridan J

Sourced by: LawAfrica

[1] Jurisdiction – Company – Report by Official Receiver on company in liquidation – Allegation of fraud by directors – Order of court for public examination of directors – Order made without issue of summons and in absence of Official Receiver – Application for discharge of the order – English Companies (*Winding-up*) *Rules*, 1929, *r.* 8 (2) *and r.* 59 – *Companies Ordinance* (*Cap.* 212), *s.* 356 (1) (*U.*).

Editor's Summary

After considering a report by the Official Receiver the court made an order for public examination of the directors of a company in liquidation. The directors applied for discharge of the order on the ground that the court had no jurisdiction to make the order as r. 8 (2) and r. 59 of the English Companies (Winding-up) Rules, 1929, which are applicable to Uganda by virtue of s. 356 (1) of the Companies Ordinance had not been observed. The directors contended that the issue of a summons was a prerequisite under r. 8 (2) to confer jurisdiction upon the court to make the order for public examination and that the attendance in chambers of the Official Receiver when the order was made was mandatory under r. 59.

Held –

(i) the omission to proceed by summons as required by r. 8 (2) of The English Companies (Winding-up) Rules, 1929, was a formal defect which did not invalidate the proceedings, since no substantial injustice had resulted.

(ii) a judge in chambers can make an order on the strength of the Official Receiver's report and it is not absolutely essential for the Official Receiver then to be present.

Application dismissed.

Cases referred to in judgment:

(1) *In re Trust and Investments Corporation of South Africa*, [1892] 3 Ch. 332.

(2) *In re National Stores Ltd.*, [1899] 2 Ch. 773.

(3) *In re Great Kruger Gold Mining Company Ex parte Barnard*, [1892] 3 Ch. 307.

Judgment

Sheridan J: This is an application by the applicants, the directors of Industrial Oil Products Corporation, in liquidation, for discharge of the order for public examination made by Mr. Justice Bennett on January 25, 1960, on the ground of want of jurisdiction. The order of the learned judge is in the following terms:

> "January 25, 1960. On considering the further report of the Official Receiver dated October 22, 1959 –
>
> "**Order.** It is ordered that the persons whose K appear at the foot of the report attend before the court to be publicly examined as to the conduct of the business of the company and as to their conduct and dealings as directors.

(Sgd.). G. Bennett.”

The further report referred to is a report of the Official Receiver under s. 214 (1) of the Companies Ordinance (Cap. 212), in which she stated that in her opinion a fraud had been committed by the applicants since the formation of the company names and requested the court to direct that they should attend the court for the purpose of being publicly examined as to the conduct of the business of the company.

By s. 356 (1) of the Ordinance the Companies (Winding-up) Rules, 1929, of the Imperial Parliament are made applicable to Uganda. The relevant rules, in considering this application, are r. 8 (2):

> "Every application in Chambers shall be by summons which, unless otherwise ordered, shall be served on every person against whom an order is sought and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons."

And r. 59:

> "The consideration of a report made by the Official Receiver pursuant to sub-s. (2) of s. 182 of the Act [s. 214 (1) of the Ordinance corresponds] shall be before the Judge of the Court personally in Chambers and the Official Receiver shall personalty or by counsel or solicitor attend the consideration of the report and give the court any further information or explanation with reference to the matter stated in the report which the court may require."

The order of the learned judge is attacked for failure to comply with these two rules. The applicants have also filed affidavits, the substance of which is that the court lacked jurisdiction to make the order because the further report did not disclose sufficient evidence of fraud committed by them. Mr. D'Silva argued on their behalf that the issue of a summons is a prerequisite to confer jurisdiction upon the court and that in its absence no order could be made. He further relies on the use of the word "shall" in r. 59 as indicating that it is mandatory on the Official Receiver to attend on the judge in chambers. He concedes that a summons to consider a further report would be ex parte. The authority for this is *In re Trust and Investments Corporation of South Africa* (1), [1892] 3 Ch. 332, where it was held that such an order may be made ex parte leaving the party to move to discharge it if he alleges it could have been made without jurisdiction. The Official Receiver concedes that no summons was issued in this case, and that r. 59 was not complied with. There should have been a summons to move the court, but no one was prejudiced by this omission as it was not to be served on the applicant. At that stage only the Official Receiver and the court were involved. I am satisfied that this formal defect does not invalidate the proceedings as no substantial injustice has been caused by it: see r. 223 of the rules.

With regard to the failure to comply with r. 59 the Official Receiver contends that the judge has power to dispense with her presence, as it can only be for the benefit of the court so as to give further information or guidance on the report if it is not clear. There is no direct authority on this, but it is significant that in the form of Order for Public Examination as set out in Vol. 6 of Atkins Encyclopaedia of Court Forms and Precedents at p. 340, the opening words are – "Upon reading the reports of the Senior Official Receiver". Further, in Palmers Company Precedents, (15th Edn.) Part 2 at p. 316, alternative forms are given, (1) upon hearing the Official Receiver and upon reading the reports, and (2), upon reading the reports; which would seem to support the view that a judge in chambers can make an order on the strength of the report, and that it is not absolutely essential for the Official Receiver to be present.

On the second leg of this application Mr. D'Silva asks me to reconsider the order made by Mr. Justice Bennett and to discharge it on the ground that the further report did not disclose sufficient evidence of fraud to connect the applicants with it. I fail to see how I can discharge the order of a brother judge who was satisfied that the report warranted the public examination of the applicants, nor can I see how this can be argued to be a question of jurisdiction. The question whether the applicants did take part, as reported by the Official Receiver, in the fraud is one of the very things which it is the object of the examination to ascertain: *see In re National Stores Ltd.* (2), [1899] 2 Ch. 773 per Wright, J., at p. 776. Further, the question whether or not there shall be a public examination is entirely a matter for the discretion of the court and the exercise of its discretion can only be impugned on the ground that the court has no jurisdiction: see *In re Great Kruger Gold Mining Company Ex parte Barnard* (3), [1892] 3 Ch. 307. All that Mr. Justice Bennett was required to do was to consider whether there was prima facie evidence to support the opinion of the Official Receiver that a fraud had been committed by the applicants or any of them in relation to the company since its formation. That matter will be determined at the public examination. I fail to see how I can in any way interfere with the order of the learned judge. The application is dismissed with costs.

Application dismissed.

For the applicants:
Wilkinson & Hunt, Kampala
B. E. D'Silva

In person:
The Official Receiver, Uganda
Betty Batchelor

For the liquidator:
Hunter & Greig, Kampala
H. S. Sparrow

T M Bell v The Commissioner of Income Tax
[1960] 1 EA 224 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 January 1960
Case Number:	36/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Mayers, J.

[1] Income tax – Deemed distribution of profits of company – Shares of company registered in name of testator – Whether executors are shareholders – Vested or contingent interest – Whether beneficial interest includes interest in capital – Power of Commissioner to apportion dividends without obtaining information from trustees – East African Income Tax (*Management*) *Act*, 1952, *s.* 22 – *Companies Ordinance*, *s.* 26 *and Table A cl.* 20, *cl.* 21 *and cl.* 22 (*K.*) – *Income Tax Act*, 1952, *s.* 255 (2) – *Companies Act*, 1948, *s.* 26.

[2] Income tax – Assessment – Notice of objection – Appeal to court – Whether grounds of appeal restricted to grounds set out in notice of objection – East African Income Tax (*Management*) *Act*, 1952, *s.* 74 (2) *and* (4) *and s.* 78 (1) – *Income Tax* (*Appeal to Kenya Supreme Court*) *Rules* 1955, *r.* 3 *and r.* 11 (*K.*) – *Income Tax Act*, 1918, *s.* 149.

[3] Statute – Construction of Taxing Act – Authority of United Kingdom decisions.

Editor's Summary

The appellant's father, who was the registered owner of 7,904 shares in H.B. Ltd., by his will bequeathed his entire estate to trustees upon trust, subject to the payment of the income to his wife (who predeceased him) during widow-hood, to hold the capital and income for the appellant "if and when he shall attain the age of forty years", with gifts over in the event of his dying under that age. On the death of the testator in 1950 the appellant was under the age of forty and the 7,904 shares in the company remained registered in the name of the testator until they were transferred to the appellant in 1957 on his attaining forty years of age. In November, 1952, the capital of H.B. Ltd., was increased, a bonus issue of shares was made, and 18,443 of these bonus shares were registered in the name of the executors and formed part of the trust property under the will. These shares were also transferred in 1957 to the appellant. The Commissioner of Income Tax made orders under s. 22 of the East African Income Tax (Management) Act, 1952, deeming 60 per cent. of the total income of H.B. Ltd., for each of three accounting periods to have been distributed among the shareholders as at August 31, 1952, 1953 and 1954. H.B. Ltd., had, in respect of the years of income 1952 to 1954, made a return of its shareholdings and the Commissioner had received a copy of the testator's will, but did not, under s. 22 (11) of the 1952 Act, serve upon the executors notices requiring them to furnish the names and addresses of each person having any beneficial interest in any of the shares held by them. The Commissioner assessed the appellant on the dividends deemed to have been distributed in the year of income, 1952, in respect of the 7,904 shares registered in the name of the testator and in the years of income 1953 and 1954 on the dividends deemed to have been distributed in respect of both the 7,904 shares registered in the name of the testator and the 18,443 registered in the name of the executors. The appellant objected to each of the assessments on the ground that his interest in the testator's estate and in the dividends from the shares was contingent and not vested and thus he did not have a beneficial interest in the dividends within the meaning of s. 22 (11) of the 1952 Act. The Commissioner refused to amend the assessments and the appellant appealed to the Supreme

Court setting out grounds of appeal additional to those set out in his notice of objection to the Commissioner. It was agreed that the questions for the determination of the Supreme Court in brief were:

(*a*) were the executors shareholders of the 7,904 shares within the meaning of s. 22 (11) of the 1952 Act;

(*b*) was the appellant a person having a beneficial interest in either the 7,904 shares or the 18,443 shares within the meaning of s. 22 (11) of the 1952 Act;

(*c*) had the Commissioner sufficiently complied with the provisions of s. 22 (11) of the 1952 Act.

At the hearing before the Supreme Court counsel for the Commissioner sought the opinion of the court whether an appellant could take on appeal any point which had not been set out in the original notice of objection and stated that if it was not open to an appellant to do so he would waive the objection in this case. The Supreme Court answered question (*a*) in the negative and questions (*b*) and (*c*) in the affirmative, holding that the executors were not shareholders of the 7,904 shares; that the appellant held a vested and not a contingent interest; that the appellant held a beneficial interest in the shares and that it was not mandatory on the Commissioner to require the executors as trustees to furnish the names of persons having any beneficial interest in the shares before apportioning income therefrom. The Supreme Court also held that no ground of appeal which had not been taken in the original objection could be raised on appeal and that, as this went to the jurisdiction of the court, the objection could not be waived and, as the appellant had succeeded on a point which he was not entitled to take on appeal, dismissed the appeal. The appellant further appealed against the whole of the judgment other than that part which determined that the executors were not shareholders of the 7,904 shares and the Commissioner cross appealed against the decision that the executors were not shareholders of the 7,904 shares.

Held –

(i) a person aggrieved by an assessment made upon him who has objected and has not agreed with the Commissioner as to the *amount* of his assessment is a person who has failed to agree with the Commissioner in the manner provided by sub-s. (4) of s. 74 of the East African Income Tax (Management) Act, 1952; such a person, on appeal to a judge, is not confined to the points of objection he has specified in his notice of objection under s. 74 (2) and the learned judge, therefore, had jurisdiction to determine all three issues raised before him.

(ii) (Windham, J.A., dissenting) an executor is not, within the meaning of s. 22 (11) of the Act, a shareholder of shares registered in the name of the testator.

(iii) the appellant was the only person having a beneficial interest in the shares as he was the only person entitled to receive an actual dividend therefrom at the time the dividends were deemed to have been distributed.

(iv) the Commissioner might apportion the whole of the dividends to the appellant, as the criterion under s. 22 (11) of the Act was not entitlement to capital but entitlement to the dividends.

(v) the Commissioner need not, as a condition precedent to apportioning the dividends, require the trustees to furnish the names and addresses of the beneficiaries.

(vi) where a section of a local enactment is a complete statement of the local law on the subject and its provisions are not in pari materia with the United Kingdom provisions, the local section must be construed free from interpolations arising from United Kingdom decisions; but where the

provisions of a local enactment are in pari materia with United Kingdom provisions the decisions of the Court of Appeal in England and of the House of Lords are (subject to local conditions making them inappropriate) authoritative and should be followed.

(vii) where the provisions of a taxing Act are reasonably capable of two alternative meanings the court will prefer the meaning most favourable to the subject.

Appeal allowed.

Cases referred to in judgment:

(1) *Phipps v. Ackers* (1835), 9 Cl. & Fin. 583; 8 E.R. 539.

(2) *Connecticut Fire Insurance Co. v. Kavanagh*, [1892] A.C. 473.

(3) *Inland Revenue Commissioners v. Ross and Coulter*, [1948] 1 All E.R. 616.

(4) *Penang and General Investment Trust Ltd. v. Inland Revenue Commissioners*, [1943] A.C. 486; [1943] 1 All E.R. 514.

(5) *Inland Revenue Commissioners v. Barclays Bank Ltd.*, [1951] A.C. 421; [1951] 1 All E.R. 1.

(6) *Wallace Johnson v. R.*, [1940] A.C. 231; [1940] 1 All E.R. 241.

(7) *Commissioner of Stamps Straits Settlements v. Oei Tjong Swan*, [1933] A.C. 378.

(8) *Trimble v. Hill* (1879), 5 App. Cas. 342.

(9) *Nadarajan Chettiar v. Walauwa Mahatmee*, [1950] A.C. 481.

(10) *Robins v. National Trust Co.*, [1927] A.C. 515.

(11) *Burton v. Reevell* (1847), 16 M. & W. 307; 153 E.R. 1206.

(12) *R. v. Commissioners of Income Tax* (1889), 22 Q.B.D. 296.

(13) *Victoria City v. Bishop of Vancouver Island*, [1921] 2 A.C. 384.

(14) *In re Florence Land and Public Works Co.* (1885), 29 Ch. D. 421.

(15) *In re Macdonald, Sons & Co.*, [1894] 1 Ch. 89.

(16) *James v. Buene Ventura Nitrate Grounds Syndicate Ltd.*, [1896] 1 Ch. 456

(17) *Llewellyn v. Kasintoe Rubber Estates Ltd.*, [1914] 2 Ch. 670.

(18) *Cheshire Banking Co., Duff's Executor Case* (1886), 32 Ch. D. 301.

(19) *In re the St. George's Steam Packet Co. Ex p. Doyle*, 47 E.R. 1664.

(20) *Cape Brandy Syndicate v. Inland Revenue Commissioners*, [1921] 1 K.B. 64.

(21) *Canadian Eagle Oil Co. Ltd. v. R.*, [1946] A.C. 119; [1945] 2 All E.R. 499.

(22) *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100.

(23) *Alexander Drew & Sons Ltd. v. Commissioner of Inland Revenue* (1932), 17 T.C. 140.

(24) *Chamberlain and Talbot Investment Co. v. Inland Revenue Commissioners*, [1945] 2 All E.R. 351;

(1945), 173 L.T. 333.

(25) *Houry v. The Commissioner of Income Tax*, [1959] 3 All E.R. 781.

The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree dated March 13, 1959, of a judge of the Supreme Court of Kenya dismissing with costs three appeals, all heard together, against assessments to income tax for the years 1952, 1953 and 1954 purporting to be made against the appellant, Mr. T. M. Bell, by the respondent pursuant to his powers under s. 22 of the East African Income Tax (Management) Act, 1952. There is a cross-appeal by the respondent.

The relevant facts, which are all agreed, are as follows:

On April 25, 1950, the father of the appellant, Thomas Bell, (referred to hereinafter as "the testator") died, having, by his will and a codicil, appointed as his executors and trustees his wife (who predeceased him), the appellant and two other persons. The last-mentioned three (referred to hereinafter as "the executors") took probate of the will in the Supreme Court of Kenya on September 6, 1950.

By cl. 3 of his will the testator devised and bequeathed all his estate and effects to the executors upon trust for sale (with power to postpone sale) and investment and to stand possessed of the trust premises and the income thereof in trust to pay the income to the wife during widowhood; and subject thereto as to both capital and income for the appellant "if and when he shall attain the age of forty years" with a proviso that if the appellant should die under forty then, subject to the trust of income for the widow, the trustees were to stand possessed of the capital and income of the trust premises in trust to pay an annuity to the appellant's widow during widowhood; and subject thereto, in trust for the appellant's children who should survive the testator and being male attain twenty-one or being female marry under that age; and in default of children of the appellant who should attain a vested interest, in trust for such of the testator's named nephews as should be living at his death.

As already mentioned, the testator's wife died during his lifetime. At the date of the testator's death there were living the appellant, his wife and two infant children and two nephews of the testator. These are all still living. The trust for sale was never executed.

At the date of his death, the testator was absolutely and beneficially entitled to 7,904 shares in a private limited company, Harrtz and Bell Ltd. (hereinafter referred to as "the company"). The remainder (7,096) of the shares in the company stood in the name of the appellant.

The grant of probate of the testator's will was registered with the company on September 28, 1950. None of the testator's shares was ever transferred into the names of the executors. These shares remained in the company's register of shareholders in the name of the testator until February 4, 1957, when, consequent upon the appellant's having, on January 11, 1957, attained the age of forty years and having become absolutely entitled to them, these 7,904 shares were transferred by the executors into the appellant's name and ceased to be registered in the name of the testator.

The relevant income years for purposes of this case are 1952, 1953 and 1954. During these three years the actual income of the 7,904 shares mentioned was paid to the appellant and returned by him as his income for tax purposes.

On November 26, 1952, the capital of the company having been increased, a bonus issue of shares was made by the company in proportion to existing shareholdings. 16,324 additional shares were allotted to the appellant bringing his holding up to 23,320 shares.

On the same day the company purported to allot 18,443 additional shares to the testator and the said shares were recorded in the register of members as having been allotted to him on that date. A certificate for these shares was issued in the name of "the executors of the estate of Thomas Bell". The income of these shares was thereafter paid to the appellant as his income.

On February 4, 1957, the executors transferred these 18,443 shares to the appellant who had then attained the age of forty. He thereupon became the registered owner of them.

Accordingly, the position as to registration of shares belonging to the testator or allotted to his estate

during 1952, 1953 and 1954, seems to have been:

(*a*) The original 7,904 shares of the testator were still registered in the testator's name, notwithstanding that he had died in 1950 and the grant of probate of his will to the executors had been registered with the company.

(*b*) The 18,443 bonus shares were recorded in the register of members of the company as having been allotted to the testator on November 26, 1952, and a share certificate in respect of them was issued in the name of the executors. The register of members on August 31, 1953, and August 31, 1954, showed these 18,443 shares as registered in the name of the executors.

The company made a return to the Commissioner of Income Tax showing the shareholding on August 31, 1952, August 31, 1953 and August 31, 1954, and the Commissioner was provided with a copy of the testator's will.

On August 31, 1952, August 31, 1953, and August 31, 1954, respectively orders were made by the Commissioner of Income Tax under s. 22 of the East African Income Tax (Management) Act, 1952, (hereinafter referred to as "the Act") deeming certain profits of the company to have been distributed as dividends among the shareholders. It is agreed that these orders were properly made.

Prior to making these orders, the Commissioner did not serve a notice under s. 22 (11) of the Act requiring the executors to furnish the names and addresses of each person having any beneficial interest in any shares.

The Commissioner, by a Notice of Assessment No. 24965 in respect of the year of income, 1952, assessed on the appellant a sum of Shs. 130,094 tax in relation to

> "dividend deemed distributed to the estate of the late T. Bell on August 31, 1952, by Harrtz and Bell Ltd. assessed on you under s. 22 (11)."

The Commissioner, by Notice of Assessment No. 24737 in respect of the year of income, 1953, assessed on the appellant a sum of Shs. 52,433 tax in relation to

> "dividend element distributed by Harrtz and Bell Ltd. on August 31, 1953, under s. 22 includes dividend deemed distributed to estate of the late T. Bell (see 22 (11))."

The Commissioner, by Notice of Assessment No. 24910 in respect of the year of income, 1954, assessed on the appellant a sum of Shs. 48,508 tax in relation to

> "Dividend deemed distributed by Harrtz and Bell Ltd. on August 31, 1954, under s. 20. Includes dividend deemed distributed to the estate of the late T. Bell (s. 20 (iv))."

The reference to s. 20 and "s. 20 (iv)" must be an error, as s. 20 of the Act has nothing to do with deemed distribution of dividends and does not contain a sub-s. (iv). No doubt, it was intended to refer (as in the previous notices of assessment) to s. 22 (which is the only section of the Act dealing with deemed distribution of dividends and which was the section under which the Commissioner had acted in making the orders), and, presumably, to sub-s. (11) thereof. This will be referred to later. It will be observed that none of these notices of assessment was addressed to the executors. The other two executors are not mentioned and the appellant is assessed (expressly in the 1952 and 1953 notices and presumably in 1954) by virtue of s. 22 (11) of the Act as a beneficiary.

On February 27, 1957, the appellant's accountants wrote to the respondent as follows:

"Dear Sir,

T. M. Bell – File No. 112/7.

We refer to your assessment notices as follows:

No. 24965 for 1952 (s. 22)

No. 24737 for 1953 (s. 22)

No. 24910 for 1954 (s. 22)

and object thereto on the grounds that in each of these there is included in Mr. T. M. Bell's income charged to tax income deemed to have been received by the trustees of the estate of the late T. Bell. We should not raise any objection to this if Mr. T. M. Bell's interest in the estate was vested, but it is not and it seems to us that you are treating as his income income which may never accrue to his benefit. In other words the Commissioner is treating as a 'beneficial interest' under s. 22 (11) what is in fact merely a contingent interest."

Presumably the accountants were acting under s. 74 (2) of the Act which reads as follows:

"(2) If any person dispute the assessment he may apply to the Commissioner, by notice of objection in writing, to review and to revise the assessment made upon him. Such application shall state precisely the grounds of his objection to the assessment and shall be made within thirty days from the date of the service of the notice of assessment:"

Sub-s. (4) of s. 74 of the Act reads as follows:

"(4) In the event of any person assessed, who has objected to an assessment made upon him, agreeing with the Commissioner as to the amount at which he is liable to be assessed, or where any such person does not agree the amount and the Commissioner considers the assessment should be amended, the assessment shall be amended accordingly, and notice of such amended assessment shall be served personally on or sent by registered post to such person:

"Provided always that in the event of any person who, under sub-s. (2), has applied to the Commissioner for a revision of the assessment made upon him failing to agree with the Commissioner as to the amount at which he is liable to be assessed, the Commissioner shall, unless he has amended the assessment, cause to be served personally on or sent by registered post to such person a notice of refusal to amend the assessment, and the right of appeal under the provisions of this Act against the assessment made upon such person shall remain unimpaired."

On July 16, 1957, the respondent, acting under this sub-section, sent to the appellant notices of refusal to amend the assessments.

Section 78 (1) of the Act (so far as relevant) reads:

"78(1) Any person who, being aggrieved by an assessment made upon him, has failed to agree with the Commissioner in the manner provided in sub-s. (4) of s. 74, or having appealed to a local committee, is aggrieved by the decision of such committee, may appeal against the assessment to a judge upon giving notice in writing to the Commissioner within sixty days after the date of service upon him of the notice of an amended assessment or the notice of the refusal of the Commissioner to amend the assessment as desired, or within sixty days after the date of the decision of the local committee, as the case may be:"

On May 31, 1958, the appellant filed in the Supreme Court of Kenya, memoranda of appeal against the assessments in which he set out various grounds

of objection to the assessments in addition to the ground expressly mentioned in the above-quoted letter from the appellant's accountants.

Before the case came on for hearing in the Supreme Court, it was agreed between the legal advisers of the appellant and the respondent that the matters to be determined were as under:

> "(*a*) Were the executors of Thomas Bell deceased 'shareholders' in Harrtz and Bell Limited at the relevant date within the meaning of s. 22 (11) of the East African Income Tax (Management) Act, 1952, in respect of the 7,904 shares which had been standing in the name of the deceased at the date of his death and so remained until they were transferred into the name of the appellant after he had attained the age of forty years in the year 1957 and which were never in fact transferred into the names of the executors.
>
> (*b*) Were either the said 7,904 shares (if the answer to (*a*) above be in the affirmative) or the remaining 18,443 shares held by the executors at the relevant date upon a trust by virtue whereof the appellant was 'a person having any beneficial interest' therein within the meaning of s. 22 (11) of the Act.
>
> (*c*) If the answer to (*b*) above be in the affirmative with respect to any of such shares, did the respondent sufficiently comply with the provisions of s. 22 (11) of the Act in regard to apportionment to sustain the relative assessments."

At the hearing before the Supreme Court, Mr. Newbold, for the Commissioner, asked for the opinion of the court whether it was open to an appellant to rely in his appeal to the Supreme Court on a ground not set out in his notice of objection given to the Commissioner under s. 74 (2) of the Act. Mr. Newbold submitted that it was not; but made it plain that he was only asking for the opinion of the court for guidance in future cases and, if the court was with him, would wish to waive the point so far as the present case was concerned.

As to question or issue (*a*) above, the learned judge held that the executors of the deceased were not "shareholders" in the company in respect of the 7,904 shares mentioned in para. (*a*) above. This, but for the finding on the question of jurisdiction mentioned below, would have decided this part of the case in favour of the appellant.

As to issue (*b*), the contention of the appellant was that the phrase "person having any beneficial interest" in s. 22 (11) of the Act did not include a person having merely a contingent interest and that the appellant's interest was merely contingent until he reached the age of forty. The learned judge held, on the authority mainly of *Phipps v. Ackers* (1) (1835), 9 Cl. & Fin. 583; 8 E.R. 539, that the interest of the appellant was not merely contingent, but was a vested beneficial interest liable to be divested on failure to attain the age of forty. This was a decision of that issue against the appellant.

The learned judge also decided issue (*c*) above against the appellant (subject, however, to his finding on jurisdiction mentioned below) holding that the powers conferred upon the Commissioner under sub-s. (11) of s. 22 of the Act were discretionary and not mandatory.

The learned judge, however, dealt with issues (*a*) and (*c*) upon the point raised incidentally and sought to be waived by Mr. Newbold. He held that a person who has given notice of objection on a single ground could not be regarded as a person who "has failed to agree with the Commissioner" within s. 78 (1) of the Act upon any other ground not specified in his notice of objection; from which it followed that such person could not appeal against an assessment upon any ground other than a ground so specified. The learned

judge held further that this was a point which went to the root of the jurisdiction of the court to hear the case and that it could not, therefore, be waived by a party. He, accordingly, felt it his duty to decline jurisdiction with regard to issues (*a*) and (*c*) and, having decided against the appellant on issue (*b*), he dismissed the appeals with costs.

This decision of the learned judge to decline jurisdiction forms the subject of grounds 1 to 4 of the grounds of appeal to this court and it may be convenient if I deal with it at once. Mr. Harris, for the appellant, argued that, as a matter of construction of the accountant's letter (taking that to be the notice of objection), the learned judge was wrong in holding that the notice merely raised one ground of objection. He contended further that the learned judge was wrong in deciding that no appeal lay except in regard to a matter raised in the notice and was wrong in declining jurisdiction. I do not wish to be taken as agreeing with Mr. Harris as to the construction which he sought to put upon the accountant's letter, but it is unnecessary for me to decide that point as I have come to the clear conclusion that a person who is aggrieved by an assessment made upon him and who has objected and has not agreed with the Commissioner as to the *amount* of his assessment is a person who has failed to agree with the Commissioner in the manner provided by sub-s. (4) of s. 74 of the Act. With respect, I see no valid reason for holding that such a person on appeal to a judge, is confined to the points of objection which he has specified in his notice of objection under s. 74 (2). I am of opinion that the learned judge had jurisdiction to hear and determine issues (*a*) and (*c*) as well as issue (*b*).

Section 78 (1) gives a right of appeal to a person aggrieved by an assessment made upon him who

> "has failed to agree with the Commisioner in manner provided by sub-s. (4) of s. 74."

Sub-section (4) of s. 74 provides for notice of an amended assessment to be served upon an objector: (i) where the objector now agrees with the Commissioner as to the amount at which he is to be assessed or (ii) where the objector does not agree the amount and the Commissioner considers that the original assessment should be amended. Under the proviso, where a person who has applied for a revision under sub-s. (2) has failed to agree with the Commissioner as to the amount at which he is liable to be assessed and the Commissioner has not amended the assessment, a notice of refusal to amend is to be served by the Commissioner, and the right of appeal under the provisions of the Act against the assessment is to remain unimpaired (which presumably means unimpaired by the negotiations). In every one of these cases it is expressly stated that the matter upon which agreement is reached or is not reached, as the case may be, is the amount of the assessment. The grounds therefor are not mentioned. If, therefore, a person has failed to agree with the Commissioner as to the amount of the assessment he has

> "failed to agree with the Commissioner in manner provided in sub-s. (4) of s. 74"

and has a right of appeal to a judge under the plain words of s. 78 (1). (I leave out of consideration his other right of appeal to a local committee and thence to a judge which does not arise in this case). I think "failed to agree with the Commissioner as to the amount" simply means that he has queried the amount initially and has not subsequently agreed any amount with the Commissioner. Section 78 (1) read with 74 (4) is a practical provision which gives the objector an appeal if he has not agreed the amount of tax at which he has been assessed by an initial or amended assessment. He may or may not have agreed the grounds upon which the Commissioner has based his assessment.

Mr. Newbold pointed to the word "precisely" in s. 74 (2) of the Act and argued that it was a condition precedent to the taxpayer's right of appeal to a judge that his notice of objection should have stated precisely the grounds of his objection to the assessment and, therefore, that he could not put into his memorandum of appeal to the judge any ground which had not been included in his notice of objection to the Commissioner. With respect, I am unable to accept this argument. No doubt, it is convenient that the Commissioner shall be given notice in the notice of objection of the precise grounds upon which the taxpayer objects to the assessment. But I am unable to find any provision which says that when the matter comes to a judge, the taxpayer is precluded from relying on any additional grounds, of which he may have been unaware when he put in his notice of objection or which his legal advisers may since have advised him that he has. The notice of objection must (except in cases of sickness etc.) be submitted to the Commissioner within thirty days of the assessment, whereas the taxpayer has, under s. 78 (1), sixty days from the notice of the Commissioner's refusal to amend the assessment in which to give notice of appeal to a judge, and seventy-five days are allowed by r. 3 of the Income Tax (Appeal to Kenya Supreme Court) Rules, 1955 (E.A.H.C. L.N. 32 of 1955) for preferring a memorandum of appeal. As Mr. Harris pointed out, it would be remarkable to find sixty days and seventy-five days allowed, if all that the memorandum can contain is a repetition of the grounds of objection already contained in the notice of objection to the Commissioner. Mr. Harris also pointed to r. 11 which, by implication, allows an appellant, with leave of the court, to rely upon a ground of appeal not stated in his memorandum of appeal, and he argued that that rule would be ultra vires if no ground could be relied upon before the judge which had not been included in the notice of objection to the Commissioner. I think that there is weight in these observations. I do not propose, however, to construe the Act by the rules. In my opinion, s. 78 (1) gives a right of appeal to a judge to any person aggrieved by an assessment who has failed to agree with the Commissioner in the manner provided by s. 74 (4), that is has failed to agree as to the amount at which he is liable to be assessed. I can find no words limiting this right of appeal to the grounds taken by the taxpayer in his notice of objection to the Commissioner and I should require very clear words before I would agree that the right of appeal which is conferred by the Ordinance on a taxpayer should be so restricted, or that the power of the court to do justice and to determine the real issues between the parties should be so curtailed, certainly as regards points of law where there were no disputed facts. As Lord Watson said in *Connecticut Fire Insurance Co. v. Kavanagh* (2), [1892] A.C. 473 at p. 480:

> "When a question of law is raised for the first time in a court of last resort, upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea."

A fortiori where the point raised is a point of law raised upon admitted facts at the first hearing before a court. If the procedure were by way of case stated (as, for instance, under s. 149 of the Income Tax Act, 1918) from a tribunal and the Supreme Court were required to determine any question or questions of law "arising on the case stated", the position would be different: *Inland Revenue Commissioners v. Ross and Coulter* (3), [1948] 1 All E.R. 616. But that is not the position under the Act. I do not think that this view entails any injustice to the Commissioner or any detriment which could not be adjusted by adjournment of the hearing and costs. Whatever be the position where there are disputed facts, I see nothing to justify the argument that where the facts are agreed, it is a condition precedent to the right to appeal to a judge that all grounds of appeal on points of law must have been included in the notice of objection.

With due deference to the learned judge, I think (as already stated) that he had jurisdiction to hear and determine issues (*a*) and (*c*) as well as issue (*b*), and that this court must now decide them, paying due regard to the very useful observations of the learned judge upon them.

It will be convenient to deal first with issue (*a*) set out above. This concerns only the 7,904 shares which were, during the three relevant years, standing in the books of the company in the name of the deceased. It poses the question whether the executors were "shareholders" in the company at the dates when the dividends were deemed to be distributed within the meaning of s. 22 (11) of the Act.

The relevant parts of sub-s. (1), sub-s. (4), sub-s. (5) and sub-s. (11) of s. 22 of the Act are as follows:

"22(1) Where the Commissioner is satisfied that, in respect of any period for which the accounts of a company resident in the territories have been made up, the amounts distributed as dividends by that company up to the end of twelve months after the date to which such accounts have been made up, increased by any tax payable thereon, are less than sixty per cent. of the total income of the company ascertained in accordance with the provisions of this Act for that period, he may, unless he is satisfied that having regard to losses previously incurred by the company or to the smallness of the profits made the payment of a dividend or a larger dividend than that declared would be unreasonable, by notice in writing order that the undistributed portion of sixty per cent. of such total income of the company for that period shall be deemed to have been distributed as dividends amongst the shareholders as at the end of the sixth month after the date to which such accounts have been made up and thereupon the proportionate share thereof of each shareholder shall be included in the total income of such shareholder for the purposes of this Act:"

.

"(4) Where the proportionate share of any shareholder of a company in the undistributed profits of the company has been included in his total income for any year under the provisions of sub-s. (1) the tax payable in respect of such proportionate share may (if the shareholder so elects by giving notice in writing to the Commissioner at any time before the due date for the payment of such tax), be recovered from the company and thereupon the Commissioner may serve a notice upon the company stating the sum so payable, and in default of payment the tax may be recovered from the company in the manner provided by s. 86; and in any such case the tax paid by the company on behalf of the shareholder shall, upon the subsequent distribution in whatever form of such profits, be recovered by deduction from such distributed profits.

"(5) Where tax has been paid in respect of any undistributed profits of a company under this section, and such profits are subsequently distributed, the proportionate share therein of any shareholder of the company shall be excluded in computing his total income.

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"(11) Where a trustee is a shareholder deemed under sub-s. (1) to have received a dividend, then the Commissioner may, by notice in writing, require the trustee to furnish the name and address of each person having any beneficial interest in the shares held by such trustee; and thereupon the Commissioner may apportion the dividends deemed to have been received in respect of such shares among such persons in accordance with such beneficial interests and such apportioned amounts shall be

> included in the total income of each such person for the purposes of this Act and the tax thereon may be recovered in accordance with the provisions of sub-s. (4)."

I think that "shareholder" in sub-s. (11) must prima facie mean the same as "shareholders" and "shareholder" in sub-s. (1) and sub-s. (4). It is to be observed that there is no definition in the Act of "shareholder". There is nothing corresponding to the definition of "member" in s. 255 (2) of the Income Tax Act, 1952, of the United Kingdom where, in the chapter of the Act dealing with the power to impose surtax on the undistributed income of certain companies by deeming it to be the income of the members, "member" in relation to any company is defined to include

> "any person having a share or interest in the capital or profits, or income of the company."

This definition seems first to have been enacted in s. 21 (7) of the Finance Act, 1922. If there were a corresponding definition of "shareholder" in s. 22 of the Act (which was enacted in 1952), clearly the appellant would fall within it, and so, I think, would executors of a deceased registered shareholder who had not themselves been registered in the companies' register of shareholders, since they would have an interest in the capital or profits or income of the company. The fact that the provisions of the local Act differ in several respects from corresponding legislation in the United Kingdom and in particular the fact that there is a wide definition of "member" in the relevant chapter of the United Kingdom legislation and no corresponding definition of "shareholder" in the local Act makes it necessary to read with caution certain of the English authorities (such, for instance, as *Penang and General Investment Trust Ltd. v. Inland Revenue Commissioners* (4), [1943] A.C. 486; and *Inland Revenue Commissioners v. Barclays Bank Ltd.* (5), [1951] A.C. 421) from which, though not precisely in point, valuable guidance might otherwise be obtained. Where a section of a local enactment is a complete statement of the local law on the subject dealt with and the provisions of the local enactment and of the United Kingdom Act are not in pari materia, what has to be construed is the local section according to what the local legislature has itself said free from interpolations derived from any exposition, however authoritative, of the law of England: *Wallace Johnson v. R.* (6), [1940] A.C. 231, 240; *Commissioner of Stamps Straits Settlements v. Oei Tjong Swan* (7), [1933] A.C. 378, 387. Per contra where the provisions of the local enactment and of the United Kingdom Act are in pari materia (e.g. s. 26 of the Companies Ordinance of Kenya and s. 26 of the Companies Act, 1948, of the United Kingdom (reproducing s. 23 of the Companies Act, 1862, s. 24 of the 1908 Act and s. 25 of the 1929 Act) the decisions of the Court of Appeal in England and of the House of Lords are (subject to local conditions making them inappropriate) authoritative and should be followed: *Trimble v. Hill* (8) (1879), 5 App. Cas. 342 (P.C.); *Nadarajan Chettiar v. Walauwa Mahatmee* (9), [1950] A.C. 481 (P.C.); *Robins v. National Trust Co.* (10), [1927] A.C. 515, 519 (P.C.).

What is the meaning of "shareholder" in sub-s. (11) of s. 22 of the Act?

> "It is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning":

Maxwell Interpretation of Statutes (10th Edn.) p. 3; *Burton v. Reevell* (11) (1847), 16 M. & W. 307; *R. v. Commissioners of Income Tax* (12) (1889), 22 Q.B.D. 296, 309; *Victoria City v. Bishop of Vancouver Island* (13), [1921] 2 A.C. 384. There may, of course, be something in the context which shows

that words or phrases cannot be intended to bear their technical or their ordinary meaning. Who then are "shareholders" in a limited company according to the technical, and to the ordinary, meaning of that term? In strictness (apart from the members who subscribe the memorandum) they are the registered shareholders and the registered shareholders only.

> "In the case of a company limited by shares the terms 'member' and 'shareholder' are synonymous":

Palmer's Company Law, (20th Edn.) p. 435. Section 26 of the Companies Ordinance enacts that, apart from subscribers to the memorandum of a company, every other person who agrees to become a member of a company, and whose name is entered in its register of members, shall be a member of the company. The learned editors of Palmer, commenting on the corresponding section of the English Companies Act of 1948, say at p. 436,

> "These and only these can strictly be called members in the sense of having acquired the full status of membership."

In *In re Florence Land and Public Works Co.* (14) (1885), 29 Ch. D. 421, it was held that persons who had applied for shares and to whom shares had been allotted, but whose names had not been placed on the register of members, had not acquired the full status of members of the company for the purpose of becoming contributories in the liquidation of the company. Fry, L.J., said at p. 447:

> "Now s. 23 of the Companies Act, 1862, makes the placing of the name of a shareholder on the register a condition precedent to membership."

Section 23 of the Companies Act, 1862 is similar in all material respects to s. 26 of the Companies Ordinance. The learned editors of Palmer at p. 437 state:

> "In the case of members other than subscribers to the memorandum two essential conditions have to be satisfied to constitute a person a member:
>
> (1) an agreement to become a member;
>
> (2) entry on the register.
>
> The two conditions are cumulative: unless they are both satisfied, the person in question has not acquired the status of member."

Lindley, L. J., (as he then was) in *In re Macdonald, Sons & Co.* (15), [1894] 1 Ch. 89, speaking of persons who had agreed to take shares but whose names had not been placed on the register of members, said at p. 103 and p. 104:

> "Are these gentlemen members according to the definition in s. 23? Clearly and plainly they are not. In order to be members they must be registered as shareholders and they are not."

In the present case, as has already been said, the person registered in the register of members of the company in respect of the 7,904 shares, at the dates when the orders under s. 22 were made by the Commissioner, was the testator. Mr. Newbold argued that his estate was the shareholder, that if there had been an actual distribution, the executors would have been treated as shareholders and would have received the dividend, that the object of s. 22 of the Act is to put the shareholders in the same position for tax purposes as if an actual distribution had been made and, accordingly, except for purposes of meetings, the words "shareholders" and "shareholder" must include the executors.

He relied on *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.* (16), [1896] 1 Ch. 456; and *Llewellyn v. Kasintoe Rubber Estates Ltd.* (17), [1914] 2 Ch. 670. He also mentioned art. 20, art. 21 and art. 22 of Table A to the Companies Ordinance which had been adopted by the company. Those articles, so far as relevant, read:

> "20 The legal personal representative of a deceased sole holder of a share shall be the only person recognised by the company as having any title to the share . .
>
> "21 Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be properly required by the directors, have the right either to be registered as a member in respect of the share or, instead of being registered himself, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.
>
> "22 A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which he would be entitled if he were the registered holder of the share, except that he shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company."

It is clear that the executors, notwithstanding that they were not registered as holders of the shares, would have been entitled to any actual dividends declared on the 7,904 shares and could have transferred the shares (as in 1957 they did) without themselves becoming registered shareholders. In *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.* (16) it was held that the legal personal representative of a deceased member whose name remained on the register of members could, under art. 27 which required new shares to be offered to "members", require an allotment to them of those shares to which the deceased would have been entitled, had he been alive. Lord Herschell said, at p. 464:

> "It is no doubt the fact that, strictly speaking, although Mr. James's name was, at the time of the resolution of April, 1893, still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word 'member', as used in some of the articles of the company, must be held to include those whose names are on the register, though they are no longer living. The article, for example, which in the case of this company is substituted for art. 72 of Table A authorises the directors to distribute the profits of the company 'between the members' by way of dividend. It cannot be doubted that they would be warranted in paying the proportionate share of the profits to the representative of a deceased member, although the word 'member' only is used, or that such representative would be entitled to claim that dividend. For this purpose the deceased member must still be regarded as a member within the meaning of the article. In a somewhat similar case the late Lord Justice James said 'the estate is the member'. This is, of course, a metaphorical expression, but it sufficiently indicates the legal situation of the parties.
>
> "Again, where a liability arises with respect to the shares – as, for example, where a call is made on the 'members' – it seems equally free from doubt that the liability attaches to the estate of the deceased member, and must be discharged by his representative, even though, being deceased, he is no longer, strictly speaking, a member of the company."

Rigby, L.J., said at p. 466 and p. 467:

> "The real question is whether the provision of art. 27 of Table A, for offering the new shares to 'members', is intended to be confined to members in the stricter sense of the word, or whether it may not include the representatives of deceased members.
>
> "Speaking generally, the executors of a deceased member of a limited company as representing his estate are entitled to all the profits and advantages attaching to the shares belonging to their testator, and subject to all the incidental liabilities, although in terms such profits, advantages and liabilities would seem to attach to members only.
>
> "Thus, under art. 72 of Table A, which provides that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares, it would be difficult to hold that the estate of a deceased member, and his executors as representing his estate, are not entitled to a proper proportion of dividend, though the executors may not be themselves registered members.
>
> "So it could hardly be contended that under art. 4 providing that the directors may make calls upon the members, the estate of the deceased member, and his executors as representing that estate, are not liable to bear calls made after his death, so long as his share remains untransferred.
>
> "The liability for call exists notwithstanding the fact that the required notice cannot effectually be given to a dead man, because it may be given to his representatives; though, if the company is not aware of his death, notice served at his registered address is sufficient when the articles provide for such service upon members. (*New Zealand Gold Extraction Co. v. Peacock* (1894) 1 Q.B. 622).
>
> "In all these cases the result is arrived at by treating the word 'member' as including a deceased member, so long as his name is on the register; or, what comes to the same thing, treating the estate of the deceased member as being a member for the purpose both of profit and liability. *Baird's* case (L.R. 5 Ch. 725)."

In *Llewellyn v. Kasintoe Rubber Estates Ltd.* (17) it was held that executors of a deceased member of a company who had not had his shares registered in their names had the same right to dissent from a re-construction scheme adopted under s. 192 of the Companies (Consolidation) Act, 1908, as the deceased member would have had if living. Swinfen Eady, L.J., at p. 683 stated the question to be decided as follows:

> "The question raised is, are the plaintiffs as executors entitled to this injunction, which depends on the question whether they have the right to dissent. It is beyond dispute that the word 'member', used in the statute of 1908 and in the articles of association of this company, is used sometimes as referring to a member on the register, and also sometimes as including and extending to a deceased member and the estate of a deceased member. It is beyond dispute that the word bears from time to time one or both of these meanings, and sometimes one and sometimes the other. The question is, therefore, does it in s. 192, sub-s. 3, include the estate of a deceased member."

The learned Lord Justice decided that it did.

But does it follow that because "member" in certain sections of the Companies Acts and in the articles of association construed in *James's* (16) and *Llewellyn's* (17) cases has been held to include the estate of a deceased member and because, speaking generally, executors represent the estate and the executors

of a deceased member are entitled to the profits and advantages and subject to the liabilities incidental to the shares held by the deceased member, that "shareholder" in sub-s. (11) of s. 22 of the Act must include the executors? Mr. Harris contended that "shareholder" means a living person whose name is on the register, or a deceased person whose name was placed upon the register during his life and has not since been removed; but that "shareholder" does not include the executors of a deceased shareholder until their names are placed on the register, and that the mere noting of a grant of probate on the register does not constitute the executors of a deceased shareholder "shareholders" in his place. Mr. Harris cited the various authorities mentioned above in order to establish that "member" means "registered member" and also relied upon Palmer's Company Law (20th Edn.) at p. 353:

> "Where a member of a company dies, his shares vest in his executors or administrators, and the estate is liable for calls if the shares are not fully paid. The executors or administrators, in whom shares have so become vested, are entitled to be registered as the holders of the shares, in the absence of provisions in the articles to the contrary; but the executors or administrators do not ipso facto become members of the company, nor is the company entitled, without their consent, to register them as members. Such registration (as members) may involve them in a personal liability, and to justify it there must be a distinct request for registration on their part. If executors accept new shares offered to them in that capacity they will be personally liable."

It seems to me that the authorities cited in Palmer bear out the statements in the text. The principle authority there cited is *In re Cheshire Banking Co., Duff's Executor's* case (18) (1886), 32 Ch. D. 301 (C.A.). In that case two companies amalgamated. A., a holder of shares in one company, received a circular asking whether he would exchange his shares for shares in the company which took over its business. A. died without having replied. His executors sent in his share certificate and asked for shares in the new company. A certificate was made out to the executors and they were entered in the share register with the description "executors of A.". The executors later objected and asked for a certificate in the name of A. The directors accordingly cancelled the original certificate and one was made out in the name of A. On a summons by the liquidator for rectification of the register by striking out the name of A. and putting in place of it the names of the executors as holders of the shares, it was held that there had been a completed contract between the executors and the company, by application and acceptance, that the shares should be taken in the names of the executors individually and that such completed contract could not have been afterwards rescinded by the company. Kay, J., said, at p. 304:

> "Now it was quite open to the executors to notify simply to the old company in which the testator was a shareholder that they were his executors, and that alone, according to the language of Lord Selborne in *Buchan's* case, would not have authorised the old company to put the executors' names upon the register of shareholders in such a way as to make them personally liable."

Cotton, L.J., said at p. 309:

> "If the question had been what was their liability in the *Staffordshire Company* in respect of the shares, then they would have been liable as executors only, because they never became the holders of those shares. The testator was the holder, and though the executors after his death represented him, they would not represent him as shareholders, but as the persons on whom the law threw the liability for his shares to the extent of

> his assets. But if once shares are put into the names of executors individually, although they have a right of indemnity against the estate they are liable personally, with that right of indemnity, and they cannot say that their liability is to be only a liability to the extent of the assets of the testator."

It seems to me that this is express authority for the proposition that unregistered executors though they represent the estate of a deceased shareholder do not represent it as shareholders, which is precisely in point in the present case. Fry, L.J., said at p. 310:

> "No company can validly allot shares to persons who are not responsible to the extent of the whole of their property."

This again shows that executors are not shareholders merely qua executors. See also *In re the St. George's Steam Packet Co. Ex p. Doyle* (19), 47 E.R. 1664.

I do not doubt that "member" in certain sections of the Companies Acts and in the articles of association construed in *James's* case (16), includes the estate of a deceased member. No doubt also, executors of a deceased member represent his estate and are, broadly speaking, entitled to the profits and advantages, and subject to the liabilities (to the extent of his assets) incidental to the shares held by the deceased member. But Cotton, L.J., expressly said in Duff's case (18) that *Duff's* executors would not represent their testator as shareholders, but as the persons on whom the law threw the liability of his shares to the extent of his assets. If it be conceded, on the authority of *James's* case (16) and *Llewellyn's* case (17), that the estate of a deceased shareholder is the shareholder, that does not conclude the matter. In order to make unregistered executors "shareholders" because they represent the estate it would still have to be shown, not only that they represent the estate, but that they represent it as shareholders, and that is precisely what *Duff's* case (18) shows that they do not do.

The question in the present case is one of construction of s. 22 of the Act and of the meaning to be assigned to the word "shareholder" in sub-s. (11), and if any reasonably clear indication could be gathered from the language used that the legislature intended that word to bear an extended meaning beyond its technical and ordinary meaning, in that context, effect would have to be given to that intention. It is argued that sub-s. (1) of s. 22 of the Act says that the undistributed portion of the income is to be deemed to have been distributed "*as dividends* amongst the shareholders" and that this indicates that the persons who are to be deemed to have participated in the notional distribution are the persons who would have been paid in respect of those shares had a dividend actually been distributed, whether in strictness they are "shareholders" or not. I would agree if the words were merely "distributed as dividends", with no mention of "shareholders" or if "shareholders" were defined to include any person entitled to dividends. But, as the words stand, and more particularly as they stand in a taxing Act, I think that they must be construed as indicating an intention that the deemed distribution is only to be persons who would be entitled to take dividends as shareholders and, as we have seen by analogy from *Duff's* case (18) and from the other authorities cited, unregistered executors of a deceased shareholder may take dividends, but they do not take them as shareholders, but as persons to whom the law gives the advantages of their testator's shares and upon whom the law throws the liabilities of those shares to the extent of the testator's assets.

I have felt the greatest difficulty in deciding whether "shareholders" and "shareholder" in sub-s. (1) and sub-s. (11) of s. 22 should or should not be construed as including the executors in this case. It would be easy to take as a starting point ideas established under rather different legislation in England, and brushing aside the technical and the ordinary meaning of the words used

and assuming an intention in the legislature that the fictional distribution of dividends was to be assimilated in all respects to an actual distribution, to decide that whoever was entitled to take an actual dividend must be taxed on a deemed dividend. But I do not think that is a proper approach to the provisions of a taxing Act. I agree with the learned judge that the canon of construction which is applicable is that stated by Rowlatt, J., in *Cape Brandy Syndicate v. Inland Revenue Commissioners* (20), [1921] 1 K.B. 64, 71 and approved by Viscount Simon, L.C., in *Canadian Eagle Oil Co. Ltd. v. R.* (21), [1946] A.C. 119 at p. 140:

> " . . . in a taxing Act one has to look merely at what is clearly said. There is no room for intendment as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Or, as Lord Cairns said in *Partington v. Attorney-General* (22) (1869), L.R. 4 H.L. 100, 122 approved in 1950 by Lord Macdermott in *Inland Revenue Commissioners v. Barclays Bank Ltd.* (5) at p. 439:

> "If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

When one looks at sub-s. (11) of s. 22 it is obvious that "shareholder" does not mean the person entitled beneficially to the shares, or the persons beneficially entitled to an actual dividend. The shareholder in this sub-section is a trustee. Then what does "shareholder" in this sub-section mean? According to the technical and I think the ordinary and well-established meaning "shareholders" means those whose names are entered as such on the register of shareholders, whether alive or dead. According to the letter of the law that would not include the executors of a deceased shareholder whose names are not on the register and who, as we have seen do not ipso facto become shareholders and whom the company cannot register as shareholders without their consent. It may be within the spirit of the law that such persons should be included in the term "shareholder", but in a taxing Act that is not enough. I can see no compelling reason derived from the context of s. 22 or the rest of the Act, why "shareholder" in sub-s. (1) or in sub-s. (11) should not be given its established meaning of shareholder on the register. That is not reading anything into the section: it is merely giving the word "shareholder" the meaning which s. 26 of the Companies Ordinance gives to it and which it ordinarily bears. I doubt whether in a taxing Act, I am entitled to go further and, relying on an assumed intention of the legislature, construe "shareholder" as impliedly including the executors of a deceased registered shareholder, such executors not being themselves registered shareholders. If that was the intention, it would have been very simple to say so or to include a definition on the lines of the definition in the corresponding legislation in the United Kingdom. If "shareholders" in sub-s. (1) is given its established meaning of registered shareholders, this would not destroy the effect of the section. The effect would be that unregistered executors or trustees of a deceased shareholder and their beneficiaries would escape participation in a notional distribution; but the section would still operate with regard to all registered shareholders and the beneficiaries of any trustee registered as a shareholder, to the extent that they were entitled to an actual dividend. It has been suggested that if unregistered executors of a deceased shareholder are excluded, sub-s. (1) would direct a deemed distribution of the *whole* amount between the registered and living shareholders. I do not agree. Such a construction would give insufficient effect to the words "as dividends".

In my opinion, the terms "shareholder" and "shareholders" in sub-s. (1) and sub-s. (11) are reasonably capable of two alternative meanings, one being the meaning contended for by Mr. Newbold and the other that which found favour with the learned judge. Having directed himself by reference to the above-quoted words of Lord Simon in *Canadian Eagle Oil Co. v. R.* (21), the learned. judge said:

> "Looking fairly at the language used in sub-s. (1) Of s. 22 it seems to me that the executors of the estate of a deceased person unless and until the shares, vested in the deceased person immediately prior to his decease, appear on the register of the company in the name of those executors cannot be regarded as shareholders within the meaning of the sub-section."

I am not prepared to say that that is not a meaning of which "shareholder" and "shareholders" in sub-s. (1) and sub-s. (11) of s. 22 are reasonably capable It is the strict meaning of the words and I see no compelling indication that they are intended to bear an extended meaning. Accordingly, the court should prefer the meaning more favourable to the subject. The principle is stated by Lord Thankerton in *Inland Revenue Commissioners v. Ross & Coulter* (3) at p. 625:

> "I cannot think that there can be much doubt as to the proper canons of construction of this taxing section. It is not a penal provision; counsel are apt to use the adjective 'penal' in describing the harsh consequences of a taxing provision, but if the meaning of the provision is reasonably clear, the courts have no jurisdiction to mitigate such harshness. On the other hand, if the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject."

It follows that I am not prepared (except on the question of jurisdiction) to differ from the conclusion of the learned judge on issue (*a*).

I now pass on to consider issue (*b*) which relates to the 18,443 shares which the company had purported to allot to the testator on November 26, 1952. These, according to the statement of further agreed facts handed in to the Supreme Court at the hearing, stood, on August 31, 1953 and 1954, registered in the name of the executors. There is, therefore, no doubt that the executors were "shareholders" within sub-s. (11) of s. 22, in respect of these shares and that they held them on trust for the persons beneficially entitled to them. The appellant contended that he was not at any material time a person having any beneficial interest in the shares within the meaning of sub-s. (11), or alternatively that if he was such a person, he was not the only such person and that the respondent had failed to make the apportionment among all such persons, as the sub-section required. Mr. Harris argued that "beneficial interest" in sub-s. (11) meant an indefeasible beneficial interest. He did not in this court dispute that the interest of the appellant was vested; but he said that it was, as to capital, liable (looking at it in 1953 and 1954) to be defeated if the appellant did not attain the age of forty: therefore, the notional dividend was not attributable to the appellant. He argued that unless "beneficial interest" was construed as "indefeasible beneficial interest", injustice might result in that, for instance, a person in the appellant's position might have the disadvantage of having to pay tax on a deemed dividend and might die before he got any corresponding advantage e.g. became entitled to the corpus increased by reason of the fact that an actual distribution had not been made. When it was pointed out to Mr. Harris that a beneficiary to whom an apportionment had been made under sub-s. (11) could have the tax paid by the company under sub-s. (4), he contended that a beneficiary could not operate sub-s. (4) as he was not a shareholder, and that it would be a breach of trust for his trustee

to operate it. Having regard particularly to the closing words of sub-s. (11), I am unable to agree with this latter contention. I cannot see why it should be a breach of trust for a trustee shareholder to relieve his beneficiaries for the time being by requiring the tax to be recovered from the company in the way that the section expressly authorises. It seems to me that "any beneficial interest" means what it says and should not be restricted to an indefeasible beneficial interest. Having regard to sub-s. (4), I do not think that undue hardship would arise from the provisions of sub-s. (11); and if there is hardship, that must have been in contemplation of the legislature. The object of the Commissioner in operating sub-s. (11) would be to get tax paid by the company at the rate appropriate to a beneficiary's income, being a higher rate than would be paid by the company or the trustee, notwithstanding that the beneficiary had not actually received a dividend. That must have been in contemplation of the legislature.

The latter part of sub-s. (11) deals with apportionment of dividends deemed have been received in respect of shares to which each beneficiary is entitled and the apportioned amount is to be included in the total income of each such person for purposes of the Act. Mr. Harris pointed to the words "having any beneficial interest in the shares" and "the dividends deemed to have been received in respect of such shares" in sub-s. (11) and argued that the tax was related to the beneficiaries' shareholding – to their capital in the company – and not to their entitlement to income. Accordingly he contended that the beneficiaries under the will of the testator other than the appellant should have been included in the assessment, notwithstanding that they were not entitled to the income from the shares when the directions were made. I cannot agree. Under sub-s. (1) of s. 20 the undistributed portion of sixty per cent. Of the total income of the company is to be deemed to be distributed "as dividends" and under sub-s. (11) it is the "dividends deemed to have been received" which are to be apportioned. Sub-s. (11) is not very happily worded; but I think that the Commissioner must look for the person or persons who would be beneficially entitled to receive the dividend or portions thereof if one had been distributed (*c.f. Alexander Drew & Sons Ltd. v. Commissioner of Inland Revenue* (23) (1932), 17 Tax Cases 140, 148). I think that where sub-s. (11) is applicable, the Commissioner must apportion the deemed dividend to or among the person or persons who would be entitled to an actual dividend at the time the apportionment is made by virtue of the beneficial interest which he has or they have in the shares held on trust for him or them. This, if there is only one person beneficially entitled to the income is, strictly speaking, an allotment or allocation rather than an apportionment; but I think that that is the meaning of the sub-section. In *Chamberlain and Talbot Investment Co. v. Inland Revenue Commissioners* (24) (1945), 173 L.T. 333 (C.A.) it was held that the words

> "the Special Commissioners may apportion to him such part of the income of the company . . ."

enabled the Special Commissioners to allot the whole of the income to the person concerned. Uthwatt, J., giving the judgment of the court said, at p. 335:

> "No stress was laid on the word 'apportion' a word which, though embracing fractional division does not import it."

It may be mentioned, in passing, that there seems to be no provision in the Act corresponding to s. 259 (1) of the United Kingdom Income Tax Act, 1952, which enables the Commissioners in determining the interests of the members of an investment company to omit consideration of an entitlement to income and attribute to each member an interest corresponding to his interest in the

assets available for distribution in a winding up. Sub-s. (11) of s. 22 of the Act permits the Commissioner to apportion the deemed dividends "in accordance with" the beneficial interests. If, as frequently happens, a beneficial interest in shares is postponed to a prior life interest, it would not be "in accordance with" the beneficial interest of the remainder man that he should be deemed to have received, before the determination of the life interest, dividends to which, had they been actually declared, he would have had no entitlement. I think that the criterion under sub-s. (11), where the sub-s. Applies, is not entitlement to capital, but entitlement to the dividend notionally distributed.

As regards the 18,443 shares the executors were shareholders and trustees. The appellant was at the material times a person having a beneficial interest in the 18,443 shares and was then entitled to the whole of the income on such shares. In my opinion, therefore, the respondent was entitled to apportion or allot the whole of the deemed dividend on such shares to him and need not apportion part of it to the persons who would be beneficially entitled if the appellant failed to reach the age of forty.

It remains to consider Mr. Harris's contention that if the Commissioner wished to use sub-s. (11) of s. 22 to tax beneficiaries, he must use the machinery thereby provided and require the trustee to furnish the name and address of each person having any beneficial interest in the shares held by such trustee and only then might he apportion the deemed dividend. No doubt, it would be the proper procedure in most cases to require the trustee to furnish this information, but I do not think that that provision is mandatory. Where the Commissioner knows (as, for instance, in the present case, from perusal of a copy of the testator's will supplied by the trustees and from a return of the shareholding supplied by the company) that there is only one person beneficially entitled to the income at the relevant date, and knows his name and address, I do not think that the Commissioner must, as a condition precedent to his power to apportion the dividend deemed to have been received, require the trustee to furnish the names of the remaindermen.

Accordingly I would answer issue (*b*) in relation to the 18,443 shares, and issue (*c*) in the affirmative.

I would allow that part of the appeal which relates to the learned judge's decision to decline jurisdiction, and dismiss those parts of the appeal which allege misdirection by the learned judge (i) in holding that the appellant was a person having a beneficial interest within the meaning of s. 22 (11) of the Act and in failing to hold that certain other persons had material beneficial interests; and (ii) in holding that the respondent was entitled to refrain from requiring the executors to furnish the names and addresses of such persons and to refrain from apportioning among them the dividends deemed to have been received.

I would dismiss the cross-appeal.

There will be an order as proposed in my judgment. As counsel have desired to be heard on the question of costs and notwithstanding that some delay may occur, an opportunity for argument on costs will be given as soon as the court which heard the appeal can be re-assembled.

Gould JA: I have had the advantage of reading the judgment of the learned president and I agree with his reasoning and conclusions upon all questions considered. As, however, I have found the question to be decided under issue (*a*) to be one of the greatest difficulty I would add a few words of my own on that topic.

It had appeared to me at one time that the object of s. 22 justified the adoption of a construction that would attach a wide meaning to the word. "shareholders" in sub-s. (1) and therefore to the word

"shareholder" in sub-s. (11). The Privy Council in the case of *Houry v. The Commissioner of*

Income Tax (25), [1959] 3 All E.R. 781 stated the purpose of the section (as well as that of s. 24) as:

> "by a fiction to place in the hands of a taxpayer income which, though not his in the eyes of the law, is thought to be fairly attributable to him in the measurement of his taxable capacity."

Such cases as *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.* (16) and *Llewellyn v. Kasintoe Rubber Estates Ltd.* (17), which are dealt with at length in the judgment of the learned president, appeared to me to justify reading the word "shareholders" as including the estate of a deceased shareholder, in the context of the section. The fiction involved in considering an estate as a share- holder could, on this view of the matter, be translated into reality by regarding the executor of the estate as the shareholder inasmuch as and to the degree that the law invests him with responsibility for the liabilities of the estate to the extent of the assets, and also with the responsibility for the receipt of income. The executor would be regarded as a shareholder, not in his personal capacity, but in his capacity as representative of the estate and to the limited extent to which membership is attributed to an estate. Unless such a construction were adopted it appeared that the object of the section would be incapable of fulfilment in the case of an estate of which the executor was not registered as a shareholder, for an estate regarded apart from human agency is nothing. The alternative construction, that of confining the words in question to their strict meaning of registered shareholders, appears to me to present at least one practical difficulty, as it would appear to permit sub-s. (1) to be read as directing a deemed distribution of the whole amount in question between the registered and living shareholders. This could not be the intention of the legislation.

The statement of the law by Cotton, L.J., in *In re Cheshire Banking Co., Duff's Executor's* case (18) is, however, contrary to the construction that I have suggested. He said, at p. 309:

> "If the question had been what was their liability in the *Staffordshire Company* in respect of the shares, then they would have been liable as executors only, because they never became the holders of those shares. The testator was the holder, and though the executors after his death represented him, they would not represent him as shareholders, but as the persons on whom the law threw the liability for his shares to the extent of his assets. But if once shares are put into the names of executors individually, although they have a right of indemnity against the estate they are liable personally, with that right of indemnity, and they cannot say that their liability is to be only a liability to the extent of the assets of the testator."

I think it is possible to distinguish the view so expressed from the present case by saying that Cotton, L.J., was considering the matter from the point of view of the liabilities and rights of the executor in his personal capacity, subject to a right of indemnity against the estate. That is not a question that would arise upon the construction of the section now under consideration, in which I the executor would be regarded as shareholder only in a representative and limited capacity. In *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.* (16) the general approach was to regard as members those whose names were on the register though they might be no longer living (p. 464); but the rights to profits and advantages and the liability for calls were regarded as being exercised or met by the unregistered executors. In terms of actuality it does not appear that there is any marked difference between saying that the executors exercise the rights and discharge the liabilities of the estate and saying that the executors

in their capacity as such are shareholders to the limited extent that an estate is regarded as a shareholder. It is only a question of a choice of words apt to describe the particular situation.

The view which I have attempted to express is one to which I would have adhered, had the Act under consideration not been a taxing measure. Upon mature consideration I think it would be wrong to do so here in the light of the principles of construction to be applied, which are sufficiently dealt with in the judgment of the learned president. To regard the executors us shareholders in a representative capacity and to a limited extent is to introduce a concept which is new, so far as I am aware, except in so far as it may be impliedly acknowledged, though differently expressed, in such cases as *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.* (16). *The Duff's Executor's* case (18) is clear authority for saying that an unregistered executor is not a shareholder, and therefore I find it impossible to say that the legislature, in using the word in s. 22 in the way it has, without widening definition, has expressed itself with the complete clarity necessary in a taxing measure. It is permissible, I think, to lean towards a construction which appears to fit with the purpose of an enactment; but it is going too far in that direction to attach to a word a shade of meaning that it has not previously borne, however well it appears to fit the intention. The danger in such a course is that, under the guise of giving effect to the purpose of the legislation, one may be relying on an intendment in an attempt to fill gaps, which have inadvertently been left. That, particularly in taxation legislation, is not one of the functions of the court. For these reasons and for the reasons given by the learned president, I agree that in the present case the construction more favourable to the taxpayer should be preferred.

Windham JA: I too have had the advantage of reading the judgment of the learned president, and I agree with his reasoning and conclusions on all the issues before us with the exception of issue (*a*), which concerns the question whether, for the purpose of s. 22 (11) of the East African Income Tax (Management) Act, 1952, the term. "shareholder" includes an executor of a deceased shareholder where the name of that executor has not yet been entered as a shareholder on the company's register of shareholders. On this question I have had the advantage of also reading the judgment of my brother Gould, J.A.; but after considering the arguments propounded and the authorities cited I feel myself obliged, with the greatest respect and not without much hesitation, to dissent from the conclusion of the learned president and from that of my brother Gould, J.A.

It has been rightly conceded that the meaning of the word "shareholder" in sub-s. (II) must be the same as its meaning in sub-s. (1), of s. 22. By a process of reasoning and after a review of the authorities with which, with respect, I entirely concur, the learned president has reached the conclusion that, where a shareholder has died, the word. "shareholder" in s. 22 must be deemed to include his estate. It is what I may call the leap from this premise to the premise that it must therefore be deemed to include the executor of that estate, in and to the extent of his capacity as such, which has caused the difficulty. In my view, however, the latter premise is little more than a corollary, and the only reasonable corollary, from the former. If one were to hold, literally, that only a person whose name appeared on the register of shareholders was a share- holder, then, in the case of a deceased shareholder, the shareholder would be a dead man. But the dead, as such, can have no rights or liabilities; and accordingly, two possibilities arise. One would be to hold that, as from the moment when a shareholder dies, there is no shareholder in respect of his share. This would be the literal result of a rigid adherence to the requirement that only one whose name appears on the register can be a shareholder; for it is the name of the deceased man, and not his estate, which is entered on the

register. But since this would be both unreasonable and unworkable, it has been rightly held that his estate shall be the shareholder, although no entry to that effect has been made on the register. This is already a departure from the strict requirement; for a dead man and his estate are different concepts. Having come so far, it seems to me that the step of saving that his executors shall (in that capacity) be deemed to be the shareholders, although not so entered on the register, follows as a necessary and automatic consequence, since it is only through executors or administrators that an estate can act or have any effective being; without them it is no more than a notional concept. And this conclusion, it seems to me, is the only one which can be reasonably read into the wording of sub-s. (1) of s. 22, once granted that a shareholder includes the estate of a deceased shareholder. For no portion of a company's income could be "distributed as dividends", as required by the sub-section, to a shareholder that was the estate of a deceased person, an estate being an abstraction. The distribution would have to be to the personal representative of that estate, in his capacity as such, even if he had not yet entered his name on the register as a shareholder in the place of the name of the deceased. In such a case any subsequent entry of his name on the register would simply confirm the fact of his being a shareholder, which had already been established by the fact of his being the person entitled to receive payment of a dividend which would have been payable to the deceased had he still been alive and thus the person deemed to have received payment of it.

I do not think that this conclusion entails reading into s. 22 anything that is not there. It is, as I see it, no more than a legitimate interpretation of the word "shareholder" in the context of the section. And I say this fully mindful of the passage from Palmer's Company Law (20th Edn.) at p. 353, quoted by the learned president in his judgment, and of the authoritative proposition laid down in *Cheshire Banking Co.*, *Duff's Executor's* case (18), a case which was not concerned with the interpretation of the expression "shareholder" in a context similar to that of s. 22 of the Act which we are now construing. Once it is conceded, as it has been conceded, that the estate of a deceased shareholder automatically becomes the shareholder in respect of the deceased's shares, upon his death, then I do not think that, in s. 22, the expression "shareholder" is "reasonably capable of two alternative meanings", to adopt the words used by Lord Thankerton in *Inland Revenue Commissioners v. Ross and Coulter* (3), at p. 625; and I do not therefore think this is a case where the court should "prefer the meaning more favourable to the subject". There are two possible meanings to the expression "shareholder" in s. 22 it is true; but I diffidently suggest that only one of them, in the context of the section, is reasonable.

I would on these grounds hold that the executors of the deceased, in the present case, were "shareholders" in *Harrtz and Bell Ltd.* at the relevant date, for the purpose of s. 22 (11) of the East African Income Tax (Management) Act, 1952, and would answer issue (*a*) in the affirmative.

Appeal allowed.

For the appellant:
Hamilton, Harrison & Mathews, Nairobi
G. Harris

For the respondent:
The Legal Secretary, E.A. High Commission, Nairobi
C. D. Newbold, Q.C., (Legal Secretary, East Africa High Commission), and *J. C. Summerfield*, (Assistant Legal Secretary, East Africa High Commission)

P Gullino (Aden) Ltd v The Trustees of the Port of Aden and Another

[1960] 1 EA 247 (CAA)

Division:	Court of Appeal at Aden
Date of judgment:	17 March 1960
Case Number:	52/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Aden – Campbell, CJ

[1] Shipping – Port – Port trustees – Trustees a body corporate by legislation – Whether trustees have powers to contract for payment of port and storage charges – Port Trust Ordinance (*Cap.* 122), *s.* 4, *s.* 14, *s.* 17, *s.* 18, *s.* 25, *s.* 37, *s.* 38, *s.* 39, *s.* 42, *s.* 43, *s.* 44, *s.* 75 (*A.*) – *Aden Port Bye-laws Nos.* 2, 7, 8, 13, 16, 19, 20, 22, 28, 29 *and* 30 – *Contract Ordinance* (*Cap.* 30) *s.* 66 (*A.*) – *Merchant Shipping Act*, 1894, *s.* 493, *s.* 494.

[2] Bailment – Port trustees storing goods pursuant to powers conferred by legislation – Whether trustees hold goods as bailees – Port Trust Ordinance (*Cap. 122*), *s.* 42, *s.* 44 (*A.*).

Editor's Summary

The appellants, as shipping agents, unloaded at a wharf controlled by the first respondents a cargo of 4,828 bags of cement consigned to the second respondents at Aden. The appellants issued to their own wharfinger a delivery order for the whole cargo, made out to the second respondents as consignees, but only 4,370 bags were, on May 25, 1956, actually removed, the balance being left, in a damaged condition, in a shed on the wharf. All charges due at June 1, 1956, to the first respondents, as the port trustees, were duly paid but, in September, the first respondents asked the appellants to remove the remaining bags from one shed to another, whereupon the appellants wrote to the first respondents' wharf superintendent, formally asking for the bags to be accepted in the new shed. The bags remained in the shed to which they had been removed until the following year, when the first respondents sold them to cover storage charges, but the price then realised was less than the sum which had accrued due to the first respondents for storage, and they accordingly sued both the consignees and the shipping agents. The trial judge held that the appellants were liable to the first respondents on an implied contract to pay the charges arising out of the request made in September by the appellants to the wharf superintendent, but the judgment did not deal, in terms, with the liability of the second respondents, the consignees. On appeal.

Held –

(i) the powers given by the Port Trust Ordinance and the Bye-laws made thereunder were such that in the normal course it would not be necessary for the Port Trust to enter into express contracts for payment of sums due for cargo, but if it were in any case necessary, the trustees could do so,

provided the contract did not conflict with the Ordinance or Bye-laws.

(ii) the Ordinance places no personal obligation on any person enforceable at the suit of the Port Trust, and the scheme of the Bye-laws was that the Port Trust should rely on its lien to enforce payments of moneys due in respect of cargo.

(iii) Bye-law 22 obliges the owner, importer or consignee of imported goods, or his agent, to make an application and to pay the money due, but only as a condition precedent to the removal of the goods from the wharf, and no right was thereby conferred on the Port Trust to sue the persons therein indicated; the Port Trust could not rely upon s. 42 of the Ordinance, since it failed to give

the required notice which was a condition precedent to the cause of action conferred by s. 42 (1).

(iv) from the time the cement was landed, until its removal from one shed to another, the appellants were licensees of the first respondents as port trustees, but, from the date of removal of the cement from one shed to the other, the Port Trust was exclusively the warehouseman of the goods and the provisions of the Bye-laws fully applied; the first respondents had acquired possession of the cement under powers conferred by the Ordinance and the Bye-laws and, accordingly, held the goods under and subject to that legislation, and not by contract.

(v) the circumstances of the case did not point to the acceptance by the first respondents of the obligations of a bailee, or to any tacit promise by the appellants to pay storage charges, and the contention that the appellants were liable upon an implied contract could not be entertained.

Appeal allowed.

Cross-appeal dismissed. Action dismissed.

Case referred to:

(1) *Cutler v. Wandsworth Stadium Ltd.*, [1949] A.C. 398; [1949] 1 All E.R. 544.

(2) *Liverpool Borough Bank v. Turner* (1861), 30 L.J. Ch. 379.

(3) *Glyn Mills & Co. v. East and West India Dock Co.* (1882), 7 A.C. 591.

(4) *Ex parte Ford* (1885), 16 Q.B.D. 305.

(5) *Marzetti v. Williams and Others*, 109 E.R. 842.

(6) *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326.

The following judgments were read:

Judgment

Gould JA: In the action from the judgment in which this appeal has been brought, the plaintiff (the trustees of the port of Aden) sought to recover certain storage charges from the first (defendant (Mitchell Cotts & Co. (Red Sea) Ltd.) and alternatively from the second defendant (P. Gullino (Aden) Ltd.). The action succeeded against the second defendant but failed against the first; the second defendant has now appealed against the judgment which was given against him and the plaintiff has lodged a cross appeal against the dismissal of the suit as against the first defendant, though counsel for the plaintiff stated before this court that he desired to rely on his cross appeal only in the event of the main appeal succeeding. The plaintiff is an incorporated body charged by Ordinance with duties in connection with the operation of the port of Aden; the first defendant was the consignor and consignee of the cargo in question; the second defendant is the shipping agent from whose vessel the goods were landed in Aden. It will be convenient hereafter to refer to these parties as the Port Trust, the consignee and the shipping agents respectively.

The ship in question was the s.s. “Bahr Nagash” which arrived in Aden on or about May 12, 1956, and from which the shipping agents unloaded 4,828 bags of cement, on to a wharf controlled by the Port Trust. The shipping agents issued a delivery order addressed to their own wharfinger, covering the whole

of the cargo and made out in favour of the consignee – the photostatic copy of this order in the record bears, apparently on the reverse side, an indorsement in favour of one Ali Ismail Turkey, to whom the bill of lading had also been indorsed. A passnote was issued by the Port Trust on May 25, 1956, covering

the whole cargo, but only 4,370 bags were actually removed; it was given in evidence by Ali Ismail Turkey that they were taken by his brother. The remaining 458 bags, which were in a damaged condition, remained on the wharf in a shed referred to (in a letter from the shipping agents dated September 6, 1956), as shed U 2.

It is common ground that all charges due to the Port Trust were paid to June 1, 1956; it is also agreed that the shipping agents were requested by the chief wharf superintendent of the Port Trust to remove the 458 bags from shed U 2 to shed 6 and that a letter in the following terms was thereupon written by the shipping agents to the Port Trust:

"Aden, 6th September, 1956.

To: The Wharf Supt.,
A.P.T. Maalla.

Sir,

Would you kindly accept in your No.6 godown the undermentioned uncleared cargo lying in shed U 2:

Ex s.s. "Bahr Nagash" dated 12.5.1956.

MC RS

AC/14/56 458 bags cement

Ex s.s. "Perseus" dated 10.7.1955

Asfahani 1/7 7 cases Quincailleries

Transhipment cargo to Port Sudan.

Thanking you in advance,

Yours faithfully,

For P. Gullino (Aden) Ltd.

sc: – To M/S P. Gullino (Aden) Ltd.
Steamer Point,
Aden

Maalla Wharfinger."

It is also common ground that shed 6 was under the complete control of the Port Trust. I will refer later to the status of shed U 2. The 458 bags were removed to shed 6 on October 8, 1956, by labour employed by the shipping agents, and remained there until the Port Trust caused them to be sold by auction on May 29, 1957. The fact that the price realized fell short by Shs. 6,160/80 of the sum alleged to have accrued due to the Port Trust for storage and removal fees, resulted in the bringing of the action now under appeal.

In that action the Port Trust claimed that the consignee was primarily liable as "consignor and/or consignee" of the said goods, and that the shipping agents were liable in the alternative. The basis of liability of the shipping agents was not specifically mentioned but it was pleaded that they were the shipping agents, that they landed the goods at Aden and that they wrote the letter dated September 6, 1956, the terms of which are set out above. The learned Chief Justice in the court below gave judgment against the shipping agents on the basis that they were liable upon an implied contract to pay the scheduled charges arising out of the request in the letter of September 6, 1956. The judgment does not

deal in terms with the question of the liability of the consignee but it is to be implied that the learned Chief Justice considered that it was not liable to the Port Trust.

It is now necessary to give consideration to certain aspects of the constitution and functions of the Port Trust. The relevant enactment is the Port Trust

Ordinance (Cap. 122) under which a number of Bye-laws have been made pursuant to powers conferred by s. 48. The Ordinance was extensively amended in the year 1958 but for the purposes of this case must be considered as it stood in 1956 and 1957. Section 4 provides that the trustees shall be a body corporate with power to sue and be sued in the corporate name. There is no specific power given to enter into contracts, but certain sections make it obvious, that the corporation was intended to have such power to contract as was necessary to enable it to fulfil its duties and functions. For example s. 14 empowers the chairman to "enter into any contract or agreement" on behalf of the Port Trust subject to certain restrictions in the case of contracts exceeding She. 7,500/- in value. Section 17 and s. 18 contemplate contracts of employment for staff purposes. Section 25 indicates a number of "works to be constructed and carried out by the board", and a proviso requires that in the case of new work estimated to cost more than Shs. 6,000/- no contract shall be entered into until plans and estimates have been approved. Section 75 provides that no trustee shall be personally liable for any contract made by or on behalf of the Port Trust but that the funds of the latter shall be chargeable "with all contracts made in manner provided in this Ordinance."

The question of the power of the Port Trust to contract is relevant to a submission by counsel for the shipping agents that it had no power to contract for payment of its charges in respect of goods, and that therefore the shipping agents could not be liable upon an implied contract to meet such charges. I will revert to the matter of implied contract later, but I am of opinion that the implication of the Ordinance is that contracts made for purposes necessary or incidental to the carrying out of the functions of the Port Trust would be intra vires. The powers given by the Ordinance and Bye-laws are such that in the normal course it would not be necessary for the Port Trust to enter into express contracts for the payment of moneys due in relation to cargo, but I think that if it were in any case necessary, it could do so provided the contract did not conflict with any provision of the Ordinance or Bye-laws. Perhaps some support for this opinion is to be derived from s. 38 of the Ordinance, which does not relate to storage, but provides for the collection of tolls on the landing and shipping of goods and adds, as an alternative, that they may be com- pounded for by the Port Trust for any period not exceeding one year at a time.

The Port Trust is empowered by s. 36 to prescribe a scale of "tolls" on the landing and shipping of goods, of "rates" for the use of the wharves and other facilities and for storing goods in any of its premises, and of "charges" for services performed by its servants in respect of any vessel or goods. Section 37 speaks of these tolls, rates and charges being "leviable" under s. 36. Section 38 provides that tolls on the landing and shipping of goods may be collected by officers or other persons appointed by the Port Trust but does not state by whom they are payable. There is no equivalent provision for rates and charges but by s. 39 provisions is made for a lien in respect of all three categories.

Section 39 is as follows:

> "39(1) For the amount of all tolls, rates and charges leviable under this Ordinance in respect of any goods the board shall have a lien on such goods, which may be seized and detained until such tolls, rates and charges are fully paid.
>
> "(2) Tolls, rates and charges in respect of goods to be landed shall become payable immediately on the landing of the goods, and in respect of goods to be removed from the premises of the board or to be shipped for export shall be payable before the goods are removed or shipped or taken on board a lighter for the purpose of being shipped.
>
> "(3) The lien for such tolls, rates and charges shall have priority over all other liens and claims except a lien for freight, primage, general

average and lighterage, where such lien has been preserved in the manner hereinafter provided, and a lien for money, payable to the Crown:"

Section 40 and s. 41 deal with the lien for freight etc. referred to in s. 39 (3) 3cnd have no relevance to this case. Section 42 is as follows:

"42(1) Whenever goods which have been landed have without any default on the part of the board been left for five clear days on or in any wharf or shed belonging to the board, the board may cause such goods to be removed either to any warehouse or other part of the premises belonging to it or with the consent of the Governor, to a public warehouse, and the removal to and detention in any such warehouse shall be at the risk and expense of the owner of the goods.

"(2) Whenever any goods are so removed the board shall give notice of such removal to the consignee of such goods or to his agent, if the address of either is known, by letter sent by post to such address or left thereat.

"(3) The goods so removed shall remain subject to all liens to which they would have been liable if they had remained in the possession of the board, and to the power of sale hereinafter given."

The relevant portion of s. 43, which deals with the enforcement of the lien by sale, is as follows:

"43(1) If the tolls, rates and charges payable to the board under this Ordinance in respect of any goods are not paid, . . . the board may, . . . at the expiration of three months from the time when the goods were seized or placed in their custody, sell them by public auction . . ."

Section 44 provides that the proceeds of sale shall be applied in payment of the expenses of sale, of liens having priority to that of the Port Trust, then in payment of the tolls, rates and charges due to the port trust and lastly that the surplus, if any, shall be paid, in certain circumstances, to the owner of the goods or his agent.

The power to make Bye-laws conferred by s. 48 includes a power to make them

"for settling the method of payment of tolls, charges and rates levied under this Ordinance:",

and a number of the Bye-laws so made are relevant. Bye-law 19 is as follows:

"19. No goods landed at a wharf shall be removed there from for clearance inwards, or for transhipment, or for export to other ports, unless they are covered by a Port Trust receipt for toll or other charges due thereon, or by a certificate in case of free goods (Appendices A, B and C) and passed by the inspector."

Bye-law 20 makes equivalent provision for goods being exported and Bye-law 22 lays down the procedure for obtaining a Port Trust receipt. So far as relevant it is as follows:

"22. The owner, importer, or consignee of goods imported into Aden, or the agent of such person shall, before such goods are removed from a wharf, produce before the wharf manager, an application in the form given in Appendix A, in three parts, duly filled in, showing the marks, quantity, description and value of such goods, and shall pay to the wharf manager the amount of toll, rates or other charges as may be assessed thereon. The wharf manager, on receipt of the amount due to the port trust on such goods, shall grant a receipt (counterpart 2 of Appendix A), and a permit

for the removal of goods (counterpart 3 of Appendix A) to the applicant who shall produce the said permit to the inspector of the wharf on which the goods are landed, and the said inspector shall allow the removal of the goods indicated in the said permit in accordance with the terms thereof."

There is a separate group of Bye-laws under the heading "Tolls" of which No.2, No.7 and No.8 are relevant.

"2. Import goods and transhipment goods will be allowed to remain on the Port Trust wharves free of rent for periods of ten and five days respectively. After such period rent will be charged as shown in column 8 of the foregoing scale of tolls, rates and charges.

"7. Warehouse rent will be levied at the rates detailed in column 8 of the scale of tolls, rates and charges, from the date from which the goods are placed in the warehouse.

"8. When goods lying on the wharf are removed to the warehouse at the instance of the board, after the expiration of the free days allowed, a charge at the rates detailed in column 9 of the scale of tolls, rates and charges, will be levied."

These Bye-laws show that, after the free period, rent (or storage) is payable for the goods at the same rate irrespective of whether they remain on the wharf or have been removed to the Port Trust warehouses.

There are two further Bye-laws from the main group which it is necessary to set out. They are No. 16 and No. 13.

"16. All goods shall be landed at or removed for shipment or otherwise from any public wharf in accordance with the directions of the wharf manager, and all goods not for immediate removal shall be deposited and stacked in such shed or place and to such height as may be directed by the wharf manager. Goods of the same marks, countermarks and numbers shall be stacked together, as closely as possible, in even stacks, marks outward and with spaces between and around the stacks, so as to facilitate delivery and removal. On delivery or removal of any goods from a stack, the remaining goods shall be restacked as directed by the wharf manager. Non-compliance with this by-law will entitle the wharf manager to stop the landing, removal and stacking of goods, and will render the offender liable to the penalty prescribed by By-law 47.

"13. The trustees do not provide labour at their wharves for the landing, shipping or removal of goods. All goods lying at the wharves shall remain there at the risk of the consignee or shipper, and shall be deemed to be in his charge."

Lastly there are three Bye-laws touching the question of the responsibility of the Port Trust for goods. They are:

"28. The board shall not be responsible for any damage or loss to goods lying in their 'lock-up' warehouses which is caused by natural or unavoidable causes.

"29. Permission will be given for the opening of packages for extracting samples, but all packages so opened shall, unless their condition has been questioned, be considered as if the owner or consignee had duly taken delivery thereof, and no claim for damages subsequently discovered or reported, shall be entertained.

"30. Packages which have once been opened will lie in the 'lock-up' warehouses at the risk of the owner or consignee, and the board shall not be answerable for the contents of any package, the outward appearance

of which at the time of its delivery to the owner or consignee. Does not show any signs of damage."

It would appear that, apart from any question of contract express or implied, the scheme of this legislation is that the Port Trust is to rely on its lien to enforce payment of the moneys due in respect of cargo. With the exception of s. 42 (1) of the Ordinance, which may by implication give a right of action against the owner, as defined for the purposes of the Ordinance, for some of the charges, I do not think that any of the relevant provisions places a personal obligation enforceable at the suit of the port trust, on any person. Bye-law 22 obliges the owner, importer or consignee of imported goods, or their agent to make an application and pay the moneys due but only as a condition precedent to the removal of the goods from the wharf. It does not, in my opinion, confer a right to sue the persons indicated. In the normal course of business the existence of such a lien would be a sufficient safeguard and provide a workable system; provided that the Port Trust was vigilant to safeguard its own interests it would also normally provide sufficient security. Apart from contract, therefore, I am unable to see that the Port Trust would have any cause of action unless s. 42 is applicable in the circumstances of the case. Counsel did not dispute that, if the section were applicable, the Port Trust would have a right of action against the owner, as defined by s. 2, for any sum by which the expenses of removal and detention fell short of the amount realised on sale of the goods. The words "at the. . . expense of the owner", import a statutory right in the Port Trust and a corresponding duty upon the owner; it is true that the Ordinance provides that the amount due to the Port Trust may be recovered from the sale price and to that extent the Ordinance provides its own remedy. The following passage from the speech of Lord Simonds in *Cutler v. Wands worth Stadium Ltd.* (1), [1949] A.C. 398 at 407, is in point:

> "It is, I think, true that it is often a difficult question whether, where a statutory obligation is placed on A., B. who conceives himself to be damnified by A.'s breach of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications, which point with more or less force to the one answer or the other, is clear from authorities, which, even where they do not bind, will have great weight with the house. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But 'where an Act' (I cite now from the judgment of Lord Tenterden, C.J., in *Doe v. Bridges*) 'creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner. This passage was cited with approval by the Earl Of Halsbury, L.C., in *Pasmore v. Oswaldtwistle Urban District Council*. But. This general rule is subject to exceptions. It may be that, though a specific 1 remedy is provided by the Act, yet the person injured has a personal right of action in addition."

I think that one possible construction of the relevant section in the present case is that to the extent that the mode of recovery provided by the Ordinance falls short of accomplishing its object there is no remedy provided and therefore an action may be resorted to. Alternatively, it might be considered that, though security had been provided, it was not the intention thereby to exclude the remedy of personal action, which would otherwise have been available. Either

construction is sufficient to support the present action, and is preferable to a construction which would limit the rights of the Port Trust to the proceeds of sale.

The definition of the word "owner" in s. 2 is, so far as relevant, as follows:

> "'owner', when used in relation to goods, includes any consignor, consignee, shipper or agent for the sale or custody of such goods."

This definition would clearly include the consignee and it was contended before this court that it would also include the shipping agents. I do not need to come to any conclusion upon this question as I have, though not without some hesitation, formed the opinion that s. 42 is not available to the Port Trust in the present case. The first relevant requirement is that the Port Trust should have "caused" the goods to be removed to shed 6. It does not appear that such causation is a necessary preliminary to sale under s. 43, for that section authorises sale after three months from the time when the goods were "seized or placed in their custody". The goods concerned were undoubtedly placed in the custody of the Port Trust and it is immaterial in the circumstances of the case and for the purposes of s. 43, whether that placing is regarded as having been done when, at the request of the Port Trust, they were transferred into shed 6, or when they were originally put down at the wharf. Nevertheless, as it is under s. 42 and not s. 43 that the right of action may arise, it is material to ascertain whether the Port Trust did cause the goods to be removed to shed 6 – this matter is also relevant to the question of implied contract dealt with below.

The goods were in fact removed after the shipping agents had sent the letter of request, dated September 6, 1956. Nevertheless the evidence shows that letter was written because the chief wharf superintendent had asked the shipping agents to remove the bags to shed 6. This action by the chief wharf superintendent was taken, according to the evidence of Mr. Jospeh Pinto, because the shipping agents did not want to remove the bags – I understand that as meaning, remove the bags from the Port Trust precincts, which would, of course, involve payment of the charges accrued to that date. The procedure adopted was rather a peculiar one. The Port Trust had ample power under s. 39 (1) to seize and detain the goods and under s. 42 (1) to cause them to be removed to its warehouse; there was also power under Bye-law 16 for the wharf manager to direct in what shed the goods were to be stacked, though it is arguable that this Bye-law applies only to the goods on first arrival. The reason for the removal does not emerge clearly from the evidence, though counsel that it may have been a question of space on the wharf suggested it; it is also a reasonable inference that the Port Trust regarded the removal as an act preparatory to the enforcing of its lien by sale. The fact remains that the removal was effected at the desire of the Port Trust, which had every power to enforce its request, and the action taken by the chief wharf super-intendent was therefore a causa sine qua non. The resulting letter of September 6, 1956, appears to me to have been merely part of the machinery adopted to achieve the desired result. In the circumstances, and despite Mr. Pinto's evidence that the removal was not regarded as one effected under s. 42 of the Ordinance, I am of opinion that it would be attaching far too I narrow a meaning to the word "cause", to hold that the Port Trust did not cause the goods to be removed to shed 6.

Although I am accordingly of the opinion that the requirements of s. 42 (1) were fulfilled I remain of the view that s. 42 cannot be relied upon by the Port Trust, as it is common ground that it failed to give the notice of the removal of the goods to the consignee or his agent, which is a requirement of s. 42 (2). The Port Trust undoubtedly knew the address of the consignee. The requirement of notice is essentially one for the protection of the consignee and

through him, of others who, falling within the definition of "owner", may be liable for accruing rates and charges. The notice would serve as a warning, if the consignee remained the person entitled to the goods, that they were in danger of being sold, and, if the right to take delivery had been transferred to another, it would constitute advice that acceptance of delivery was being unduly delayed and afford the consignee an opportunity to take action for his own protection.

The wording of sub-s. (2) of s. 42 of the Ordinance is mandatory in form; it may be that it would be proper to construe it as directory in the sense that if the Port Trust could show that the consignee was aware of the removal through means other than that of notice sent by post, that would be sufficient. There is no suggestion in the evidence that any such position obtained in the present case and we are therefore left with the position that the Port Trust failed to carry out a duty imposed upon it by the section. No authority was quoted by counsel for the consignee for the proposition that failure to carry out that duty deprives the Port Trust of the right impliedly given by s. 42 (1) to proceed personally against the consignee, and I have not been able to discover anything directly in point. Whether a duty is a condition precedent must depend in each case upon the construction of the particular enactment – as was said by Lord Campbell in *Liverpool Borough Bank v. Turner* (2) (1861), 30 L.J. Ch. 379 at p. 380 and p. 381:

> "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

I have set out above what I conceive to be the object and effect of the requirement concerning notice and I consider it to be so obviously linked with the provision in sub-s. (1) casting the financial burden upon the owner that I am "satisfied that the requirement as to notice is a condition precedent. It would F be remarkable if a person could take advantage of a statutory provision for his financial benefit, and at the same time completely disregard a requirement of the statute that he perform an act closely connected with that provision and designed for the protection or advantage of those upon whom is thrown the financial burden so created. An analogy, though perhaps not a close one, may be found in the law of tort. When a person or public body is given statutory G rights or duties which could not otherwise be carried out without infringing the legal rights of others, the rights or duties conferred must be exercised in accordance with the powers granted and any correlative duties imposed must be performed scrupulously and without negligence. (See Halsbury's Laws of England (2nd Edn.), Vol. 31, p. 532, par. 694 and par. 695). I think therefore that, having failed to give notice, the Port Trust cannot avail itself of the right of action conferred by sub-s. (1) of s. 42, and that as the requirement of notice to the consignee is something which enures to the benefit of all those within the definition of "owner" the remedy is lost as against all. I have come to this conclusion without regard to the fact that in the court below counsel for the Port Trust expressly stated that he did not rely upon s. 42, but in view of that statement it is a decision of which he can hardly complain.

For the reasons I have given I am of the opinion that neither the consignee nor the shipping agents were liable to the Port Trust under the provisions of s. 42 of the Ordinance. There is no other section or Bye-law under which, in my opinion, the consignee could be fixed with liability and the cross appeal against the consignee must consequently be dismissed. It remains only to consider whether the shipping agents were answerable, as the learned Chief Justice held, upon an implied contract to pay the charges in question arising out of the letter of September 6, 1956.

The relevant passage of the judgment under appeal is as follows:

> "In my view the second defendants alone are liable upon an implied contract. When they wrote to the plaintiffs on September 6, 1956 'Would you kindly accept in your No.6 godown the undermentioned uncleared cargo lying in shed U .2' they impliedly undertook to pay the scheduled charges therefor. If this storage had been storage under s. 42 of the Port Trust Ordinance many other questions would have had to be answered. This section is one empowering the board to cause goods to be removed from their wharf or one of their sheds to one of their warehouses and it provides that the expenses of the removal and detention shall be at the risk and expense of the owner. But this was not the position here. It is true that the request that the goods here should be put in a warehouse or 'go-down' emanated from the plaintiffs. But the second defendants were free to accept or refuse the request. They had a choice of putting them in the godown or taking them away. They chose the former and themselves put the goods in the go-down. Section 42 is only relevant when the owner refuses or neglects to remove his goods from the wharf or cannot be found: not when he has a choice of action and decides to use the plaintiffs' godowns. When he has a choice the removal and storage becomes a contractual matter."

Before this court counsel for the appellant argued that there was no implied contract upon the basis that the matter was governed by s. 66 of the Aden Contract Ordinance (Cap. 30) which is in the same terms as s. 70 of the Indian Contract Act. This section is as follows:

> "66. Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

I very much doubt whether this section is what the learned Chief Justice had in mind. Section 70 is in chapter V of the Indian Contract Act which treats of "certain relations resembling those created by contract", and in the commentary upon that section in Pollock and Mulla (6th Edn.) at p. 395, it is stated:

> "It is superfluous to add that the section does not apply where an act is done by one person at the express request of another. Thus if a client engages a pleader to act for him in a case, and if no fee is fixed, the pleader is entitled to reasonable remuneration not under this section, but because the request implies a promise to pay such remuneration."

In the present case the learned Chief Justice based his finding upon the express request contained in the letter of September 6, 1956, in circumstances giving H rise to an implied promise to pay the scheduled charges for the storage of the goods. That is the position envisaged in the concluding words of the quotation from Pollock and Mulla above set out. Upon the view I take of the matter, however, I think nothing turns upon the distinction.

If there were nothing more in the relationship between the parties than that of businessmen, the one requesting and the other providing storage accommodation, I would be in full agreement with the learned Chief Justice. There were in the present case, however, considerations, which underlay the arrangement between the parties and which tend to negative this simple contractual relationship. The position of a ship, which is, of course, represented by its agents, regarding cargo which has been discharged, but of which the consignee has not taken delivery, is indicated generally in the following passage from Carver on Carriage of Goods by Sea (10th Edn.) at p. 697:

> "Also, if the consignee refuses to take delivery of the goods, the carrier is not afterwards responsible for them as carrier. They remain in his hands against his will, under circumstances not dealt with by the contract; and his only duty with regard to them is to treat them in a reasonably careful and prudent manner; even though he may be retaining them in his hands in order to preserve his lien for the freight due on them.
>
> "And the same rule applies when the consignee fails to take delivery in proper time. If the cargo is ready to be delivered, it is the duty of the consignee to come and take it, and if he does not come within the agreed time, or within a reasonable time, where no fixed period is allowed, the shipowner is improperly saddled with the care of the goods. He may therefore terminate his responsibility as carrier by warehousing them; and after doing so he becomes, subject to the statute as to warehousing, responsible as a warehouseman only."

Where, however, the harbour and wharves are controlled by an undertaking such as the Port Trust under a statutory enactment and Bye-laws made thereunder, the enactment and Bye-laws form special conditions under which the discharge of cargoes must take place: Carver (supra) at p. 689. In the present case therefore the relevant Ordinance and Bye-laws have a bearing on the relationship between the parties and must be considered; they are not easily construable, particularly in conjunction with the custom, which counsel agreed is observed in Aden, whereby the Port Trust allots sheds (such as U 2) to the various shipping agents for the reception of their cargo; according to evidence given on behalf of the shipping agents no rent is payable by them in respect of these sheds but apparently the port trust recovers whatever is due to it upon any consignment of goods before their removal is permitted. Keys of such sheds are held by both the Port Trust and the shipping agents.

There are some indications to be found in the Bye-laws that the Port Trust F takes the goods into its own custody immediately they are landed. It directs where they are to be placed (Bye-law 16), charges rent against them after a short free period (Bye-laws 2 and – ") and prevents their removal until rent and other charges are paid (Bye-laws 19 and 22). Bye-laws 28-30, by limiting the liability of the Port Trust for the goods in specific instances, impliedly acknowledge general responsibility for their safety. The Bye-laws last mentioned, however, contain references to goods lying in the "Lock-up" warehouses of the Port Trust, and although all of the warehouses are the property of the Port Trust, its counsel suggested that the reference is only to warehouses, such as shed 6, to which the goods have been removed from the sheds allotted to shipping agents, and not to the sheds last mentioned. This is a matter which might have been resolved by more detailed evidence of the superimposed custom, but the Bye-laws themselves provide no indication of what is meant. Another indication that the goods are in the custody of the Port Trust from landing, is to be found in s. 40 of the Ordinance which enables the ship to preserve its lien for freight and the like by notice to the Port Trust; it is provided that the goods shall be retained in the warehouses and sheds of the Port Trust or, with the consent of the Governor, in a public warehouse. If the cargo remained in the possession of the ship's agents after landing there would appear to be no need for this provision. In England there IS similar provision for the preservation of the ship's lien contained in s. 494 of the Merchant Shipping Act, 1894, which applies when the shipowner has exercised his right under s. 493 of that Act to cause goods to be warehoused upon default on the part of the consignee in taking delivery. Another factor for consideration is that the shipping agents issued a delivery order to their own wharfinger in respect of the consignment in question. This, as a factor tending to show in whose possession the goods were, is neutral, for the evidence shows the delivery

order to be a pre-requisite to the issuance of the pass note by the Port Trust, which is the effective document permitting the goods to be removed. As appears from the speeches of their lordships in *Glyn Mills & Co. v. East and West India Dock Co.* (3) (1882), 7 A.C. 591, if a warehouseman is in possession of goods under s. 66, s. 67, s. 68, s. 69, s. 70, s. 71, s. 72, s. 73, s. 74, s. 75, s. 76 and s. 77 of the Merchant Shipping Act, 1862 (now replaced in similar terms by Part VII of the Merchant Shipping Act, 1894) he is under a duty to deliver them to the person to whom the shipowner was bound to deliver them. The delivery order would provide a convenient method of ensuring the discharge of this duty. Finally, reference must be made to Bye-law 13, which provides that goods at the wharves are at the risk of the consignee and deemed to be in his charge. It is difficult to reconcile this with other Bye-laws unless it refers to goods before their removal to sheds; read with s. 42 (2) of the Ordinance which requires notice of removal to be given to the consignee it perhaps points a tendency in the legislation to regard the Port Trust, in relation to imported goods, as being concerned rather with the consignee than with the shipowner.

I have mentioned these various factors as bearing upon the question whether the scheme of the legislation was to place the Port Trust in the position of a warehouseman in England after goods had been placed in his custody under s. 493 of the Merchant Shipping Act, 1894. I do not need to arrive at any finding as to the period between the date of the landing of the goods and that of their removal to shed 6, which took place on October 8, 1956; in respect of that period I am content to assume in favour of the Port Trust, that the shipping agents were licensees of the Port Trust, having the right within the precincts of the latter to the custody of goods landed from their ships but subject to the directions and of the lien of the Port Trust. As from October 8, however, there is no doubt that the Port Trust were exclusively the warehousemen of the goods and that the provisions of the Bye-laws above mentioned fully applied. The Port Trust had acquired possession pursuant to powers conferred by the Ordinance and Bye-laws and it follows that it held the goods under and subject to that legislation, and not by contract. I think that the opinions expressed in *Glyn Mills & Co. v. East and West India Dock Co.* (3) on that point are equally applicable to the position of the Port Trust at that stage. Lord O'hagan said, at p. 601:

> "The defendants got possession of the goods from the captain, not by virtue of any contract or bailment, as has been contended at the bar, but under the provisions of the statute and subject to the liabilities created, and the duties imposed, by it. And amongst them was the obligation to deliver them to such person or persons, and on such conditions, as the statute should be held to have indicated and required to warrant delivery by the shipowner or the master. On the payment of the freight and the removal of the stop-order it seems to me that they were bound, as he would have been, to deliver them to the person making presentment of the bill of lading."

In the speech of Lord Blackburn, at p. 609, is the following:

> "I do not think the dock company held the goods by virtue of any contract. They held them under the statute subject to a duty imposed by I the statute, to deliver them to the person to whom the shipowner was bound to deliver them. And, as I think, they were justified, or rather excused, by anything which would have justified or excused the master in so delivering them."

I do not think that different considerations arise because under s. 493 of the Merchant Shipping Act, 1894, the initiative in warehousing the goods is with the shipowner, whereas, if I am right in my finding that the Port Trust "caused"

the goods to be removed to shed 6, it was in the present case with the Port Trust. In my opinion that fact makes it even more clear that the Port Trust held the goods subject to the relevant legislation and not pursuant to any contract.

Even apart from authority I find myself unable to agree that in the circumstances a contract between the shipping agents and the Port Trust was to be implied. What is to be understood by an implied contract? The text books approach the matter in slightly differing ways but it is clear that there must be a tacit promise on the part of the person whom it is sought to charge, and that, as the promise has not been made either orally or in writing, it must be inferred from the circumstances of the case. It is not, of course, a question of quasi-contract, in which the obligation is attached by law and not by the parties. The words used by Lord Esher, M.R., in *Ex parte Ford* (4) (1885), 16 Q.B.D. 305 at 307 are apt:

> "It seems to me that whenever circumstances arise in the ordinary business of life in which, if two persons were ordinarily honest and careful, the one of them would make a promise to the other, it may properly be inferred that both of them understood that such a promise was given and accepted."

In Chitty on Contracts (21st Edn.) Vol. 1, p. 69, it is put:

> "The first class of implied contracts consists of real contracts in every sense but they are tacit or silent as to one or more of their terms. The law implies or infers from the facts that the parties have actually agreed to enter into a legal obligation containing certain stipulations."

Leake on Contracts (7th Edn.) at p. 9 says (on the authority of Parke, J., in *Marzetti v. Williams and Others* (5), 109 E.R. 842 at 846):

> "The only difference between an express and an implied contract is in the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence."

A contract may also be partly express and partly implied.

By the application of these principles a contract would be implied when a person having the possession of goods voluntarily sends them for storage to a public warehouse and they are accepted for that purpose. That, without more, would involve on the one hand the acceptance of the obligations of a bailor and on the other, a promise to pay usual charges. Bailment of goods is defined in Chitty on Contracts (21st Edn.) Vol. 2 at p. 63 as follows:

> "Bailment is the delivery of goods to another, other than as a servant, for some purpose upon a condition, express or implied, that after the purpose has been fulfilled they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or kept till he reclaims them."

In the case of a normal storage such as I have mentioned above the promise to pay storage charges is inferred for a number of reasons. The warehouse conducts a business of storing goods for payment; that fact is known to the bailor, as is the fact that his goods would not be accepted except on the understanding that charges would be paid. The bailor also knows that the goods will be held on his account and subject to his instructions. If, in the light of his knowledge of these circumstances, the bailor sends his goods for storage, all of this circumstantial evidence points the same way – to a tacit promise to pay the usual charges.

The present circumstances are very different. The Port Trust does not carry on a public storage business in its No.6 godown – that distinction is made in

s. 42 (1) of the Port Trust Ordinance. There is no evidence that it customarily charges shipping agents rent for storage of goods in shed 6, or that it ever does. There is no indication that the Port Trust held the goods in shed 6 as bailee of the shipping agents. On the contrary it held them under the Ordinance – s. 42 and s. 44 and r. 30 appear to indicate responsibility to the owner or consignee, and *Glyn Mills & Co. v. East and West India Dock Co.* (3) indicates that the duty of the Port Trust was to deliver the goods, not to the shipping agents, but to the person to whom the shipping agents would have had to deliver. A Port Trust receipt had in fact already been issued to that person. Nothing in these circumstances points to the Port Trust having assumed towards the shipping agents the obligations of a bailee, which is a factor to be considered in determining whether the shipping agents intended to enter into any contractual relation with the Port Trust when the letter of September 6, 1956, was signed.

It is necessary next to consider that letter. It is a bare request to accept the cargo in No.6 godown. It does not request storage "on our account" or "in our name". As I have pointed out, the storage was not on the shipping agents' behalf. The transference of the goods effected no change in the accrual of storage charges, which were provided for by the rules and for which the Port Trust had a lien, except that s. 42 of the Ordinance, had its provisions been fulfilled, might be thought to put the Port Trust in a rather better position after the transfer than before. The request was a voluntary one in the sense that the shipping agents might have refused to write the letter, but that does not alter the fact that it had its origin in a request by the Port Trust to transfer the goods to shed 6. Why this procedure was adopted when the Port Trust had all necessary power of removal I am unaware. If the object of the Port Trust was to establish personal liability on the part of the shipping agents it would have asked for incorporation in the letter of an undertaking to pay storage charges; it would be wrong to suggest that a public corporation would adopt a means of placing liability on the shipping agents the implications of which were not fully appreciated by them. I think there is a very substantial difference between the implications arising from a request, which emanates freely from a particular person, that another shall perform some act which the former wishes for his own purposes to have performed, and a request made at the instigation of another for the purposes of that other. There is no evidence on the point, but it does not seem unreasonable to suppose that the Port Trust, on taking full possession of goods, would wish to have a signed acknowledgment, which it could rely upon to establish the origin of the goods if, perhaps after sale, it became necessary. From the point of view of the shipping agents I do not think that their signing of the letter of September 6, 1956, signified anything more than acknowledgment of the right of the Port Trust to take the goods over and acquiescence in the procedure required. I am not of opinion that the circumstances as a whole point to the acceptance by the Port Trust of the obligations of a bailee towards the shipping agents or to a tacit promise by the latter to pay storage charges.

For these reasons I am impelled to differ, with great respect, from the finding of the learned Chief Justice that the shipping agents were liable upon an implied contract. I should add that before this court counsel for the Port Trust sought to put forward an additional argument that the shipping agents were liable upon an implied contract from the time that the goods were discharged from the ship. The court did not consider that such a submission could be entertained at that stage as it had never been relied upon or suggested in the court below.

Before concluding this judgment I must refer to a procedural matter. Counsel for the Port Trust and the shipping agents, in dealing with the facts of the case, more than once made reference to facts having been agreed in the court below,

or to the case having been argued upon this or that basis. Before this court such assertions did not invariably meet with complete confirmation from opposing counsel and it should be borne in mind at all times by counsel that, where it is expedient to save costs by agreeing facts, the facts so agreed should be reduced to writing for record purposes, or at least precisely formulated so that they can be recorded by the presiding judge. It is not satisfactory, particularly as a substantial period may elapse between trial and appeal, for counsel to have to rely upon their memories in such matters. It is a corollary which hardly needs stating, that a Court of Appeal has not the advantage of such close acquaintance with local commercial practice as have counsel in the locality and cannot take for granted what may have appeared self evident in the court below.

For the reasons given above I would allow the appeal, dismiss the cross appeal and set aside the decree in the court below, substituting a decree that the suit be dismissed with costs as against both defendants. The appellant's costs of the appeal should be borne by the first respondent which should also pay the second respondent's costs of the cross appeal. The second respondent's costs of the appeal (if any) should be borne by the appellant.

Sir Kenneth O'Connor P: I agree with the conclusion reached by the learned Justice of Appeal and his reasoning. The point of difficulty in the case is whether or not the letter dated September 6, 1956, from the appellant to the wharf superintendent of the first respondents asking him to accept the goods in his No. 6 godown constituted an implied contract under which the appellant undertook to pay the first respondent's scheduled charges. Normally a request for services to be rendered would imply an undertaking to pay for them. But an implied contract must be proved by circumstantial evidence from which a promise given and accepted can properly be inferred. I can only say that, in my opinion, the very special circumstances of this case (which are fully set out in the judgment of the learned Justice of Appeal and which I will not repeat) are not such as to justify an inference that the appellant promised by its letter of September 6 to make itself liable for the first respondents' charges if the goods were accepted in No. 6 godown.

I am aware that this is a contrary inference to that drawn by the learned Chief Justice whose conclusion I hesitate to upset. But where there is no question of the credibility of witnesses, but the sole question is the proper inference to be drawn from specific facts, an appellate court is in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion, though it will give weight to the opinion of the trial judge; *Benmax v. Austin Motor Co. Ltd.* (6), [1955] 1 All E.R. 326.

There will be orders in the terms proposed by the learned Justice of Appeal.

Sir Alastair Forbes VP: I agree with the judgments of the learned Justice of Appeal and the learned President, and have nothing to add.

Appeal allowed. Cross appeal dismissed. Action dismissed.

For the appellant:
S. N. Iyer, Aden

For the first respondent:
P. K. Sanghani, Aden

For the second respondent:
Westby Nunn & Kazi, Aden
E. Westby Nunn

H J Shah v Ladhi Nanji w/o Haridas Vasanji and Two others
[1960] 1 EA 262 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	13 January 1960
Case Number:	26/1959
Before:	Harley J
Sourced by:	LawAfrica

[1] Rent restriction – Application by tenant for new tenancy – Subsequent death of respondent – Application by tenant to join executors as respondents – Whether proceedings to be treated as suit under Civil Procedure Ordinance for purpose of limitation – Landlord and Tenant (*Shops*) *Ordinance*, 1956, (*K.*) – *Landlord and Tenant Shop Rules*, 1957, *r.* 5, *r.* 7 *and r.* 10 (*K.*) – *Civil Procedure Ordinance* (*Cap.* 5) (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XXIII, r.* 4 (3) (*K.*) – *Indian Limitation Act*, 1877, *art.* 175 (*c*).

Editor's Summary

The appellant had applied in the magistrate's court at Eldoret on July 11, 1957, for a new tenancy under the Landlord and Tenant (Shops) Ordinance. The original respondent died on October 18, 1957, and the appellant then applied by chamber summons for leave to join his executors as respondents. The application was dismissed on the ground that application must be made by notice of motion, both the magistrate and counsel having overlooked r. 5(1) of the Landlord, and Tenants Shop Rules, 1957, which prescribes a chamber summons. Subsequently, a motion was taken out on November 24, 1958, but was dismissed on the ground that it was out of time, the magistrate holding that the application had abated under O. XXIII, r. 4(3) of the Civil Procedure Rules and under article 175(*c*) of the Indian Limitation Act, 1877. The appellant thereupon appealed to the Supreme Court and it was argued on his behalf that (1) the application was not governed by the Civil Procedure Ordinance or the Civil Procedure Rules (2) the application was not a suit within the meaning of the Civil Procedure Rules and the parties to the said application were not "plaintiff" and "defendant" within the meaning of art. 175 (*c*) and (3) that the application should be dealt with under r. 5 of the Landlord and Tenant (Shop) Rules, 1957, which said rule was not subject to any limitation.

Held –

(i) the magistrate was right in treating the application as a suit and applying the ordinary rule of limitation.

(ii) r. 7 (3) and r. 10 of the Landlord and Tenant Shop Rules, 1957, have the effect of directing that the

proceedings should be treated as a suit except where the special rules direct to the contrary.

Appeal dismissed.

Case referred to:

(1) *East African Leather Factory and Others v. Esmail Adam*, [1960] E.A. 162 (K.).

Judgment

Harley J: I made some general observations on the Landlord and Tenant (Shops) Ordinance, 1956 (Cap. 52/56) in *East African Leather Factory and Others v. Esmail Adam* (1), [1960] E.A. 162 (K.). I would not wish any tenant to be deprived lightly of his right to a new tenancy. The learned resident magistrate treated the tenancy proceedings as a suit, and applied the ordinay limitation rule. I think he was right so to do. In my view r. 7 (3) and r. 10 of the Shops Rules G.N. 433/57 have the effect of directing that the

proceedings should be *treated* as a suit except where the special rules direct to the contrary.

Accordingly the learned resident magistrate was right to treat the proceedings as a suit and to apply the limitation rule. Appeal dismissed with costs.

Appeal dismissed.

For the appellant:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

For the respondent:
Bali Sharma & Co, Nairobi
J. M. Nazareth, Q.C., and *J. G. Ganatra*

Samuel Kenneth Odendaal and The Official Receiver v Richard Gray
[1960] 1 EA 263 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 January 1960
Case Number:	50/1959
Before:	Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Miles, J.

[1] Mortgage – Equitable mortgage by deposit of title deeds – Enforcement of – Whether Rules of Court (*Mortgages Suits Consolidation*) *apply – Indian Transfer of Property Act*, 1872, *s.* 58, *s.* 59 *and s.* 104 – *Indian Acts* (*Amendments*) *Ordinance, s.* 2 *and s.* 4(*K.*) – *Equitable Mortgages Ordinance, s.* 2 (*K.*) – *Registration of Titles Ordinance* (*K.*) – *Civil Procedure Rules*, 1948, *O. XXXVI, r.* 3 – *Conveyancing Act*, 1881, *s.* 25 (2) (*U.K.*) – *Registration of Titles Ordinance* (*Cap.* 123), *s.* 138 (*U.*).

[2] Practice – Appeal – Mortgage suit – Preliminary decree obtained by consent – Final decree subsequently obtained – Appeal from final decree – Whether appellant can indirectly attack validity of preliminary decree – Civil Procedure Ordinance, s. 67 (2) *and s.* 68 (*K.*) – *Indian Civil Procedure Code*, 1908, *s.* 97.

[3] Crown Lands Ordinance – Equitable mortgage – Prior consent to transaction not obtained – Whether consent can be obtained after transaction entered into – Exercise of power to give consent delegated to Commissioner for Lands by Governor – Consent required to be endorsed on instrument requiring consent – Whether Commissioner of Lands can delegate to a subordinate officer power to effect such endorsement – Crown Lands Ordinance (*Cap.* 155) *s.* 5 *and s.* 88 (*K.*) – *Crown Lands*

(*Amendments*) *Ordinance*, 1953, (*K.*).

[4] Land Control Ordinance – Equitable mortgage by deposit of title deeds – Consent to transaction recorded on mortgagee's application by Chairman of Land Control Board – Whether consent is that of board – When consent to be obtained to transactions within the Ordinance – Land Control Ordinance (*Cap.* 150), *s.* 7 (*K.*).

[5] Bankruptcy – Equitable mortgage by deposit of title deeds – Mortgagor subsequently becoming bankrupt – Effect of bankruptcy on security – Whether trustee in bankruptcy can challenge validity of mortgage – Bankruptcy Ordinance (*Cap.* 30), *s.* 9 (*K.*).

[6] Supreme Court – Jurisdiction – Suit in respect of land at Naivasha filed at Nairobi – Whether Supreme Court sitting at Nairobi has jurisdiction – Civil Procedure Ordinance, s. 12 (*c*) *and s.* 15 (*K.*) *– Kenya Colony Order-in-Council,* 1920 (*K.*) *– Kenya Protectorate Order-in-Council,* 1920, *art. XII* (*K.*).

Editor's Summary

The respondent had sued the first appellant to enforce an equitable mortgage by deposit of title deeds. The first appellant entered an appearance but filed no defence, and when the case came up for formal proof, judgment in terms of a consent letter was entered for the respondent for the sum of Shs. 104,000/- for principal and interest plus further interest "at the agreed rate of 8 per cent. per annum from the 5th day of April, 1956 . . . until payment in full". As the first appellant did not for a long period repay the principal or pay interest, a preliminary decree purporting to follow a form in the Schedule to the Rules of Court (Mortgage Suits Consolidation) for sale of the mortgaged property was, after approval by the first appellant's advocates, drawn up by the deputy registrar. Subsequently, the first appellant was adjudged bankrupt and his property vested in the second appellant and when the respondent applied for a final decree for sale of the mortgaged property under the Rules of Court (Mortgage Suits Consolidation), the second appellant opposed the application attacking, inter alia, the validity of the equitable mortgage and thus, indirectly, the validity of the preliminary decree. The judge overruled the objections raised and granted the final decree for sale. The appellants thereupon appealed and at the hearing it was submitted for the appellants inter alia that (1) as Chapter IV of the Indian Transfer of Property Act did not cover equitable mortgages by deposit of title deeds the court had no power to order a final decree for sale either under the Rules of Court (Mortgage Suits Consolidation) or under any other legislation (2) neither of the consents required under s. 88 of the Crown Lands Ordinance and s. 7 of the Land Control Ordinance were shown to have been given to the instant mortgage which was therefore void, (3) the words "on the immovable property" appearing in the last sentence of s. 2 of the Equitable Mortgages Ordinance limited the preceding words "the same effect" so as to exclude the remedy of sale in execution of the mortgage (4) if the judge had power to make a final decree he exercised his discretion in disregard of the equities in making it and (5) the Supreme Court of Kenya sitting at Nairobi had no jurisdiction to make a decree for the sale of the mortgaged property which was situate in the Naivasha District. Counsel for the respondent submitted by way of preliminary objection that it was not competent for the appellants to attack, in effect, the validity of the preliminary decree under cover of an appeal against the final decree and that the judge should have ordered the final decree for sale purely on the strength of the preliminary decree and the first appellant's admitted non-compliance with its terms.

Held –

(i) it was clear that a consent judgment was to be entered for the respondent on his claim, which was claim to enforce the mortgage.

(ii) the appellants by reason of both s. 67(2) and s. 68 of the Civil Procedure Ordinance, were precluded from appealing against the final decree on any ground which simultaneously touched upon the validity of the preliminary decree.

(iii) the terms of the definition of "mortgage" in para. (*a*) of s. 85 of the Indian Transfer of Property Act, 1872, were wide enough to include mortgages by deposit of title deeds; therefore, Chapter IV of the Act covered them and the Rules of Court (Mortgage Suits Consolidation) made under s. 104 ibid applied to them: *Imperial Bank of India v. U. Rai Gyaw Thu & Co. Ltd.* (1923), 50 I.A. 283

applied.

(iv) s. 2 of the Equitable Mortgages Ordinance made an equitable mortgage by deposit of title deeds valid, provided that the requirements of such of the

Ordinances which it enumerated as applied had been complied with, and the effect of the last sentence of s. 2 ibid was to equate a mortgage by deposit of title deeds in Kenya to an equitable mortgage in England, that is to say, it made it take effect as a security enforceable by redemption or sale: *Barclays Bank D.C.O. v. Gulu Millers Ltd*. [1959] E.A. 540 (C.A.) considered.

(v) it was within the power of the Supreme Court to make the final decree for sale, and even if the Mortgage Suits Rules had not been in existence as the appropriate medium for making it, the court could still have made such a decree under its inherent power.

(vi) in making the final decree for sale the trial judge had a discretion to do so and exercised it properly.

(vii) since there was only one Supreme Court in Kenya with jurisdiction throughout Kenya, the Supreme Court sitting at Nairobi had jurisdiction to make a decree for the sale of property situated in the Naivasha District: *Riddlesbarger and Another v. Robson and Others*, [1958] E.A. 375 (C.A.) followed.

(viii) an ex post facto consent under s. 88 of the Crown Lands Ordinance was sufficient to satisfy the section.

(ix) while s. 5 of the Crown Lands Ordinance did not authorise the Commissioner to authorise a subordinate officer to exercise powers vested by the Ordinance in the Governor and delegated by him to the Commissioner, it did empower the Commissioner to entrust to another officer the mere task of signifying that the Commissioner had performed an act he was duly authorised by the Governor to perform.

(x) the consent required under s. 88 ibid was sufficiently signified over the signature of a subordinate even though the words used were “consent is hereby given” and not “it is hereby notified that consent has been given”, so long as, in fact, consent had already been given by the person empowered to give it.

(xi) the consent of the Land Control Board as required by s. 7 of the Land Control Ordinance was duly obtained and there was no evidence to rebut the presumption that the consent by the chairman of board was a consent by the board itself.

(xii) s. 9 (2) of the Bankruptcy Ordinance merely saved the rights of a secured creditor in his own right as such; the section did not preclude the appellants from relying on a valid ground of objection to the security, had they had one.

Appeal dismissed.

Cases referred to in judgment:

(1) *Attorney-General of Kenya v. Block and Another*, [1959] E.A. 180 (C.A.).

(2) *Talebali v. Abdul Aziz* (1930), 57 Cal. 1013.

(3) *Sheikh Mohamed Bashir v. United Africa Co. (Kenya) Ltd.*, [1959] E.A. 706 (C.A.).

(4) *Imperial Bank of India v. U. Rai Gyaw Thu & Co. Ltd*. (1923), 50 I.A. 283.

(5) *Barclays Bank D.C.O. v. Gulu Millers Ltd.*, [1959] E.A. 540 (C.A.).

(6) *Riddlesbarger and Another v. Robson and Others*, [1958] E.A. 375 (C.A.).

(7) *Edwards and Another v. Denning*, [1958] E.A. 628 (C.A.).

(8) *Hemming v. Hale and Another*, 141 E.R. 905.

(9) *Carltona Ltd. v. Commissioner of Works and Others*, [1943] 2 All E.R. 560.

The following judgments were read:

Judgment

Windham JA: The plaintiff/respondent filed an action in the Supreme Court, Nairobi, against one Samuel Kenneth Odendaal, who is the

first appellant in this appeal, claiming repayment of a loan of Shs. 100,000/- with interest thereon at the agreed rate of 8 per cent. per annum. According to the uncontested facts alleged in the plaint the loan had been secured by equitable charge, the plaint alleging that on or about October 4, 1955, the defendant deposited with the plaintiff by way of equitable charge the title deeds of a piece of land therein specified, to secure the loan of Shs. 100,000/- advanced to him by the plaintiff on that same day, the loan being repayable on demand and carrying interest at 8 per cent. per annum. The defendant having paid no interest for more than six months, and the plaintiff having demanded repayment without result, the plaint was lodged on April 19, 1956, claiming repayment of the loan with interest as aforesaid, and further claiming

> "that in default of payment that the premises comprising the defendant's security may be sold and the proceeds thereof be applied in or towards payment of the plaintiff's claim. . ."

with the usual claim against the defendant personally for any deficiency. The suit was, in short, an ordinary suit upon a mortgage.

Appearance was entered by the defendant, but no defence was filed, and the case came before the court for formal proof and judgment in the plaintiff's favour. When it came up, on September 20, 1956, a letter of consent dated September 15 was produced by plaintiff's counsel, who asked for judgment in terms of the letter. The letter, which was signed by the advocates for both parties, asked for a consent judgment in the plaintiff's favour for Shs. 104,000/- (which represents Shs. 100,000/- plus interest at 8 per cent. per annum for six months), plus further interest

> "at the agreed rate of 8 per cent. per annum from the 5th day of April, 1956, on the principal sum of Shs. 100,000/- until payment in full",

plus costs with interest thereon. It has been suggested for the appellant that this letter consented only to judgment for the amount of the loan, with interest, without reference to the equitable mortgage or charge. But the mention of the "agreed rate of 8 per cent. per annum" and the terms of the plaint linking the agreement to pay 8 per cent. with the securing of the loan by deposit of the defendant's deeds, make it clear that consent judgment was to be entered for the plaintiff on his claim, which was a claim to enforce the mortgage.

The learned trial judge accordingly entered "judgment by consent in terms of the letter of September 15, 1956". The defendant, during the ensuing twenty months, made no repayment of principal or payment of interest upon his debt, and accordingly a preliminary decree for sale was drawn up and was issued on May 21, 1958, under the hand of the deputy registrar. The terms of this decree, which were approved by the defendant's advocates, were as follows:

> "This suit coming on the 20th day of September, 1956, for formal proof before the Honourable Mr. Justice Forbes in the presence of counsel for plaintiff and upon reading the consent to judgment dated the 15th day of September, 1956, signed by counsel for the plaintiff and counsel for the defendant by consent it is hereby declared that the amount due to the plaintiff on account of principal and interest calculated up to 31st day of December, 1956, is Shs. 110,062/63 as appears by the deputy registrar's certificate in the First Schedule hereto plus the taxed costs of this suit as per certificate of taxation issued and that the principal amount, namely, Shs. 100,000/- shall carry interest at the rate of 8 per cent. per annum and the amount of taxed costs shall carry interest at the rate of 6 per cent. per annum from the 1st day of January, 1957, until realisation and it is decreed as follows:

> "1. That if the defendant pays into court the amount so declared due on or before the 31st day of December, 1956, the plaintiff shall deliver up to the defendant or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him and shall put the defendant in possession of the property.
>
> "2. That if such payment is not made on or before the said 31st day of December, 1956, the mortgaged property or sufficient part thereof shall be sold and the proceeds of sale (after defraying thereout the expenses of the sale) shall be paid into court and applied to payment of what is declared due to the plaintiff as aforesaid together with subsequent interest and subsequent costs, and the balance, if any, shall be paid to the defendant.
>
> "3. That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance."

It is to be noted that, although there is in the above preliminary decree for sale no mention of the provision of the law under which it purports to be made, or the prescribed form (if any) which it purports to follow, it does in fact follow exactly (save for its reference to the consent to judgment) the wording of form 4, headed "Preliminary Decree for Sale", which appears at p. 513 of Vol. V of the Laws of Kenya (1948), the form being contained in the Schedule to the Rules of Court (Mortgage Suits Consolidation) which appear at p. 506 of that same volume, and being prescribed under r. 11 of those rules. Those rules are made by the Supreme Court of Kenya under s. 104 of the Indian Transfer of Property Act, 1882, as applied to Kenya by Order-in-Council. I have no doubt that the preliminary decree purported to be drawn up under them, and to follow form F in their Schedule. The relevance of this will appear presently.

On May 30, 1958, nine days after the issue of the preliminary decree, the defendant (first appellant) was adjudged bankrupt, and his property vested in the Official Receiver, who is the second appellant in this appeal.

Neither appellant has in form appealed against the issuing of the preliminary decree, nor in terms alleged its invalidity. On July 10, 1958, the parties appeared through their advocates in chambers before Miles, J., Mr. Munro appearing for the Official Receiver, and the respondent asked for a final decree for sale of the mortgaged property and consequent directions, under the Rules of Court (Mortgage Suits Consolidation), to which I have already referred, and which I will hereinafter refer to as the Mortgage Suits Rules. Mr. Munro, for the Official Receiver, raised a number of objections to the granting of the final decree for sale, which included attacks on the validity of the equitable mortgage upon which the preliminary decree was based, and therefore indirectly upon the validity of the latter. After several adjourned hearings the learned judge, having carefully considered these objections on their merits, held in the respondent's favour and ordered the final decree for sale. Against that order the appellants now appeal.

Before us Mr. Nazareth, for the respondent, submitted, as a preliminary objection, that it was not competent for the appellants to attack, in effect, the validity of the preliminary decree under cover of an appeal against the final decree, by reason of the provisions of s. 67 (2) and s. 68 of the Civil Procedure Ordinance. He also contended that by reason of those same sections the learned judge, although the sections were not cited to him, ought not to have considered on their merits such arguments against the validity of the mortgage and (in effect) of the preliminary decree, but ought to have refused to entertain them and should have ordered the final decree for sale purely on the strength of the preliminary decree

and the first appellant’s admitted non-compliance with its

terms. Mr. Munro opposed this contention by submitting that he had received no notice that it would be raised, and that he should have received such notice because Mr. Nazareth was seeking to have

> "the decision of the court below affirmed on grounds other than those relied on by that court."

By amendments to para. (1) and para. (3) of r. 65 of the East African Court of Appeal Rules, 1954, which amendments came into force on November 1, 1959, a respondent in such a case must, within seven days of the service upon him of the record of appeal, give notice of cross-appeal specifying such grounds. Those amendments, however, are not retrospective; and since the seven days from service on the respondent of the record of appeal expired, in the present case, before November 1, 1959, the amendments are inapplicable. Mr. Munro contended that r. 65 having before that date been silent on the point, the relevant English practice, imported by r. 52, should be applied, where under prior notice of the kind now provided for by the amendments to r. 65, has long been required. The answer to this contention, however, is afforded by the decision of this court in *Attorney-General of Kenya v. Block and Another* (1), [1959] E.A. 180 (C.A.), in which it was held that under r. 65 in its unamended form, prior notice need not be given by a respondent seeking to support a decision on grounds other than those relied on by the court that made it. Although we intimated to counsel that such was the position, we thought it preferable, as a matter of convenience, to hear Mr. Munro's submissions on his appeal before hearing Mr. Nazareth on s. 67 (2) and s. 68 of the Civil Procedure Ordinance, while still allowing Mr. Nazareth to maintain his position that his contentions were preliminary objections to our hearing any argument which in effect attacked the validity of the equitable mortgage or of the preliminary decree founded upon it. It now becomes necessary to consider those contentions.

Section 67 (2) and s. 68 of the Civil Procedure Ordinance (Cap. 5) read as follows:

> "67(1)
>
> "(2) No appeal shall lie from a decree passed by the court with the consent of parties.
>
> "68. Where any party aggrieved by a preliminary decree passed after the commencement of this Ordinance does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree."

It is Mr. Nazareth's submission for the respondent that, although the appeal is in form an appeal against the final decree for sale, the appellant is in reality disputing in it the correctness not only of the final decree but also of the preliminary decree, and is accordingly precluded from doing so by s. 68. Now the position in law is that if an appellant asks the trial court to hold that a final decree cannot be made, or asks this court to hold that a final decree ought not to have been made, on any ground which would necessarily carry with it (although the appellant does not in terms so pray) a finding that the preliminary decree also should not have been made, then he is precluded by s. 68 from attacking either the preliminary decree or the final decree upon such a ground if he has not appealed against the preliminary decree. In such a case the only grounds on which he may appeal against the final decree are grounds which would affect the validity or propriety of the latter without also affecting the correctness of the former. The reason for this provision of s. 68 is that it is the preliminary decree which embodies the whole substance of the court's decision in an action upon the mortgage, the final decree being merely ancillary and subordinate to it. The position is made clear in Mulla's Code of Civil

Procedure, (12th Edn.), at p. 360 and p. 361, in the commentary upon s. 97 of the Indian Civil Procedure Code, 1908, which is exactly reproduced in s. 68 of the Kenya Ordinance; and in *Talebali v. Abdul Aziz* (2) (1930), 57 Cal. 1013, a case concerned with s. 97 of the Indian Act, there appear the following pertinent observations in the judgment of the court delivered by Rankin, C.J., at p. 1037:

> "In mortgage or partition suits, in suits for partnership or other accounts, the preliminary decree is what in the Court of Chancery would have been described simply as 'the decree'; the final decree corresponds to the 'order on further consideration'. . . Section 97 has expressly excepted preliminary decrees from the position assigned to interlocutory orders, precluding an appellant from impeaching them in the course of an attack upon the final decree. If there be any general doctrine of law to the effect that interlocutory orders cease to have any effect after the final disposal of the suit and that, therefore, they lose their appealable character upon the passing of the final decree, and I do not here affirm such doctrine, it is in my judgment reasonably clear that preliminary decrees, under the Code of 1908, which determine such questions as liability to account, existence of a mortgage, share in joint property, are altogether outside its scope . . . In my judgment, the final decree is, in its nature, dependent and subordinate, because it is a decree which has been passed as a result of proceedings directed and controlled by the preliminary decree and based thereon."

Why, then, in the instant case, did the appellants not appeal in due time against the preliminary decree? Notwithstanding Mr. Munro's submission that neither of the appellants is a "party aggrieved" by it for the purpose of s. 68 (with which submission I will deal presently) it seems to me reasonably clear that no such appeal was filed in time because, the preliminary decree having been passed by consent of the parties, it was realised that no appeal lay against it by reason of the provisions of s. 67 (2) of the Civil Procedure Ordinance. Indeed when, together with their application to this court for leave to appeal against the final decree out of time, the appellants applied formally in Civil Application No. NAI. 22 of 1959, for leave to appeal out of time against the preliminary decree also, Mr. Munro conceded that as regards the preliminary decree he had no answer to s. 67 (2), and this court on June 5, 1959, dismissed the latter application forthwith.

Mr. Munro, faced with this formidable difficulty, has attempted to argue that neither appellant is or was a "party aggrieved" by the preliminary decree, as distinct from the final decree, for the purpose of s. 68 of the Civil Procedure Ordinance, and that accordingly that section is inapplicable and does not preclude him from attacking the preliminary decree under guise of attacking the final one. He properly conceded, during the course of argument, that the Official Receiver (second appellant) stands in the shoes of the bankrupt debtor (first appellant), and is in no better position than the latter, for the purposes of s. 68. In view of that concession, and of the fact that the preliminary decree was made against the first appellant and placed his mortgaged property in jeopardy, it is obvious that the first appellant was aggrieved by it, that is to say that he was adversely affected by it; and indeed the appellant's application for leave to appeal against it out of time was an admission of that fact.

Accordingly, in my view, by reason both of s. 67 (2) and of s. 68 of the Civil Procedure Ordinance, the appellants are precluded from appealing against the final decree on any ground which at the same time touches the validity of the preliminary decree. The question is not one of estoppel, but rather of the clear statutory prohibitions laid down in those sections. And this precludes them from advancing any submission that the equitable mortgage itself was invalid for want of compliance with any necessary legal pre-requisites or formalities; for this would constitute an attack on the correctness of the preliminary decree

which was founded squarely upon it. The grounds of appeal against the final decree, as set out in the memorandum of appeal, read as follows:

> "1. That the learned judge was wrong in law in holding that the Supreme Court at Nairobi had jurisdiction to hear and determine the proceedings herein:
>
> "2. That the learned judge was wrong in law in holding that an equitable mortgage is mortgage within the meaning of the Rules of Court (Mortgage Suits Consolidation) Rules:
>
> "3. That the said order or decree was made without jurisdiction:
>
> "4. That the said order or decree was wrong in law in as much as it decreed enforcement of a mortgage which was void for non-compliance with the provisions of s. 88 of the Crown Lands Ordinance (Cap. 155):
>
> "5. That the said order or decree was wrong in law in as much as it decreed enforcement of a mortgage which was void for non-compliance with the provision of s. 7 of the Land Control Ordinance (Cap. 150):
>
> "6. That the learned judge misdirected himself in finding that the preliminary decree for sale was passed as a result of non-payment of a judgment debt obtained by consent:
>
> "7. That the learned judge misdirected himself and was wrong in law in holding that the first appellant was estopped from raising objections to the making of the said order or decree:
>
> "8. That the learned judge misdirected himself and was wrong in law in holding that the respondent was a secured creditor of the first appellant:
>
> "9. That the learned judge was wrong in holding that the respondent was entitled to the said order or decree:
>
> "10. That the learned judge was wrong in law in disregarding or not accepting the uncontradicted evidence of the value of the land the subject of the said order or decree contained in the affidavit of Ronald Henry Munro:
>
> "11. That the learned judge was wrong in law in holding that it was equitable to make a final order or decree as prayed by the respondent:
>
> "12. That the decision of the learned judge was wrong and ought to be reversed."

In argument before us Mr. Munro revealed that, of the grounds of appeal as above set out, the lack of jurisdiction alleged in ground 1 relates to the court's jurisdiction to make the preliminary decree as well as the final decree; that the lack of jurisdiction alleged in ground 3 arises by reason of the submission contained in ground 2, so that these two grounds may be considered together; that grounds 6 and 7 are interdependent, as are also grounds 10 and 11; and that grounds 9 and 12 are general submissions adding nothing to the remaining grounds of appeal. Bearing this in mind, and after careful consideration of the arguments submitted by both sides on all the grounds of appeal, I am of the opinion that the only grounds which attack the final decree without necessarily attacking at the same time the preliminary decree, are grounds 2 and 3 which may be considered together, and that accordingly Mr. Nazareth was right, in respect of all the other grounds, in submitting that the appellants were precluded by s. 68 of the Civil Procedure Ordinance from advancing them. I will therefore consider first grounds 2 and 3. Since, however, some of the remaining grounds concern either questions of jurisdiction or points upon which a pronouncement of opinion by this court might be desirable, and since also this matter may go further, I will then consider those other grounds too.

The contention advanced in grounds 2 and 3 of the appeal is that, even assuming that the court had power to make the preliminary decree and adopted the correct procedure in doing so, and even conceding that no appeal lies from that decree by reason of s. 67 (2) or s. 68 of the Civil Procedure Ordinance, the court had no power to order a final decree for sale, whether under the Mortgage Suits Rules, under which the relevant application and the final decree purported to be made, or (since the respondent had initiated the whole proceedings by action and not by originating summons) under any other legislation. This submission rests on the contention that the Mortgage Suits Rules are made, as in fact they are under s. 104 of the Indian Transfer of Property Act, and that Chapter IV of that Act, which deals with mortgages and charges and which comprises s. 58 to s. 104 inclusive, does not cover equitable mortgages by deposit of title deeds, except where they were made in the particular towns in India specified in s. 59. The text of the Transfer of Property Act which, by virtue of s. 2 of the Indian Acts (Amendments) Ordinance (Cap. 2) applies in Kenya, is the text in force on November 27, 1907. Subsequent amendments in India do not apply here. At the date s. 58 and s. 59 of the Act read as follows. Only para. (*a*) and para. (*b*) of s. 58, as it stood in 1907, are relevant to this appeal:

> "58. (*a*) A mortgage is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.
>
> "The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage-money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.
>
> "(*b*) Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgage property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee.
>
> "(*c*)
>
> "(*d*)
>
> "(*e*)
>
> "59. Where the principal money secured is one hundred rupees or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.
>
> "Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by an instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.
>
> "Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immoveable property, with intent to create a security thereon."

The question whether the Mortgage Suits Rules, which provide for the making of preliminary and final decrees for sale in execution of mortgages, apply to the mortgage in the instant case, may be divided into two questions.

The first is whether those rules, or the Civil Procedure Rules, 1948, which make parallel but far from identical provision for the execution of decrees in respect of immovable property generally, are the rules applicable in the execution of mortgages of any description where the proceedings have been instituted (as here) by action, and not upon originating summons under O. 36, r. 3, of the Civil Procedure Rules, 1948. The second question is whether, if it is the Mortgage Suits Rules which apply, they apply not only to mortgages in general but to equitable mortgages by deposit of title deeds in particular.

The first of these two questions was answered by this court very recently in *Sheikh Mohamed Bashir v. United Africa Co.* (*Kenya*) *Ltd. and Others* (3), [1959] E.A. 706 (C.A.), where, on the principle of generalia specialibus non derogant, it was held that the appropriate rules are the Mortgage Suits Rules. It is accordingly unnecessary to do more than to note the appositeness of that decision and to follow it, and then pass on to consider the second question, with which that decision was not concerned, namely whether the rules apply equally to equitable mortgages by deposit of title deeds. And this brings us back to Part IV of the Transfer of Property Act, under which those rules were made, and in particular s. 58 and s. 59.

The only mention in those sections of equitable mortgages by deposit of title deeds, or indeed of equitable mortgages of any kind, is (or rather, was in 1907) the saving provision in s. 59 that

> "nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon, by delivery to a creditor or his agent of documents of title to immovable property, with intent to create a security thereon."

It is Mr. Munro's contention that by reason (1) of the implied assumption in this passage that such mortgages are invalid if made outside the towns mentioned; and (2) of the non-applicability to such mortgages (as he would argue) of the definition of a "mortgage" generally in para. (*a*), and of a "simple mortgage" in para. (*b*), of s. 58, equitable mortgages by deposit of title deeds (save in those five Indian towns) are not recognised as mortgages under Chapter IV of the Transfer of Property Act, and accordingly lie outside the scope of the Mortgage Suits Rules, which are made under s. 104, which is the rule-making section in Chapter IV. This submission might have had more force, though for reasons which I am about to give it would not even then have prevailed, if the passage from s. 59 regarding equitable mortgages, which I have quoted, had appeared not in that section but in s. 58, as it does in India now, where since 1929 it has been removed from s. 59 and appeared as para (*f*) of s. 58, by an amendment enacted in that year. But in s. 59 the passage merely provides that such mortgages if made in one of the five towns shall, even if made to secure more than 100 rupees, be valid although not effected by registered instrument as required in the earlier part of the section for all mortgages for more than 100 rupees. Equitable mortgages by deposit of title deeds for less than 100 rupees, wherever made, are untouched by the section; and this suggests that the Act does recognise such mortgages in general. This is borne out, in my view, by the wide terms of the definition of "mortgage" in para. (*a*) of s. 58. Those terms are quite wide enough to include mortgages by deposit of title deeds. And it was so held by the Privy Council in *Imperial Bank of India v. U. Rai Gyaw Thu & Co. Ltd.* (4) (1923), 50 I.A. 283. Lord Dunedin, delivering the judgment of their lordships, said at p. 289, after reciting the terms of s. 58 (*a*) and s. 59:

> "It is to be observed that there is here no distinction between legal and equitable mortgages as in English law, where the legal mortgage will always prevail against the equitable unless the holder of the legal has done

> or omitted to do something which prevents him in equity from asserting his paramount rights."

And at p. 293 he continued, more specifically:

> "It was then argued that the equitable mortgage effected by deposit of title deeds was not a mortgage in the sense of the Act and that consequently the priority sections had no application. This seems untenable in view of the words of s. 58 (*a*). Unless the deposit of title deeds effects the transfer of an interest in a specific immovable property for the purpose of securing the payment of money advanced or to be advanced, it is absolutely nothing at all. Further the concluding words of s. 59 actually use the word 'mortgage' to denote the security effected by delivery of documents of title."

Accordingly, in my view, the definition in s. 58 (*a*) of the Transfer of Property Act includes equitable mortgages by deposit of title deeds, Chapter IV of that Act therefore covers them, and the Mortgage Suits Rules, which are made under s. 104 (the rule-making section in Chapter IV) must apply to them. With regard to the limitations imposed by s. 59, not only would the references to Indian towns in that section be inapplicable in Kenya by reason of the provisions of s. 4 of the Indian Acts (Amendments) Ordinance (Cap. 2), which requires Indian Acts to be read in Kenya with

> "such formal alterations as to names, localities . . . as may be necessary to make the same applicable to the circumstances",

but those limitations are specifically modified by s. 2 of the Equitable Mortgages Ordinance (Cap. 152). That section reads as follows:

> "2. Subject to the provisions hereinafter contained, nothing in s. 59 of the Indian Transfer of Property Act, 1882 (Act IV of 1882), as applied to the Colony shall be deemed to render invalid mortgages or charges made in the Colony by delivery to a person or his agent of a document or documents of title to immovable property, with intent to create a security thereon. Such delivery shall, subject to the provisions of the Crown Lands Ordinance, or, as the case may be, the Land Titles Ordinance, or the Registration of Titles Ordinance, or the Registration of Documents Ordinance, whether made before or after the date of this Ordinance, have the same effect on the immovable property sought to be charged as a deposit of title deeds in England at the date of this Ordinance."

The effect of s. 2 of the Equitable Mortgages Ordinance is thus that an equitable mortgage by deposit of title deeds alone is valid, provided that the requirements of such of the Ordinances which it enumerates as apply have been complied with. In the present case the Ordinances which apply are the Registration of Titles Ordinance (Cap. 160), whose requirements are admitted to have been duly complied with, and the Crown Lands Ordinance (Cap. 155), under s. 88 of which the written consent of the Governor is required in order to render the mortgage valid. Also, in addition to any of the Ordinances mentioned in s. 2, the Land Control Ordinance (Cap. 150) applies to the mortgage, s. 7 of which requires the written consent of the Land Control Board. It is contended for the appellants that neither of these last two consents were shown to have been given to the mortgage in the present case. These contentions, which impugn the validity of the mortgage, are among those which, as I have said earlier, the appellants are in my view precluded from raising by virtue of s. 67 (2) and s. 68 of the Civil Procedure Ordinance, but with which, for reasons that I have given, I nevertheless propose to deal. Before turning to them, however, I will consider a contention advanced for the appellants arising out of the wording of s. 2 of the Equitable Mortgages

Ordinance. That section lays down, as we have seen, that, subject as therein provided, an equitable mortgage by deposit of title deeds shall

> "have the same effect on the immovable property sought to be charged as a deposit of title deeds in England at the date of this Ordinance."

It is submitted that the words "on the immovable property" limit the preceding words "the same effect" so as to exclude the remedy of sale in execution of the mortgage, which remedy would, in the absence of those words, have been available as being a remedy available in England. It is contended that the only remedy provided for or contemplated in the section or covered by the words "On the immovable property" is the passive one of retention of the documents of title by the mortgagee so as to prevent the alienation of the land to a third party. It is difficult to appreciate the force of this contention, and in my view there is no substance in it. An order for the sale of mortgaged immovable property is manifestly one of the effects which the mortgage may have on that property. The property itself is directly affected.

In my opinion the effect of the last sentence of s. 2 of the Equitable Mortgages Ordinance is to equate a mortgage by deposit of title deeds in Kenya to an equitable mortgage in England, that is to say, that it makes it take effect as a security enforceable by redemption or sale: (Conveyancing Act, 1881) s. 25 (2); *Barclays Bank D.C.O. v. Gulu Millers Ltd.* (5), [1959] E.A. 540 (C.A.). I have already expressed my opinion that the procedure for enforcement of a mortgage security provided by and under the Transfer of Property Act is applicable to an equitable mortgage, but it may be noted that in *Barclays Bank D.C.O. v. Gulu Millers Ltd.* (5) this court said in relation to s. 138 of the Registration of Titles Ordinance of Uganda (Cap. 123) (which provides for the creation of an equitable mortgage by deposit of a certificate of title):

> "It cannot have been the intention of the legislature in enacting s. 138 and its predecessors enabling equitable mortgages by deposit to be created, that an equitable mortgagee should be unable to enforce his security. As no method of enforcement was enacted, it must have been the intention that an equitable mortgagee should have any remedies open to him under the general law, so far as these were not inconsistent with the Registration of Titles Ordinance or other local enactment."

I would therefore hold that the final decree for sale was one which it lay within the Supreme Court's power to make, and that, even if the Mortgage Suits Rules had not been in existence as the appropriate medium for making it, the court could still have made such a decree under its inherent power.

It has been argued in the alternative, though not with very much force, that although the learned trial judge may have had power to make the decree, he exercised his discretion wrongly, and in disregard of the equities, in making it. To accede to this contention would carry with it the conclusion that the preliminary decree for sale was likewise made without regard to the equities and upon a wrong exercise of discretion, the final decree being (as we have seen) merely ancillary to it. Such a finding, for reasons that I have given earlier, it is not open to the appellants directly or indirectly to ask this court to make. But even upon its merits I can find no grounds for the submission. It is for the mortgagor to show that an order for sale, which the mortgagee executing the mortgage has a prima facie right to demand, is in the circumstances not appropriate, and he must put forward far stronger grounds in opposition to it than the appellants were able to do. The learned trial judge in his judgment considered carefully the equities and the relevant evidence before him, and I see no ground for interfering with his conclusions. I would accordingly hold, in disposing of grounds 10 and 11 of the memorandum of appeal, that the learned

trial judge, in making the final decree for sale, had a discretion to do so and exercised that discretion properly.

I will now dispose briefly of the point of jurisdiction raised in ground 1 of the memorandum of appeal. The submission is that the Supreme Court of Kenya sitting at Nairobi had no jurisdiction to make a decree for the sale of property situated, as this mortgaged property is situated, in the Naivasha District of Kenya, but that the suit should have been instituted in the Supreme Court at Nakuru. Section 12 (*c*) is relied on, which lays down that, subject as in the section provided, suits

> "for the foreclosure sale or redemption in the case of a mortgage of or charge upon immovable property. . . shall be instituted in the court within the local limits of whose jurisdiction the property is situate."

This is not the first time that this contention, void of merit though it is, has been advanced before the Supreme Court and rejected. The learned trial judge rightly rejected it in the present case, holding that there is only one Supreme Court in Kenya, with jurisdiction throughout Kenya. He relied on the following passage from this court's judgment in *Riddlesbarger and Another v. Robson and Others* (6), [1958] E.A. 375 (C.A.) at p. 383:

> "Section 12 provides in effect that, subject to the pecuniary and other limitations prescribed by any law, suits relating to immovable property 'shall be instituted in the court within the local limits of whose jurisdiction the property is situate'; and 'property' is defined in an explanation of the section to mean property situate in the Colony. Accordingly as the Supreme Court has jurisdiction throughout the Colony, 'court' in the section can only refer to a subordinate court."

The learned trial judge rightly observed that, since this court had, in the above case, been considering s. 15 of the Civil Procedure Ordinance rather than s. 12, the passage quoted must be regarded as obiter. I need do no more than say now, in considering s. 12, that the passage in my view expresses the true legal position arising from the provisions of art. 4 (1) of the Kenya Colony Order-in-Council, 1921, read with art. XII of the Kenya Protectorate Order-in-Council, 1920.

I turn now to those grounds of appeal which attack the validity of the mortgage itself, and thus of the preliminary decree founded upon it.

The first of these submissions is that the mortgage was void because it never received the written consent of the Governor as required by s. 88 of the Crown Lands Ordinance (Cap. 155). It is common ground that the section applies to the land mortgaged. The first three sub-sections of s. 88 (the remaining subsections being irrelevant) read as follows:

> "88(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor, shall any person acquire any right, title or interest in any such land for or on behalf of any person of any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor;
>
> "Provided that nothing in this sub-section contained shall affect:
>
> (*a*) any such transactions made by or in favour of the Crown;
>
> (*b*) any gift of land by way of testamentary disposition.

> "(2) Applications for the consent of the Governor under the provisions of sub-s. (1) of this section shall be made in the manner prescribed.
>
> "(3) Any instrument, in so far as it purports to effect any of the transactions referred to in sub-s. (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument:
>
> "Provided that where the Governor refuses his consent and any money has been paid by either party in respect of any such transaction, such money shall be recoverable as a civil debt from the party to whom it has been paid."

The relevant facts were the following. A "memorandum of charges by deposit of title" in respect of the mortgage, exhibit 2, had been duly executed and registered as required by the Registration of Titles Ordinance (Cap. 160), on November 24, 1955. Upon this memorandum there was placed, on November 30, 1955, an official stamped endorsement, under the heading "Crown Lands Ordinance", in the following words:

> "Under powers delegated to me by the Governor, consent is hereby given to the transaction."

This was signed "A. Drummond, for Commissioner of Lands". It is conceded that the Commissioner of Lands himself, Mr. A.W. Horner was duly authorised by the Governor to consent on his behalf to transactions under s. 88. Mr. Drummond was an official of the Department of Lands subordinate to the Commissioner of Lands, and was duly authorised to sign documents on his behalf; but it was rightly held by the learned trial judge that the Commissioner had no power to sub-delegate to Mr. Drummond the power delegated to him (The Commissioner) by the Governor to give consents under s. 88, in accordance with the maxim delegatus non potest delegare. In addition to the endorsement of consent by Mr. Drummond, however, it is common ground that the Commissioner of Lands himself had in fact consented to the mortgage. A formal written application for his consent (exhibit 1) dated October 4, 1955, had been submitted to him, and in his own hand, at the foot of it, he had written – "appd. A.W.H. 21/11". These were his initials, and the abbreviation "appd.", as is not disputed, stood for "approved".

The learned trial judge, relying on a recent judgment of this court in *Edwards and Another v. Denning* (7), [1958] E.A. 628 (C.A.) held, rightly in my view, that an ex post facto consent under s. 88 is sufficient to satisfy the section. But he held that what was required by the section was an endorsement on the instrument (in this case the memorandum, exhibit 2) of the consent of the Governor or of his delegate the Commissioner of Lands, but not of a sub-delegate of the latter, and that the circumstance that the Commissioner himself had in fact, some days earlier, given his consent was irrelevant. The relevant passage from his judgment reads as follows:

> "Mr. Munro argues that in accordance with the maxim delegatus non potest delegare the Commissioner for Lands is not empowered to sub-delegate the power conferred upon him by the Governor. In this Mr. Munro is undoubtedly right. Mr. de Souza contends that the endorsement is only a statement of what has already been effected, and that the consent was, in fact, given by the Commissioner of Lands on November 22, 1955. Leaving aside the point that the application form is addressed to the Land Control Board and makes no request for the consent of the Governor to the transaction, it seems to me that the meaning of s. 88, sub-s. 3 is clear and that what is required to be endorsed on the instrument is the consent of the Governor or some person duly authorised on his behalf and I am

fortified in this view by another passage from the judgment of the Court of Appeal in *Edwards v. Denning* (7) at p. 12:

> 'I have also entertained some doubts as to whether an instrument which does not have endorsed upon it the written consent of the Governor is void if, in fact, that consent has been obtained. I am inclined to think, however, that the words "which shall be endorsed on the instrument" are mandatory and that the instrument, and that only, is the evidence which the Ordinance requires of the fact that the consent has been obtained.'

"For the purpose of ascertaining whether consent has been given, the evidence of Mr. Brown must be ignored and one must look only at the endorsement on the memorandum of charge which, be it noted, states that consent is "hereby given to this transaction'. In my opinion, Mr. Munro's argument on this second point is unanswerable."

The learned judge's conclusion on this point was not, of course, fatal to the respondent, since he eventually found for the latter on other grounds. But nevertheless, I think, with respect, that his conclusion on the point was wrong. The dictum in *Edwards v. Denning* (7) to which the learned judge referred, was not a concluded opinion and may require further consideration if occasion arises, but, on the basis that that dictum is correct, I am still of opinion that the consent of the Governor was sufficiently endorsed on the memorandum. In my view, such a formal signification may properly be effected by a subordinate of the person whose consent, under delegated powers from the Governor, has been personally given. It is not a question of those powers being sub-delegated by the latter to a subordinate, for the subordinate had no discretion in the giving or withholding of consent, but was no more than a piece of administrative machinery. As such, the power was rightly delegated to him of signifying the Commissioner's approval: *see Hemming v. Hale and Another* (8), 141 E.R. 905, where at p. 910, Williams, J., discussing the maxim delegatus non potest delegare, said:

> "Where a man employs an agent, relying on his peculiar aptitude for the work entrusted to him, it is not competent to that person to delegate the trust to another. But, where the act to be done is of such a nature that it is perfectly indifferent whether it is done by A. or by B., and the person originally entrusted remains liable to the principal by whomsoever the thing may be done, the maxim above referred to has no application."

See also *Carltona Ltd. v. Commissioner of Works and Others* (9), [1943] 2 All E.R. 560. Section 5 of the Crown Lands Ordinance (as replaced by Ordinance No. 21 of 1953) is also relevant. That section provides as follows:

> "5. The Governor shall appoint a Commissioner of Lands (hereinafter in this Ordinance referred to as 'the Commissioner') who shall have charge of the administration of this Ordinance, and shall further appoint such Assistant Commissioners, land officers, assistant land officers and other officers as the Governor may deem necessary who may, if so authorised by the Commissioner either generally or specially, perform any of the duties or do any of the acts or things required or authorised by this Ordinance, or by any law regulating the sale, letting disposal and occupation of Crown land, to be done by the Commissioner."

The wording of the above section does not, in my view, authorise the Commissioner to authorise a subordinate officer to exercise powers, such as those under s. 88, which are vested by the Ordinance not in the Commissioner but in the Governor and are only delegated to the Commissioner by the Governor.

But it empowers the Commissioner to entrust to another officer the mere task of signifying that the Commissioner has performed an act which he has been duly authorised by the Governor to perform. And I think that the consent is sufficiently signified over the signature of a subordinate even though, as here, the words used are "consent is hereby given" and not "it is hereby notified that consent has been given" or similar words, so long as, in fact, consent has already been given by the person empowered to give it.

I turn lastly to the appellants' submission that the mortgage was void for non-compliance with the requirements of s. 7 of the Land Control Ordinance (Cap. 150). Here again the learned trial judge, though finding that those requirements had not been complied with, eventually found for the respondent on other grounds. But here again I think, with respect, that his finding that s. 7 had not been complied with was wrong. The relevant parts of the section read as follows; the references to the "board" are to the Land Control Board established under the Ordinance:

> "7(1) No person shall, except with the consent in writing of the board in the exercise of its powers under sub-s. (1) of s. 8 of this Ordinance – (*a*) sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of a like nature to the foregoing or not, alienate, encumber, charge or part with the possession of any land, or any right, title or interest, whether vested or contingent, in or over any land to any other person;
>
>
>
> "(2)
>
> "(3) Every agreement for sale, lease, mortgage or for any other transaction referred to in sub-s. (1) of this section shall be reduced into writing and every such agreement shall be void for all purposes:
>
> (*a*) if the board refuses its consent thereto, as from the date of such refusal; or,
>
> (*b*) if the board has not signified its consent thereto within a period of four months from the date of the agreement, as from the expiration of that period,
>
> and if any money has been paid under any agreement which becomes void as aforesaid, such money shall be recoverable as a civil debt from the party to whom it has been paid."

The facts relevant to compliance with s. 7 were as follows. The same approval of the respondent's application for consent as we have considered in dealing with s. 88 of the Crown Lands Ordinance, initialled by the Commissioner of Lands was shown to have been given by the latter not only in his capacity as Commissioner for Lands but also in his capacity as chairman of the Land Control Board, the board's consent being required by s. 7. And an endorsement headed "Land Control Ordinance" was stamped on the memorandum, exhibit 2, similar to the endorsement stamped on it under the Crown Lands Ordinance, stating "consent is hereby given to this transaction", signed, as in the other endorsement, by Mr. A. Drummond, but this time "for Land Control Board". My earlier observations regarding the nature of Mr. Drummond's other endorsement, and his power to make it, apply equally to his endorsement under the Land Control Ordinance.

The grounds on which the learned trial judge was of the opinion that s. 7 of that Ordinance had not been complied with were two. First, he held that there must, in the case of every transaction of any of the kinds dealt with in para. (*a*) of s. 7 (1), be a preliminary agreement to enter into such transaction,

and that by virtue of s. 7 (3) such agreement must be in writing. The relevant passage in his judgment reads as follows:

> "The section clearly distinguishes between the agreement for sale, mortgage, etc., and the actual instrument which effect the transaction. It cannot be said that the instrument itself institutes the agreement since every sale or mortgage of land must be in writing and the provision for a written agreement would in these circumstances be otiose. In other words, s. 7 (1) imposes a condition precedent to the carrying out of a transaction, namely, the approval of a preliminary agreement. That being so, there having in the present case been no prior written agreement and the consent of the Land Control Board, if it has been obtained at all, which is doubtful for reasons to be mentioned in a moment, was obtained after the execution of the memorandum of charge which would accordingly be void."

There is an anacoluthon in the concluding sentence of this passage, but the meaning seems clear, namely that unless (*a*) there has been a written agreement to enter into the mortgage, preceding the mortgage itself, and (*b*) the board's consent has been given to that agreement before the execution of the memorandum, exhibit 2, the mortgage will be void. There is force in the view of the construction of the section taken by the learned judge, but I do not think it is the right construction. It is to be noted (*a*) that there is no provision in the section that a purported transaction under sub-s. (1) of the section shall be void in the absence of the consent of the board; (*b*) that there is no provision that money paid under a transaction prohibited by sub-s. (1) shall be recoverable. It is only in sub-s. (3) that these provisions occur: c.f. s. 88 of the Crown Lands Ordinance. I think it follows from this that the draftsman has treated the "agreement" for the transaction as assimilated to the transaction itself. Every sale, lease, mortgage etc.; must, of course, be preceded by an agreement, but if that agreement is "reduced into writing" in terms of the proposed transaction, it seems to me that this is a sufficient reduction into writing for the purposes of sub-s. (3). Such an instrument, signed by the parties, cannot, of course, take effect otherwise than as an agreement until consent of the board has been obtained, but I see no reason why it should not take effect as a transfer, mortgage, etc., upon the necessary consent being obtained within the time limited by the section. If the transaction is preceded by a written agreement, and consent is obtained to that agreement, then, it would seem, no further consent is necessary under sub-s. (1). In other words, the section requires one consent only of the board to any transaction. If the consent is given to a prior written agreement, that consent will cover the transaction. If the "reduction into writing" of the agreement takes the form of setting out the terms in the actual form of the final conveyance, mortgage etc., it still remains a mere agreement and is the agreement referred to in sub-s. (3) until consent to the transaction has been given. It seems to me that sub-s. (3) is capable of this construction, and that such a construction is more reasonable than a construction which requires two written instruments in every case, no matter how simple the transaction. The consent of the board was duly obtained in the present case, subject only to consideration of the question to which I now turn, namely whether the consent of the Commissioner of Lands, given in his capacity as chairman of the Land Control Board, was sufficient evidence that the board itself had given its consent as the section requires. The learned trial judge held that it was not; and this was the second ground on which he held that the section had not been complied with.

This point may be disposed of briefly. The learned judge took it on his own motion. Mr. Munro, who appeared for the appellant below, did not there suggest that there was any evidence or circumstance to rebut the presumption that where a person gives a consent on behalf of a body of which he is

chairman, the body has given that consent and has authorised him to signify it. Nor was there, in spite of the learned judge's observation to the contrary, any evidence that the board had not in fact given its consent. In these circumstances, Mr. Munro, having argued the point in his opening address before us, very properly said in his reply that he would no longer take it.

There is one last matter which I should mention. The learned trial judge's decision in favour of the respondent was based on sub-s. (2) of s. 9 of the Bankruptcy Ordinance (Cap. 30). He said:

> "Mr. de Souza's sheet anchor in this case is s. 9 of the Bankruptcy Ordinance and in particular sub-s. 2 thereof. This section is in the following terms:
>
> '(2) But this section shall not affect the power of any secured creditor to realise or otherwise deal with his security in the same manner as he would have been entitled to realise or deal with it if this section had not been passed.'
>
> "In my opinion, this section is decisive. The decree holder is a secured creditor as defined by s. 2 of the Ordinance; there was a consent judgment and this operates as an estoppel. None of the technical points raised by Mr. Munro, whatever effect they might have had if they had been raised by the debtor in the course of the suit, can avail him at this stage, nor can they avail the Official Receiver."

With respect, I do not think this sub-section takes the matter any further. In my view it is merely a saving provision, saving the rights of a secured creditor notwithstanding the bankruptcy. But the secured creditor must be a secured creditor in his own right before the sub-section can take effect. As I have indicated, I do not think that it was open to the appellants to challenge the validity of the security at the stage of the final decree for sale, nor that there was any validity in the grounds on which they sought to base their challenge; but, had they had a valid ground of objection to the security on which they could have relied at such a late stage, s. 9 of the Bankruptcy Ordinance would not have precluded them from so doing.

For all these reasons I would dismiss the appeal, and would uphold the order of the learned judge, though not all the conclusions on which he based it. I would order that the appellants do pay the respondent's costs of the appeal, to be paid out of any balance of the proceeds of sale of the mortgaged property after satisfaction of the decree, and failing any such balance or to the extent that such balance does not extend, by the appellants personally.

Forbes VP: I agree and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Gould JA: I also agree.

Appeal dismissed.

For the first appellant and the Official Receiver:
The Official Receiver, Kenya
R. H. Munro and Charles Njonjo

For the respondent:
Stephen & Roche, Nairobi
J. M. Nazareth, Q.C., and *Ralph C. de Souza*

R v Amani Marunda
[1960] 1 EA 281 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	8 January 1960
Case Number:	14/1960
Before:	Crawshaw J
Sourced by:	LawAfrica

[1] Insurance – Motor vehicle – Carriage for hire or reward – Insurance policy excluding risks of carriage for reward – Particulars of offence – Omission of material averment – Motor Vehicles Insurance Ordinance (*Cap*. 169), *s.* 4, *s.* 5, *s.* 10 *and s.* 16 (*T.*).

Editor's Summary

The accused was charged in one count with "using a motor vehicle without a valid insurance policy on the road contrary to s. 4 (1) and (2) Motor Vehicles Insurance Ordinance, Cap. 169". The particulars alleged that the accused used the vehicle "in respect of which a valid insurance policy for the purpose of carrying passengers for hire or reward was not in force on the road" but did not state for what purpose the vehicle was being used, nor was the vehicle's insurance policy before the court. The accused who was the driver but not the owner of the vehicle, when called upon to plead, said "I admit" and was convicted. In revision

Held –

(i) the charge was bad because the particulars did not state for what purpose the vehicle was being used.

(ii) if the charge before the court involves the insurance of a vehicle, the court should first be satisfied as to the precise terms of the policy and if there is, relevant to the charge, a restriction of liability, the court should see if it is one of the restrictions set out in s. 16 of the Motor Vehicles Insurance Ordinance; if it is so, then it is ineffective against a claim by a third party required to be covered under s. 5 (*b*) but effective against the insured.

(iii) if, however, it is a restriction outside s. 16, the insurer is not liable to the insured or third parties and the insured will not be covered against third party risks and in using the vehicle will commit an offence.

(iv) "third parties" includes passengers if the vehicle is habitually or normally used for hire or reward but not if it is an isolated case.

Conviction and sentence quashed.

Cases referred to in judgment:

(1) *Wyatt v. The Guildhall Insurance Co. Ltd.*, [1937] 1 K.B. 653; [1937] 1 All E.R. 792.

(2) *Ramadhani Ali v. R.*, [1958] E.A. 344 (T.).

(3) *R. v. Harnam Singh* (1950), 24 K.L.R. 101.

(4) *Bright v. Ashfold*, [1932] 2 K.B. 153.

(5) *Gray v. Blackmore*, [1934] 1 K.B. 95.

(6) *Alamanzane Kakoza v. R.*, [1958] E.A. 444 (U.).

(7) *Herbert v. Railway Passengers Assurance Co.*, [1938] 1 All E.R. 650.

Judgment

Crawshaw J: The accused was charged on count 2 with

> "Using a motor vehicle without a valid insurance policy on the road contrary to s. 4 (1) and s. 4 (2) Motor Vehicles Insurance Ordinance, Cap. 169"

and the particulars allege that the driver

> ". . . did use the said vehicle in respect of which a valid insurance policy for the purpose of carrying passengers for hire or reward was not in force on the road."

On being called upon to plead, the accused said, "I admit", which was recorded as a plea of guilty, and he was duly convicted, sentenced to pay a fine of Shs. 80/- and disqualified from driving for a period of twelve months.

As the charge does not appear to disclose an offence, I have taken the case in revision. Section 4 (1) of the Ordinance reads:

> "Subject to the provisions of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance."

The relevant part of s. 5 reads:

> "In order to comply with the requirements of the last preceding section the policy of insurance must be a policy which:
>
> (*b*) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:
>
> Provided that a policy in terms of this section shall not be required to cover –
>
> (ii) except in the case of a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arise . . ."

In the first place the charge was bad because the particulars failed to state for what purpose the vehicle was in fact being used. This no doubt was carelessness, and it seems probable that the prosecution intended to allege that the accused was carrying passengers for hire or reward, and that the insurance policy did not cover the insured for this purpose. When I say "did not cover" I mean that the conditions of the policy either did not cover death or injury to the passengers, or that they went further still and purported to exclude any liability under the policy at the time of the carrying.

The policy was not apparently before the court, and it is not known what the terms were. As, however, there have lately been a considerable number of prosecutions in cases of this type, I think that perhaps it may be as well to try and clarify the position as I see it. In the case of *Wyatt v. The Guildhall Insurance Company Limited* (1), [1937] 1 K.B. 653, which was a civil action and the full criminal aspect was not considered, the insured person, Wilcox, held a policy which excluded the use of his vehicle for "hiring". On an isolated occasion, however, whilst making a private journey, he carried two passengers for payment and collided with another car, as a result of which one of his passengers, Wyatt, was injured. Wyatt obtained damages against Wilcox and Wilcox unsuccessfully sought indemnity against the insurers. Wyatt therefore, being unsuccessful in recovering from Wilcox sued the insurers under s. 10 of the Road Traffic Act, 1934, which is similar to s. 10 of our Ordinance. Branson, J., observed that in order to recover he must show (1) that Wilcox was entitled to

be indemnified under the policy in respect of the liability falling on him as a result of this accident, and (2) that the circumstances were such that Wilcox was under an obligation under the Road Traffic Act, 1930, s. 36 (similar to our s. 5), to have in force a policy covering injury which might be sustained by the plaintiff arising out of the use of the car on the road. The learned judge held that Wilcox was not in the circumstances covered by the terms of the policy, and that the action therefore failed, but he then went on to consider the position under s. 36 (1). Was it not for the proviso to our s. 5, there is no doubt that a policy would under s. 5 (*b*) be required to cover death or injury to persons being carried in a vehicle whether for reward or not, but proviso (ii) provides that a policy shall not be required to cover such persons

> "except in the case of a vehicle in which passengers are carried for hire or reward."

The learned judge considered whether this exception included an isolated carrying for reward or whether it related only to normal or habitual carrying for reward. After hearing argument he gave reasons, although they were only obiter, why he favoured the latter construction, the main reason being the position of the exception, as a clause by itself, at the commencement and not at the end of the proviso, and said:

> "I think that this sub-section is really dealing with vehicles normally or habitually used in the way mentioned in the exception, and that the mere fact that on an isolated occasion a man takes some reward – not necessarily a monetary reward – for the conveyance of a passenger in his car does not render him liable to a penalty for not having an insurance policy covering that passenger on that occasion. Two constructions may be possible, but as this is a penal statute one leans against the construction which would turn the user of the car into a criminal user."

The learned Chief Justice in *Ramadhani Ali v. R.* (2), [1958] E.A. 344 (T.), agreed with the reasoning of Branson, J., on the interpretation of the proviso, and, with respect, so do I. On the basis of those cases the result is that if in the instant case the carrying was for hire or reward it would have been necessary either for the accused to have pleaded guilty to normally or habitually carrying passengers for hire or reward, or else for the prosecution to have proved that he did so and that his policy did not cover such use. But although there is vis-à-vis a passenger, no legal necessity for a policy to cover the carrying of passengers in isolated cases, there is a broader aspect of the matter which was not considered in the *Wyatt* case, and that is, what the position would be if, whilst carrying a passenger for hire or reward even in an isolated case, death or injury was caused to a third person other than the person being carried. If the carrying in the terms of the policy did not thereby exclude liability in respect of such third person, no difficulty arises of course. If, however, as is common, there was a term in the policy that the carrying avoided liability as a whole, then the question arises whether the insured has not after all committed an offence by ceasing to have a policy which covers such third person.

This question was, I think it can be said, answered in principle in the case of *R. v. Harnam Singh* (3) (1950), 24 K.L.R. 101. In that case the accused had been charged before a magistrate with, inter alia, riding a motor cycle without a certificate of competency or a driving licence and without having in force a policy of insurance covering third party risks. The accused was acquitted on this last charge, though convicted on the others, and the Crown appealed to the Supreme Court by way of case stated. The Appeal Court, consisting of Sir Barclay Nihill, C.J., and Modera, J., (as they then were) held that the magistrate did right to acquit, but based their finding on different grounds to that of the magistrate. The policy limited the definition of "driver" to a person

who was permitted by law to drive, which the accused, because of the offences mentioned, was not. It would seem that the terms of the policy therefore purported in the circumstances to exclude the insurers' liability in respect of third party risks. The appellate court held, however, that the provisions of s. 8 of the Kenya Ordinance (similar to our s. 8) prevented such avoidance of liability. Section 8 reads:

> "Any condition in a policy of insurance providing that no liability shall arise under the policy, or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy, shall, as respects such liabilities as are required to be covered by a policy under s. 5 of this Ordinance, be of no effect:
>
> "Provided that nothing in this section shall be taken to render void any provision in a policy requiring the persons insured to repay to the insurer any sums which the latter may have become liable to pay under the policy and which have been applied to the satisfaction of the claims of third parties."

The appellate court observed:

> ". . . in our view, by reason of s. 8 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, the insurance company could not in law have escaped liability under the policy in regard to a third party claim on the ground that the insured had failed to observe a condition in the policy.
>
> "The relevant words in s. 8 for the purposes of this case are the following:
>
> > 'Any condition in a policy of insurance providing that no liability shall arise under the policy . . . shall, as respects such liabilities as are required to be covered by a policy under s. 5 of the Ordinance, be of no effect.'
>
> "Amongst the liabilities required to be covered by a policy of insurance under s. 5 is the liability which the driver of a motor vehicle might incur in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle on a road. On the face of it then it is clear that an insurer cannot by the insertion in the policy of some words of limitation avoid satisfying the legally established claim of a third party in the first place although the insurer may have a right subsequently to recover from the insured . . ."

The appellate court then considered the effect of s. 10 (1), similar to our s. 10, which reads:

> "If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered in a policy under para. (*b*) of s. 5 of this Ordinance (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, not-withstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments."

After observing that there was no evidence of any circumstances relevant to the other sub-sections of s. 10, the court said:

> "We are of the opinion therefore that had an accident occurred to the

> accused's motor cycle at 12 noon on February 21, 1950, involving death or injury to a third party and had such third party or his legal representative subsequently obtained judgment for damages against the accused, the insurer under the policy now before us would have been liable in the first instance to pay those damages to the person entitled. That being our conclusion it follows that we hold that the charge against the accused on the fourth count was not maintainable and that the magistrate did right to acquit him. The case will not therefore be remitted back to the learned magistrate for any further action."

The significance of "12 noon" is not specifically mentioned, but I suppose it was the time the accused was apprehended riding the motor cycle.

The court therefore held that the charge relating to the insurance policy was not maintainable.

The court's construction of s. 8 appears to be at variance with earlier English cases, to which the Kenya Court made no reference, and to English text books. In *Bright v. Ashfold* (4), [1932] 2 K.B. 153, the insurance policy contained a condition (which I believe is usual) that,

> "the Corporation shall not be liable for any accident or damage caused or sustained while any motor cycle in respect of which indemnity is granted under this policy is carrying a passenger unless a side-car is attached."

The driver of the motor cycle on the occasion concerned had no side-car and carried a pillion rider, and he was charged with the offence of using a motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third party risks as complied with the requirements of Part 2 of the Road Traffic Act of 1930. The justices dismissed the information on the ground that the condition in the policy was of no effect by reason of s. 38 of the Road Traffic Act, 1930, (substantially similar to our s. 8), and that therefore the policy of insurance was in force on that occasion.

On a case stated, Lord Hewart, C.J., in a short judgment, with which his brother judges concurred, allowed the appeal, observing,

> "there was no policy of insurance in force in respect of third party risks . . . I think it is quite clear that that section (s. 38) has no relation to a condition such as is contained in this policy."

Similarly, in *Gray v. Blackmore* (5), [1934] 1 K.B. 95, it was held, in the words of the headnote,

> "Section 38 does not avoid a condition limiting cover under a policy; it merely prevents an underwriter escaping liability to a third party by reason of some act or omission of the assured after the claim has arisen."

In other words that the word "after" governs the whole section and not only that part which commences – "or that any liability so arising shall cease . . .". It is to be observed however, that there is no comma immediately before these words in the English section whereas there is in our section, but there is a comma after the word "cease", whereas there is not in ours. The positioning of the comma was considered by Keatinge, J., after hearing argument in *Alamanzane Kakoza v. R.* (6), a Uganda Criminal Revision reported in [1958] E.A. 444 (U.). The petitioner there drew attention to the position of the comma and sought to read the section (s. 102 of the Uganda Traffic Ordinance, 1951, similar to our s. 8) in the same way as the court did in the *Harnam Singh* case, to which however there appears to have been no reference. The learned judge said,

> "It may here be observed that if the above rendering of s. 102 is correct, then the remainder of the section is quite superfluous and the provisions of s. 110 (similar to our s. 16) which deals further with avoidance of restrictions on the scope of policies are also superfluous."

He then referred to English authorities, including *Wright v. Ashfold* (4) and *Gray v. Blackmore* (5) and said,

> "in my opinion our s. 102 has exactly the same meaning as s. 38 of the Road Traffic Act, 1930."

Faced with these authorities, I am, with respect, inclined to the view of Keatinge, J., and I think that had the learned judges in the *Harnam Singh* case had before them the English authorities they might well have placed a different construction on the Kenya section, in spite of the comma there being placed as in our section and not as in the English section, a point which was not however taken by them. It cannot be said for certain, of course, what construction the English courts would have placed on our section, but, especially from the judgment of Branson, J., in the *Gray case*, it seems to me unlikely that the position of the comma would have affected the decisions. Branson, J., referred to a suggestion that the section should be read in the following way:

> "Any condition (*a*) that no liability shall arise or (*b*) that any liability so arising shall cease in the event, etc., shall be of no effect."

and said,

> "Now, it seems to me that that is an impossible construction to put upon this clause, whether you put a comma after 'cease' or not . . . ; I think the matter may be tested by leaving out one of the suggested alternatives, and dealing with the other by itself. So treated, the section, according to the plaintiff's argument, would read, 'Any condition providing that no liability shall arise under the policy shall be of no effect,' which is obviously a provision which the statute never meant to enact; and the attempt to break up the words of the section as suggested by the plaintiff leads to what seems to me to be a nonsensical provision in the statute."

With respect, I agree. The East African legislation stemmed, one presumes, from the English Acts, and I can hardly believe that a mere change in the position of the comma was a deliberate attempt by our legislature to introduce a new affect in the law on so vital a matter, nor did the objects and reasons to the bill suggest this. The Uganda case, incidentally, on facts very similar to those in the instant case, went on to consider the position with regard to passengers, but not with regard to other third parties.

This still leaves the finding of the Kenya court that the insurers would be liable to a third party under s. 10 (1). Here again the court did not refer to any English authorities on the subject. Shawcross on "Motor Insurance" (2nd Edn.), at p. 362, reviews certain cases, and in referring to a specific instance said,

> "the insurers could evade liability to third parties by showing that at the time of the accident passengers were being carried for hire or reward in a private car, whereas the assured had expressly stipulated that he would not carry such passengers, and thereby such a user of the vehicle was expressly excluded by the terms of the policy."

The learned author then observed that,

> "the liability arising from the accident could be shown not to be covered by the terms of the policy." In those circumstances the rights of the third party given by the earlier provision to sue insurers direct were defeated."

It seems amply clear from these English authorities that a third party has no claim against an insurer under s. 10 (1) unless the liability is covered by the terms of the policy, except in the circumstances referred to in s. 16 of our Ordinance. Section 16 provides that certain specified restrictions in an insurance policy shall be of no effect as respects such liabilities as are required to be covered by a policy under para. (*b*) of s. 5. The restrictions include under para. (*c*) of s. 16 "the number of persons that the vehicle carries", but not be it observed, persons carried for hire or reward, even on isolated occasions. The fact that it was thought necessary to specify these restrictions strengthens the view that otherwise insurers can introduce limitations effectively evading liability. In *Herbert v. Railway Passengers Assurance Co.* (7), [1938] 1 All E.R. 650, PORTER, J., said at p. 653:

> "But s. 10 does not, I think, impose any such liability in a case where the insurers have limited their liability by the wording of the policy, but only in a case where there is an apparently valid policy covering the liability, which yet they could have avoided or cancelled because of some misrepresentation or concealment on the part of the assured."

To sum up, a court should first satisfy itself what the precise terms of the policy are. If there is, relevant to the charge, a restriction limiting liability, the court should see if it is one of the restrictions set out in s. 16. If it is, then it is ineffective against a claim by a third party required to be covered by s. 5 (*b*), although effective against the insured. If however it is a restriction outside s. 16, the insurer is excluded from liability to the insured and to third parties, and the insured will not be covered against third party risks and in using the vehicle will commit an offence. Third parties include passengers if the vehicle is normally or habitually used for hire or reward, but not in isolated cases. In isolated cases no cover is necessary in respect of passengers by virtue of exception (ii) to the proviso to s. 5. In cases such as the instant case therefore, if the policy avoided liability and thereby laid the driver open to the commission of an offence in the event of the vehicle being used for carrying passengers for hire or reward, even on an isolated occasion, the charge should include words to the effect that the person used the motor vehicle on a road without there being in force in relation to the user of the vehicle such a policy of insurance in respect of third-party risks as complied with the requirements of the Motor Vehicles Insurance Ordinance contrary to s. 4 (1). The particulars should then set out the grounds of complaint, and these can of course only be ascertained after the police have carefully perused the policy and satisfied themselves that there was in the circumstances no cover as required by law.

In view of the deficiency in the particulars of the charge, I quash the conviction and sentence on count 2 and the order of disqualification. In any event it can hardly be said, I think, that the plea, "I admit", especially by a driver who is not the owner, is unequivocal.

Conviction and sentence quashed.

For the Crown:
The Attorney-General, Tanganyika
D. M. MacDonagh (Crown Counsel, Tanganyika)

The accused did not appear and was not represented.

K C M Thyssen v Wakisu Estate Limited

[1960] 1 EA 288 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	25 February 1960
Case Number:	986/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Negligence – Contributory negligence – Motorist colliding with unlit lorry in street after dark – Motorist dazzled but failing to slow down – Speed of motorist – Apportionment of liability.

[2] Damage – Remoteness – Novus actus interveniens – Motorist's money stolen whilst unconscious after accident – Whether money recoverable.

Editor's Summary

After driving his car 270 miles the plaintiff reached the outskirts of Kampala after dark and as he entered the town dipped his headlights to oncoming traffic. Two cars in succession did not respond and being momentarily blinded by their lights the plaintiff drove into the back of an unattended unlit lorry which was parked at the side of the road. The lorry had two red reflectors at the back but was muddy and dusty. Through the collision the plaintiff was injured and unconscious for less than half an hour, and he claimed damages from the defendants for negligence including a sum in cash stolen from his pocket whilst lying unconscious in the car. The defendants contested liability on the grounds that the plaintiff's speed was excessive, the lorry had been parked where it was in a "no parking" area because it had developed a mechanical defect and as regards the claim for cash stolen they contended that the damage was in any event too remote.

Held –

(i) the plaintiff was guilty of some contributory negligence in that he should have slowed down or stopped when dazzled and was also driving at over 40 m.p.h.; but there was less reason for the plaintiff to expect a lorry to be parked in a prohibited area on a town road than in the countryside and since the lorry was unlighted the defendants were liable to the plaintiff for three quarters of the damages.

(ii) the defendants were not liable for the loss of the plaintiff's cash since this could not have been foreseen and was "novus actus interveniens".

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Kotecha and Another v. East African Millers Ltd. and Another*, Uganda High Court Civil Case (Jinja Registry) No. 144 of 1957 (unreported).

(2) *S. V. Patel v. Jamal Walji & Co.*, Uganda High Court Civil Case No. 71 of 1948 (unreported).

Judgment

Sheridan J: The plaintiff claims damages for negligence arising out of an accident which occurred on November 21, 1958, when the Chevrolet car No. UFX. 445 which he was driving collided with the back of the defendant's lorry No. UFZ. 909, which was parked on the side of the road in Queensway, facing Kampala.

Subject to the question of the speed at which the plaintiff was travelling I accept all the evidence except that of Kaloli Lwanga, the lorry driver (D.W. 1), who was proved to be a liar by Mr. Kagwa (P.W. 3) and Corporal Ogonya (D.W. 2). I do not believe that he was present at the time of the accident, or that he reported it to the police.

Accordingly I find that the plaintiff left Kabale at noon and after driving some 270 miles reached the outskirts of Kampala after dark and with his headlights on. As he drove along Queensway he dipped his lights to oncoming traffic. Two cars in succession did not respond; he was momentarily blinded and ran into the defendant's unlighted and unattended lorry which was parked on the left side of the road. The lorry had tow red reflectors on the wooden frame at the back but the frame itself was muddy and dusty. There is nothing to contradict the defendant's evidence that the lorry was parked in this "no parking" area because it had suddenly developed a mechanical defect. It was negligent to leave the lorry unattended and unlighted – the reflectors by themselves were not a sufficient warning of its presence on the road – and subject to the question of contributory negligence I find the defendants liable. The plaintiff maintains that owing to the volume of traffic on the road he had to slow down to 22-24 m.p.h. On the other hand Cpl. Ogonya found skid marks for 71 feet before the collision. This was a dry macadam road and according to the table of approximate minimum stopping distances on braking as set out in Binghams Motor Claims Cases (3rd Edn.), p. 43 the plaintiff must have been travelling at over 40 m.p.h. when he applied his brakes. He complains (1) that he was dazzled by the undipped lights of the oncoming cars. The answer to that is that he should have slowed down, or even stopped: see para. 46 of the Uganda Highway Code. His failure to do so is made relevant on the question of liability by reg. 101 (2) of the Traffic Regulations, 1951; (2) the lorry was an unexpected hazard at that place and he acted in the agony of the moment. But as I said in *Kotecha and Another v. East African Millers Ltd. and Another* (1), Uganda High Court Civil Case (Jinja Registry) No. 144 of 1957 (unreported):

> "It is notorious that unlighted lorries are a frequent nocturnal hazard on the roads of Uganda, not to speak of cattle, unlighted bicycles etc. . . . it was a naive assumption that there would be no obstacle."

The only material differences between that case and the instant case are (1) there I found that the car was being driven recklessly at a very high speed along a road in the countryside. Here the plaintiff's contributory negligence is slight in comparison, he had less reason to expect this obstruction on a "town" road where parking was prohibited; (2) there the lorry had no reflectors but its front lights were on which would have silhouetted it. The car driver should have had a clearer warning of its presence than the present plaintiff had of the defendant's lorry. In that case I reviewed the authorities and I do not propose to do so again. I find that the plaintiff was guilty of some contributory degree of negligence. I apportion the liability for damages as to one quarter to be paid by the plaintiff and three quarters by the defendants.

The special damages have been agreed at Shs. 2,015/-. In addition there is a claim for Shs. 1,514/- representing cash stolen whilst the plaintiff was lying unconscious in the car after the accident. The defendants do not dispute the amount but they disclaim liability on the ground that the damages are too remote. It is in evidence that a large crowd gathered after the accident, and it is not improbable that someone in that crowd helped himself to the plaintiff's wallet in the prevailing confusion. Mr. Troughton, for the defence, relies on *S. V. Patel v. Jamal Walji & Co*. (2), Uganda High Court Civil Case No. 71 of 1948 (unreported). In that case the defendant's lorry was negligently driven into the plaintiff's shop and while the plaintiff was lying unconscious a crowd of Africans looted some of the contents of the shop. The question was whether the plaintiff was entitled to recover the value of these goods as damages. Ainley, J., held that these damages were not recoverable. I respectfully agree and I am unable to improve on his reasoning which is set out in the following passage from his judgment:

"Is the plaintiff entitled to recover that sum as damages? The test, easy to state, but difficult to apply is, I think, whether the loss by theft was the direct result of the negligence of the defendant's driver. The defendants say that it was not for the simple reason that between the act of negligence and the loss of these goods and this cash, an entirely new course intervenes, that is the deliberate and unwarrantable act of thieves.

"The plaintiff however argues that it has been said in many recorded cases that where what is relied on as a new cause, or novus actus interveniens, is the very kind of thing which is likely to happen if the want of care which is alleged takes place, then the original wrongdoer is not excused.

"He argues that to smash in a shop front with a lorry will inevitably lead to a crowd collecting, and that given the smashed shop front and goods within the shop members of the crowd will as a reasonable probability steal.

"What has happened is, he says, precisely what one would expect to happen, and therefore the defendants are liable.

"Now there are a number of cases from which dicta apparently favourable to the plaintiff can be culled. I may mention *Stansbie v. Treman* (1948 A.E.R. p. 599). *Hyett v. G.W. Rly*. (1947 A.E.R. Vol. 2, p. 264) and *Haynes v. Harwood* (1935 1 K.B. p. 146) together with those cases dealing with the leaving unattended of vehicles. It may also be said that the intervention of human conduct even if wrongful does not necessarily prevent the plaintiff's damage from being the direct result of the defendant's negligence. But from my study of reported cases it appears to me quite clear that where it has been held that the damage resulting from the deliberate and wrongful act of a third party is directly and naturally attributable to the negligence of the defendant it has also been shown either that the third party's act was the very thing which should have been foreseen by the defendant when he did the act complained of, the act complained of being shown to be negligent by reason of the forseeable consequences or that the defendant owed a duty to prevent the kind of thing which actually happened. Now the defendant's driver in this case was not placed in a position where it became his duty to prevent theft, and no one could possibly suggest that he could have foreseen that as a result of his negligent driving lawless persons would steal the defendant's goods, and I cannot see that the line of cases relied on by the plaintiff have any real meaning on the present facts. Doubtless the stealing would not have taken place without the negligence of the defendant's driver, but between his wrongful act and the loss to the plaintiff an entirely new cause, unanticipated, incapable of anticipation under the circumstances, unintended, and springing from a deliberate and criminal exercise of will by third parties, intervened.

"It is I think a case to which the dictum of Lord Sumner in *Wild Blundell v. Stephens* (1920 A.C. p. at 986) can be applied:

> 'In general (apart from special contacts and relations and the maxim "respondent superior") even though A. is in fault, he is not responsible for injury to C. which B., a stranger to him, deliberately chooses to do. Though A. may have given the occasion for B.'s mischievous activity, B. then becomes a new and independent cause.'

"The principle embodied in this statement was applied in the two reported cases most nearly approaching the present facts, viz.: *Scholes v. N.L.R.* (1870 21 L.T. p. 835) and *Cobb v. G.W. Rly*. (1894 A.C. 419), and I think that it should be applied here. The defendants must pay for the

> damage their driver did, but not for the loss caused by the thefts of casual thieves with whom they have no connection."

I find that this item of special damages is not recoverable.

In support of the claim for general damages for pain and suffering there are two agreed medical reports (exhibits A and B) which are in the following terms:

> "A. The above named was seen by me on the evening of the 21.11.58 when I happened to be on casualty duty at the hospital.
>
> "On examining him I found that he had sustained two skin deep lacerations on the forehead, which were sutured, contusion of the base of the chest, left side, and minor abrasions over the left knee. He was also suffering from shock. I had him admitted to hospital for observation, investigations and further treatment. From perusal of his notes, I find that he was discharged the next day."
>
> "B. He was apparently involved in an accident in Kampala on 21.11.58, when he was knocked out for 20 minutes.
>
> "He sustained a cracked eighth left rib anteriorly, an was in hospital for two or three days.
>
> "He was seen here first on 25.11.58, when he was complaining of pain in the right side of his chest: this was accounted for by the cracked rib. The left side of his chest was strapped, giving symptomatic relief. Subsequently the rib healed well.
>
> "He also had a cut on his forehead, the scar of which was giving him a neuralgic type of headache. His skull was X-rayed on 15.1.59, but there was no evidence of any bony injury.
>
> "Analgesics did not help these headaches. Local injections into the site of the scar relieved them for a short time only, and it was decided to exercise under a local anaesthetic. This was done on 4.2.59 by my partner, Mr. G. Stewart Hunter, with considerable subsequent relief.
>
> "In June, 1959, Mr. Thyssen complained again of headaches and eye-strain, but this seemed to be separate and different from the headaches he had previously complained of. They lasted a few weeks, and one gathers that they were controlled by Analgesic drugs, for he did not come back for further consultations on that particular subject."

It is clear that the plaintiff suffered from considerable pain and discomfort for at least three months. He managed to work half-time as he was doing a one-man job: that is to his credit. On the other hand he made a complete and fairly rapid recovery and there has been no disfigurement or other permanent ill effect from the accident. The assessment of general damages in these cases is never easy and the sum awarded must always be somewhat arbitrary. Doing the best I can I assess the general damages at Shs. 3,000/-. In the result the plaintiff is entitled to three-quarters of Shs. 5,015/-. There will be judgment for the plaintiff for Shs. 3,761/25 with interest and costs.

Judgment for the plaintiff.

For the plaintiff:
Russell & Co., Kampala
T. van Tijn

For the defendant:
Hunter & Greig, Kampala
J. F. G. Troughton

Alfred Bazanyamaso and another v The Attorney-General of Uganda

[1960] 1 EA 292 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	14 March 1960
Case Number:	907/1959
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Regulations – Interpretation – Governor required to ask district council to submit names for appointment to board – Refusal by district council to submit names – Whether Governor has power to appoint members without recommendation from district council – Kigezi District Appointment Board Regulations, 1959, *reg.* 4 (2) *and reg.* (4) (3) (*U.*) – *Legal Notice No.* 173 *of* 1959 (*U.*) – *District Administration* (*District Councils*) (*Amendment*) *Ordinance*, 1958, *s.* 25 *and s.* 35 (*U.*) – *District Administration* (*District Council*) *Staff Regulations*, 1959, (*U.*).

Editor's Summary

The Kigezi District Council refused when requested to submit to the Governor suitable names for appointment to the Kigezi District Appointments Board and appointments were made without its recommendations. The plaintiffs as taxpayers, filed an action in the High Court claiming, inter alia, a declaration that the appointments of certain members to the board were illegal, null and void in that the Governor failed to comply with reg. 4 (2) and reg. 4 (3) of the Kigezi District Appointments Board Regulations, 1959.

Held –

(i) on the plain wordings of reg. 4 (2) and reg. 4 (3) wide powers are conferred on the Governor which in his absolute discretion he may use or not.

(ii) the plaintiffs had neither a legal right which the court could enforce by granting the declaration sought, nor had damage accrued to them nor was it likely to accrue; the grant of a declaratory order is discretionary and in any event it was not certain that all the proper parties, including the board, were before the court.

Declaration refused.

Case referred to:

(1) *Thomas and Others v. Moore and Others*, [1918] 1 K.B. 555.

Judgment

Sheridan J: The plaintiffs claim declarations (*a*) that the appointment by the Governor on September 7, 1959, by General Notice No. 1286 of 1959, published in the *Uganda Gazette* dated September 10, 1959, of four members of the Kigezi District Appointments Board was illegal, null and void in that the Governor failed to comply with reg. 4 (2) and reg. 4(3) of the Kigezi District Appointments Board Regulations, 1959, (hereinafter referred to as "the Regulations") Legal Notice No. 173 of 1959; (*b*) that any act or omission inconsistent with the aforesaid provisions of the Regulations under s.35 of the District Administration (District Councils) (Amendment) Ordinance, 1958, is invalid; (*c*) that any act or omission and/or proceeding of the Kigezi District Appointments Board (hereinafter referred to as "the board") is invalid as the members were not appointed in accordance with the Regulations and/or the Ordinance; and (*d*) that "the Regulations" are oppressive and unreasonable and are therefore null and void.

I can quickly dispose of declaration (*b*). It is mere tautology and can only mean that if anyone acts unlawfully, he acts unlawfully.

With regard to para. (*d*), Mr. Clerk – Who appeared for the plaintiffs – abandoned it realising that the Regulations are included in the definition of "Ordinance" in the Interpretation and General Clauses Ordinance, and that they cannot be impugned on the grounds that they are oppressive and unreasonable any more than can an Ordinance passed by the Legislative Council. He sought to substitute a plea that the Regulations were ultra vires the Ordinance. Here he had an uphill struggle. Section 25 of the Ordinance confers very wide powers on the Governor to make subsidiary legislation with regard to Appointment Boards. It was somehow sought to establish that the provision in reg. 6 of the Regulations which enabled persons holding certain designated offices to be members of the Appointments Board and, at the same time, be members of the district council was ultra vires because their impartiality would be affected. I am informed that with the exception of the Secretary General, who holds his appointment for five years, the other three offices are held for life. I am unable to see any repugnancy between this provision and s. 25 of the Ordinance.

Coming to declaration (*a*) it is necessary to set out reg. 4 (2) and reg. 4 (3) which are as follows:

> "4.(2) The members of the board shall be appointed by the Governor, who in making any such appointment shall take into consideration, but shall not be bound by, any recommendations which may be made by the council in accordance with the provisions of this regulation.
>
> "(3) For the purpose of making recommendations under the provisions of para. (2) of this regulation, the council may whenever requested by the Provincial Commissioner of the province wherein the council is established so to do, submit to the Governor the names of eight persons who are, in the opinion of the council, suitable for appointment to the board and who except in the case of teachers are not in the service of the Government."

It will immediately be seen that a very wide discretion is conferred on the Governor. In this case the district council were requested to submit to the Governor suitable names for appointment to the board, but they refused to do so, and from that it is argued that the Governor could only take action under s. 35 of the Ordinance. On the plain wording of reg. 4 (2) and reg. 4 (3) a power is conferred on the Governor which is in his absolute discretion to use or not. This is underlined by the words "he shall not be bound by" in line three of reg. 4 (2). If names are submitted the Governor is not bound by them. It follows that his power cannot be more fettered if the council refuses to submit names. In other words, he is not debarred from making appointments if no recommendations are made. I see no reason for construing the word "may" in reg. 4 (3) as "shall". It is used in contrast to the word "shall" in reg.4 (2). If a mandatory duty were imposed on the council to submit names to the Governor then there might be some justification for saying that the Governor would be obliged to act under s. 35 of the Ordinance. But even under that provision the Governor in council retain a discretion and is not bound to enforce performance of a council's duties and functions in the manner set out therein. Section 35 contains machinery for overcoming a deadlock where a council refuses to exercise its mandatory powers, but the Governor is not bound to take action under it in cases, for instance, where the council has made only a minor default in its duties. A further submission was made that the appointments were illegal in that they prevented the appointees from giving the three months' notice to terminate their employments in contravention of the Kigezi Staff Regulations. But these regulations were superseded by the District Administration (District Council) Staff Regulation, 1959, which appeared in the *Gazette* of February 5, 1959, that is, at least six months before these

appointments were made, and these Regulations are silent on the question of notice.

Finally, although the plaintiffs are entitled, by s. 15 of the Government Proceedings Ordinance, 1958, to come to court and ask for an order declaratory of their rights against Government, the power of the court to grant or refuse such an order is discretionary. The principles on which declaratory judgments and judgment against the Crown will be granted are set out in Halsburys Laws of England (3rd Edn.), Vol. 22 at pp. 746-752, and I need not repeat them. The plaintiffs are described as resident taxpayers in Kigezi, but that seems to be the extent of their interest in this suit. I fail to see that they have any legal right which I could enforce by granting the declaration sought. No damage has accrued to them, or is likely to accrue: see *Thomas and Others v. Moore and Others* (1), [1918] 1 K.B. 555 at p. 567. Nor am I satisfied that all the proper parties, including the Appointments Board, are before the court. The attack on the legislation in this suit fails. I decline to make the orders sought and accordingly the suit is dismissed with costs.

Declaration refused.

For the plaintiffs:
Mayanja, Clerk & Co., Kampala
A. V. Clerk

For the defendant:
The Attorney-General, Uganda
A. M. McMullin (Crown Counsel, Uganda)

Mohamedhusein Tharia Topan v Mwanahaluwa Binti Mohamadi
[1960] 1 EA 294 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	12 February 1960
Case Number:	22/1959
Before:	Horsfall J
Sourced by:	LawAfrica

[1] Tree – Negligence – Damage to property – Tree falling owing to rot caused by water collecting in fork of two branches – Whether owner under duty to inspect tree periodically.

[2] Pleading – Negligence – Plaint alleging owner negligent in allowing tree to grow very old – Finding that owner negligent in not periodically inspecting the tree – Whether finding falls within the pleadings – Civil Procedure Rules, O. VII, r. 1 (*e*) (*Z.*).

Editor's Summary

A baobab tree belonging to the appellant fell and caused damage to the respondent's hut. The respondent sued the appellant in the magistrate's court and was successful, the magistrate holding that the respondent was liable in negligence because he had failed to inspect the tree. On appeal it was argued for the appellant that on the pleadings as they stood in the court below the issue was whether the appellant was liable in damages to the respondent for allowing a baobab tree growing on his land to become so old so as to cause the damage, and that the respondent had not led evidence to show what duty of inspection a baobab tree owner in the area owed to his neighbours. Counsel for the respondent argued that it was implied in the plaint, which was subsequently amended, that the tree was likely to fall down by reason of its age and that the appellant was negligent in not periodically inspecting an old tree dangerously near the hut of the respondent. The evidence of the respondent was that the tree fell and damaged his house because its roots were rotten. The trial magistrate, however, relied on the evidence of the superintendent of

gardens, Zanzibar, who stated that "water must have been lodged in the fork of the main two branches and that water little by little brought in rot. It fell because it was rotten."

Held –

(i) the respondent should have stated in his plaint all the facts which constituted his cause of action; it was not sufficient to allege what may be a ground of action if something else be added to the plaint which was not there expressly stated.

(ii) there being no evidence of any particular propensity of baobab trees generally to drop their branches, it was not open to the trial magistrate to find that the appellant had a duty periodically to inspect this particular tree, except perhaps to keep a look out for any obvious dangers which could be easily noticed by an unexpert eye.

Appeal allowed.

Judgment

Horsfall J: Mr. Lakha for the appellant/defendant argued grounds 2 and 3 of his memorandum of appeal together. It is clear from the amended plaint and the written statement of defence that the issue in dispute on the pleadings was whether the appellant/defendant was liable in damages to the respondent/plaintiff by reason of his negligence in allowing a baobab tree growing on his land to grow very old in spite of its nearness to the hut belonging to the respondent/plaintiff whereby it fell and damaged the said hut.

Mr. Karai for the respondent/plaintiff replied that it was implied in the amended plaint that the tree was likely to fall down by reason of its age and that the appellant/defendant was negligent in not periodically inspecting an old tree dangerously near the hut of the respondent/plaintiff. In view of the clear direction in O. VII, r. 1 (*e*) of the Civil Procedure Rules which states that

> "the plaint shall contain the following particulars: (*e*) the facts constituting the cause of action and when it rose,"

this suggestion is, to say the least, a startling one. The whole object of pleadings is to bring the parties to an issue so that each party shall know when the case comes on for trial what the rear point to be discussed and decided is. To attain this end the plaintiff should state in his plaint all the facts which constitute his cause of action. It is not sufficient to allege what may be a ground of action if something else be added which is not stated in the plaint. (See D.F. Mulla's Code of Civil Procedure (7th Edn.)). In a properly drawn pleading this information, which counsel claims is implied, is would have been set forth in the particulars of negligence alleged.

This omission by the counsel for the respondent/plaintiff has adversely affected his client because there was no evidence brought on behalf of the plaintiff as to what, if any, is the degree of duty of inspection which a baobab tree owner in Ngambo owes to his neighbours. This defect in the pleadings was never brought to the attention of the learned magistrate by the counsel for the appellant/defendant. I think it likely that if Mr. Lakha had pointed out to the magistrate the defect in the plaint and that there was no evidence led by plaintiff as to the extent of the defendant's duty then the magistrate's judgment may well have been different.

The evidence of the respondent/plaintiff is to the effect that the tree fell and damaged his house because its roots were rotten. The evidence on which the learned magistrate relied in his judgment was

that of Mr. Machado, superintendent of gardens, Zanzibar Township Council. It is short and is so important that I will set it forth in full:

> "On 1/11/58 I was called to Miafuni to remove a tree. It was a baobab tree. In my opinion water must have been lodged in the fork of the main two branches and that water little brought in rot. It fell because it was rotten. I saw two houses had been damaged because the tree was right in the centre of a small square surrounded by huts on all four sides.
>
> "*Cross-examination* by *Lakha*: As far as I know a baobab tree is sometimes reputed to be one thousand years old. I should estimate this tree's age at fifty years. (In fact the learned magistrate found that it was perhaps one hundred years old). If I had passed by the tree before it fell down I should not have noticed that it was dangerous, but if I had examined it carefully by climbing up and looking into the forks I should have seen the danger. I do not think an ordinary man would have realised the danger. The branches of the tree appeared to be sound. The tree could grow again.
>
> "*Re-examination* by *Karai*: I examined the tree. The rot was right in the centre of the tree. I do not know of any way of discovering such decay by external examination.
>
> "*To Court*: It depends on the branches of the tree whether a baobab collects water. I saw two huts at least damaged on the spot. There had been slight damage to the ends of their roofs."

Mr. Lakha argued his first ground of appeal from the angle that the learned magistrate in his judgment found that his client was liable in negligence because he failed to inspect the tree. No complaint is made of his statement of the law.

> "As I conceive from the reading of the cases I have cited the defendant can only be made liable for the damage to the plaintiff's hut if it is shown that, despite the fact that the danger arose without his own act or default, he omitted to remedy it in a reasonable time after he did or ought to have become aware of it."

There is no evidence on the record that in Ngambo periodical inspections of baobab trees are made. This particular tree has been growing and giving shade before huts were built in its vicinity. Complaints about the tree's security were never made to the appellant/defendant. With respect to an eminent and learned magistrate I consider that he has misdirected himself when he says:

> "No such inspection ever took place and in the circumstances I am of opinion that the defendant cannot be heard to say that he was not aware of the defect in the tree, or that if he had, by himself or his agent, periodically examined the tree, he would not have realised the extent of the danger to the plaintiff's house."

There being no evidence of any particular propensity of baobab trees generally to drop their branches I do not think that it was open to the learned magistrate to find that there was a duty on the appellant/defendant periodically to inspect this particular tree, except perhaps to keep a look out for any obvious dangers which could be easily noticed by an unexpert eye. Mr. Machado's evidence states by implication that baobab trees generally do not collect water in the forks of their branches so as to cause rot. "It depends on the branches of the tree whether a baobab collects water". I emphasise the word "the" immediately preceding the word "tree" in the last sentence. It is also clear that an ordinary man, even if he had climbed into this particular tree and seen the water collected in the fork, would not necessarily have realised that it signified potential rot and the danger of falling. Mr. Machado, the township superintendent of gardens, has presumably particular knowledge of the ways of trees and even

he, only inspecting this tree form the ground, would not have suspected that this branch was rotten and liable to fall. The standard of duty to inspect cast on the defendant does not require him or any tree owner in Zanzibar to engage Mr. Machado or some other person with specialised knowledge of trees, periodically to climb into their branches and examine their safety. He is only liable for damage caused by danger of which he had knowledge and failed to rectify or for damage caused by danger, knowledge of which, by the standards of the ordinary reasonable man, he ought to have become aware of.

The appeal is allowed.

Having allowed the appeal for the above reasons I may be permitted to observe by way of comment that huts have been built under this tree for many years. The evidence of the appellant/defendant reveals that he had never cut the branches of this tree because his tenants did not like anyone to interfere with the tree. Presumably they enjoyed the shade given by the tree. In these circumstances I think that these tenants, including the plaintiff/respondent, owed a duty – I will place it at the least as a duty of self interest – to examine the tree from time to time. If they found signs of danger they could have so informed the appellant/defendant. If he then failed to remove the source of danger after this knowledge he would be liable in law for the resulting consequences. Alternatively the tenants would in certain circumstances be justified in entering on the land of the the appellant/defendant to abate the danger themselves and at his expense, in the event of his failing to remove an obvious danger of which they had warned him.

The appeal is allowed but as the plaintiff/respondent is suing as a poor person there will be no order as to costs.

Appeal allowed.

For the appellant:
Lakha & Co., Zanzibar
A. Lakha

For the respondent:
D. F. Karai, Zanzibar
Dinshaw Karai

Amin Electrical Services v Ashok Theatres Ltd
[1960] 1 EA 298 (HCU)

Division:	HM High Court of Uganda at Mbale
Date of judgment:	25 June 1960
Case Number:	118/1959
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Pleading – Particulars – Action for labour charges and materials supplied – No averment that charges and prices agreed or reasonable – Whether plaint discloses cause of action – Civil Procedure Rules O. 7, *r.* 11 (*a*) (*U.*)

Editor's Summary

The plaintiff sued for the value of materials used and charges for labour in respect of certain electric installations at a cinema. The plaint contained no averment that the labour charges were agreed or were reasonable, or that the prices for materials were agreed or reasonable. The defendant took a preliminary point that the plaint disclosed no cause of action since it did not contain particulars of the facts constituting the cause of action or when it arose.

Held – the failure to allege that the labour charges were agreed or were reasonable or that the materials supplied were at agreed or reasonable prices was a defect in pleading which however did not go to the root of the cause of action and was curable by amendment. *Lake Motors Ltd. v. Overseas Motor Transport* (*T.*) *Ltd*., [1959] E.A. 603 (T.) adopted.

Per Curiam: "It would not be unreasonable to infer that this series of transactions between two companies carrying on business in the same town (Mbale) in Uganda was conducted in accordance with the normal usages of trade, and that the goods mutually supplied and services rendered were supplied at prices which, if not agreed, were at any rate reasonable".

Preliminary objection overruled.

Cases referred to in judgment:

(1) *Lake Motors Ltd. v. Overseas Motor Transport* (*T.*) *Ltd*., [1959] E.A. 603 (T.).

(2) *Sullivan v. Almohamed Osman*, [1959] E.A. 239 (C.A.).

(3) *Bruce v. Odhams Press Ltd*., [1936] 1 All E.R. 287.

(4) *Husseinali Dharamshi Hasmani v. The National Bank of India Ltd.* (1937), 4 E.A.C.A.55.

Judgment

Sheridan J: Mr. Shah, on behalf of the defendants, has taken a preliminary point of law that the plaint should be rejected under the Civil Procedure Rules, O. 7, r. 11 (*a*) on the ground that it does not disclose a cause of action.

Paragraph 1 of the plaint reads as follows:

> "Plaintiffs' claim against the defendants is for the sum of Shs. 14,366/- being amount of labour charges and materials used in the electrical installations carried out by the plaintiffs in the Relief Cinema on Naboa Road, Mbale during 1958/59 at the special request and instance of the defendants and/or their agent. The particulars of the claim have already been supplied by the plaintiffs to the defendants.

Particulars:

Shs	1866-00	Price of materials used.
"	12500-00	Labour charges "
Shs	14366-00	

It is submitted that this plaint is defective in that it does not contain the particulars of the facts constituting the cause of action and when it arose as is required by O. 7, r. 1 (*e*). Although this is a claim for labour charges and materials supplied, the plaint does not state if the labour charges were agreed or were reasonable or if the materials supplied were at agreed prices or were reasonable. There is nothing in the plaint to indicate how these two sums were arrived at. There are no itemised charges and no dates are given beyond a bald averment that all this happened "during 1958/59."

Reliance is placed on *Lake Motors Ltd. v. Overseas Motor Transport* (*T*) *Ltd.* (1), [1959] E.A. 603 (T.).In that case, which was decided in the Tanganyika High Court, a plaint filed to recover the price of goods sold and delivered contained no averment that the price of the goods had been agreed or that the price was reasonable. The defendant company took a preliminary point that the plaint disclosed no cause of action since the facts constituting the plaintiffs' case had not been set out therein and that no fact which ought to be pleaded can be inferred. It was held by Law, J. that the failure to allege that the sum claimed represented an agreed or reasonable price was a defect in pleading, but that it was not every such defect which results in the plaint not disclosing a cause of action and that as the irregularity did not go to the root of the action it was curable by amendment. Like the instant case that was a claim or a balance of account and not on a single isolated transaction, but there the statement of account was annexed to the plaint. The learned judge thought it not unreasonable to infer that the series of transactions between two companies carrying on business in Tanganyika was conducted in accordance with the normal usages of trade, and that the goods mutually supplied and the services mutually rendered were supplied at prices which, if not agreed, were at any rate reasonable. The forms of plaints for services at a reasonable rate and services and materials at a reasonable cost where there was no express agreement as to the amount to be paid are set out in the Indian Code of Civil Procedure by Chitaley & Rao (6th Edn.) Vol.4, p 4460 (Forms 7 and 8). In *Sullivan v. Alimohamed Osman* (2),[1959] E.A. 239 (C.A.), the East African Court of Appeal held that in a suit for trespass to goods where duress was alleged at the trial but the circumstances of duress were not pleaded, the plaint did not disclose a cause of action. Per Windham, J.A. at p.244:

> "The plaint must allege all facts necessary to establish the cause of action. This fundamental rule of pleading would be nullified if it were to be held that a necessary fact not pleaded must be implied because otherwise another necessary fact not pleaded could not be true."

Like Law, J. in the *Lake Motors* case (1), I do not think that the Court of Appeal was purporting to lay down a principle of general application excluding in all cases inferences of the existence of facts which ought to have been pleaded. This seems to be borne out in the following passage in the judgment at p. 241:

> "This omission (i.e. to plead a fact which ought to be pleaded) would of course be fatal to the claim if the correct approach to the plaint were a literal one. But it is not. That which is necessarily implied from its context must be read into the plaint."

The plaintiff's reply to this submission is that any defects in the plaint have been remedied by the written statement of defence which not only admits that

the sum of Shs. 1,866/- is owing for the materials supplied but also avers that the labour charges were agreed at Shs. 8,100/-. Further, a statement of account is annexed to the written statement of defence. In fact, when this case was before me on March 30, 1960, it was adjourned sine die with a view to reference to arbitration. Since that date the *Lake Motors* case (1), has been reported and the defendants now rely on it. When it was suggested that the defect in the plaint could be remedied by a request for particulars, reference was made to *Bruce v. Odhams Press Ltd.* (3), [1936] 1 All E.R. 287. There the defendants applied for particulars but the judgments indicated that they might have applied with a good chance of success to have the statement of claim struck out as showing no cause of action. Per Scott, L.J., at p.294, p. 295:

> "The function of 'particulars' under r. 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim – gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. The use of particulars is intended to meet a further and quite separate requirement of pleading, imposed in fairness and justice to the defendant. Their function is to fill in the picture of the plaintiff's cause of action with information sufficiently detailed to put the defendant on his guard as to the case he had to meet and to enable him to prepare for trial. Consequently in strictness particulars cannot cure a bad statement of claim. But in practice it is often difficult to distinguish between a 'material fact' and a 'particular' piece of information which it is reasonable to give the defendant in order to tell him the case he has to meet; hence in the nature of things there is often overlapping. And the practice of sometimes putting particulars into the statement of claim and sometimes delivering them afterwards either voluntarily, or upon request or order, without any reflection as to the true legal ground upon which they are to be given has become so common that it has tended to obscure the very real distinction between them.
>
> "In a case where there is no omission of material facts under r. 4, whether particulars should be ordered is very often a matter of pure discretion – because it depends on a view of fairness or convenience which is essentially a matter of degree. But where particulars are asked because the statement of claim is defective in that it omits some essential averment – i.e. some 'material fact' – the question is not one of discretion, and the adoption by the defendant of the lenient remedy of an application for particulars instead of the more stringent remedy of striking does not turn an issue of right into an issue of discretion. As *Phillips v. Phillips* (2) is an illustration of the more stringent remedy, so *Palmer v. Palmer* (7) is an illustration of the more lenient remedy; but if in the latter case the defendant had so chosen I think he would have been entitled to the more drastic remedy."

To enable a court to reject a plaint on the ground that it discloses no cause of action, it should look at the plaint and nothing else: Chitaley and Rao (6th Edn.), Vol. 2, p. 2354. It follows that in considering this submission I must ignore the admissions contained in the defendants' written statement of defence. If the plaint discloses no cause of action I have no authority under s. 101 of the Civil Procedure Ordinance or under O. 6, r. 18 of the Rules to disregard or over-ride the specific provisions of O.7, r. 11, which are couched in mandatory terms, and no amendment to such a plaint can be made. *Hussenali Dharamshi Hasmani v. The National Bank of India Ltd*.(4) (1937), 4 E.A.C.A. 55.

Looking at the plaint by itself the point for decision is not an easy one. It is nearer the border line than the *Lake Motors* case in that no statement of

account is annexed to it, but para. 2 and para. 3 aver a reason for this. They read:

> "2. The defendants have supplied certain materials and paid some cash to the plaintiffs during the progress of the work but in spite of repeated requests the defendants have failed to supply to the plaintiffs such particulars and in the absence of such details plaintiffs were and are unable to give credit for such amount which they would have given had the particulars been supplied.
>
> "3. In spite of demand for payment having been made and particulars of cash paid and materials supplied having been asked for, the defendants have neglected and/or failed to so supply the particulars asked for or pay the balance due by them to the plaintiffs."

If the contents of these two paragraphs are true, then it is the defendants' omission to supply the particulars of the moneys with which they should be credited that has disabled the plaintiffs from striking a true balance. The contract between the parties and its breach are adequately pleaded. On the plaint and in the circumstances of this case it might not be feasible to specify in the statement of account which prices were reasonable and which prices were agreed. The defect does not, in my opinion, go to the root of the cause of action, and adopting the reasoning of Law, J., I would say that it would not be unreasonable to infer that this series of transactions between two companies carrying on business in the same town (Mbale) in Uganda was conducted in accordance with the normal usages of trade, and that the goods mutually supplied and services rendered were supplied at prices which, if not agreed, were at any rate reasonable. The defect is curable by amendment. The preliminary objection fails and I hold that the plaint does disclose a cause of action.

Preliminary objection overruled.

For the plaintiff:
J. S. Patel, Mbale

For the defendant:
Patel & Shah, Mbale
J. M. Shah

Re an Application by Ali Rehman

[1960] 1 EA 302 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	23 May 1960
Case Number:	29/1960
Before:	Lyon J
Sourced by:	LawAfrica

[1] Habeas corpus – Applicant convicted and sentenced to nine months' imprisonment by district court – On appeal conviction quashed and sentence set aside – Applicant released and at large for 135 *days –*

Conviction and sentence restored on further appeal – Applicant re-arrested and sent to prison – Original term of sentence expired when application heard – Whether period while applicant at large counts towards service of sentence – Criminal Procedure Code, s. 298 (*U.*).

Editor's Summary

On September 10, 1959, the applicant was convicted in the district court of theft by a servant and sentenced to nine months' imprisonment. On appeal the High Court quashed the conviction and set aside the sentence and the applicant was released on November 20, 1959. Meantime the Crown appealed again, the Court of Appeal allowed the appeal and restored the conviction and sentence and the applicant was re-arrested and sent to prison on April 4, 1960. The applicant then sought a writ of habeas corpus on the ground that the time during which the applicant was at large counted towards the original sentence imposed and that sentence had expired on May 2, 1960. The Crown contended that the court should take a common sense view and hold that the intention of the Court of Appeal was that the applicant should serve nine months' imprisonment with any remission earned.

Held – by virtue of s. 298 of the Criminal Procedure Code the sentence began to run from the date the sentence was pronounced by the district court and the term of the sentence having expired a writ of habeas corpus should be granted.

Application allowed.

[Editorial Note: See also *Re Mwenya*, [1959] 3 All E.R. 525.

Cases referred to in judgment:

(1) *Re Featherstone*, 37 Cr. App. R. 146.

(2) *In the matter of Moti Bhimji Jivanji* (1947), 6 U.L.R. 192.

Judgment

Lyon J: This is an application for a writ of habeas corpus to go to the Commissioner of Prisons and the Superintendent of Murchison Bay Prison, Luzira, to have the body of Ali Rehman before a judge of this court with a view to his release.

This application raises a point of great interest, one which, so far as I know, has not yet been decided in Uganda. It is agreed by counsel that the result in this application shall also be the result in a similar application made on behalf of Kantilal Chhaganlal Raval (Miscellaneous Cause No. 30 of 1960).

On September 10, 1959, the applicant was convicted in the district court, Masindi, of theft by a servant, contrary to s. 258 and s. 252 of the Penal Code, and sentenced to nine months' imprisonment. He appealed, and the appeal was successful; the conviction was quashed and the sentence set aside. He was accordingly released from prison on November 20. The Crown appealed against that decision of this court.

The judgment of the Court of Appeal was delivered by Gould, J.A., on April 4, 1960. This judgment ends:

> "The appeal is, therefore, allowed, and the convictions of the two respondents upon the respective charges and the sentences passed thereon by the learned magistrate, are restored."

That was the judgment of the court. To implement that judgment, a formal order was extracted from the registry of the Court of Appeal:

> "It is further ordered that the aforesaid convictions entered and the sentences imposed by the resident magistrate be and are hereby restored to full vigour and effect, and this court doth further direct the said High Court do take all necessary action to effect the arrest of the above-named respondents and their committal to prison to serve the sentences imposed in respect of the aforesaid offences of which they now stand convicted."

Mr. Starforth concedes that, if the 135 days during which this applicant was at large after the decision by this court in its appellate jurisdiction does count towards the sentence imposed, then the sentence did expire on May 2, 1960; and that concession has saved a great deal of trouble.

This applicant was, in fact, re-arrested in accordance with the order of the Appeal Court, and a warrant is attached to these proceedings which ends:

> ". . . keep the said Ali Rehman in your custody and carry the aforesaid order of H.M. Court of Appeal for Eastern Africa into execution according to law."

I do not think this situation has arisen before; probably because it was only in 1958 that a second appeal in these circumstances could be entertained. Mr. Wilkinson cited the second sentence of s. 298 of the Criminal Procedure Code:

> "Subject to the express provision of this or any other law to the contrary, every sentence shall be deemed to commence from and to include the whole of the day of the date on which it was pronounced."

The sentence therefore began to run on September 10, 1959. This applicant is still in custody, having been re-arrested and imprisoned at Luzira on April 4, 1960.

Mr. Wilkinson cited *Re Featherstone* (1), 37 Cr. App. R. 146 at 147:

> "The court does not grant, and cannot grant, writs of habeas corpus to persons who are in execution, that is to say, persons who are serving sentences passed by courts of competent jurisdiction. Probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner was being held after the terms of the sentence passed on him had expired."

The period of the sentence of nine months' imprisonment has expired. But for 135 days of that period this applicant was at large. Mr. Starforth invites me to take a common sense view and hold that the intention of the Court of Appeal was that this applicant should serve nine months' imprisonment with any remission earned. He concedes that there is no express statutory provision as to when a sentence shall end. That is so.

I would also refer to *In the matter of Moti Bhimji Jivanji* (2) (1947), 6 U.L.R. 192, which can be distinguished from this case, but which has some bearing upon it. There, after sentencing a convict to imprisonment, the magistrate granted bail pending an appeal when he had no power to do so. It was held that the period while that convict was at large, under that illegal order, would

count towards his service of sentence. In the instant application the applicant was at large under a proper order of this court; and therefore Mr. Wilkinson contends that this is a stronger position from his point of view than *Bhimji's* case.

With great respect I wish that the order made at the end of the judgment of the Appeal Court had been more lucid. In England when an appeal is dismissed the Court of Appeal always states from what date the sentence shall run. Here, the only words on which I can act are that the sentence of the resident magistrate is restored.

I return to this sentence in *Featherstone's* case (1):

> "probably the only case in which the court would grant habeas corpus would be if it were satisfied that the prisoner was being held after the terms (sic) of the sentence on him had expired".

That, of course, is obiter, but carries great weight coming as it does from the Lord Chief Justice, and it was the judgment of the Lord Chief Justice, Parker, J. (as he then was), and Donovan, J.

Ought I to introduce into the judgment of the Appeal Court something that is not there? And ought I to hold that the statutory provisions in Uganda must be construed in favour of Mr. Starforth's contention? He has submitted with very great force that this is a matter for common sense; and without looking at the authorities the decision would be easy. This applicant's sentence began to run on the date the sentence was pronounced by the learned magistrate, and it has already expired. My answer to both questions posed above is "No". Statutory provision must be construed in favour of an accused person and in favour of a prisoner, in my opinion; and I was impressed by Mr. Wilkinson's argument that it is at least possible that the judgment of the Appeal Court might have been intended to mean that the sentence already served by this applicant was sufficient. The judgment does not contain any such words as "the balance of sentence will be served" and, therefore, odd as it may seem, I have reached the conclusion that, the term of the sentence passed having expired, habeas corpus will be granted on this application.

Application allowed.

For the applicant:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q.C., and *B. E. D'Silva*

For the Respondent:
The Attorney-General, Uganda
M. J. Starforth (Crown Counsel, Uganda)

Erukana Kavuma v S T Mehta
[1960] 1 EA 305 (HCU)

Division:	HM High Court of Uganda at Jinja
Date of judgment:	28 April 1960
Case Number:	187/1959

Before: Sir Audley McKisack CJ

Sourced by: LawAfrica

[1] Practice – Service of summons – Defendant in India – Service on defendant's wife – No duplicate of summons delivered or tendered – Whether service bad – Civil Procedure Rules, O. 9, *r.* 3, *O.* 5, *r.* 9 *and r.* 14 (*U.*).

Editor's Summary

The affidavit of a process server who went to serve a summons on the defendant at his shop stated that he did not find the defendant there, that he was told that the defendant was in India, and accordingly served the summons on the defendant's wife. The plaintiff subsequently obtained an ex parte judgment and decree in default of appearance. The defendant then applied to set aside the decree contending that service of the summons was bad on the grounds inter alia that no duplicate of the summons was tendered or delivered to the defendant's wife.

Held –

(i) O. 5, r. 9 of the Civil Procedure Rules was not complied with because no duplicate of the summons was tendered or delivered to the defendant's wife; service was therefore bad.

(ii) the absence of the defendant from Uganda without any information about the defendant's address in India, or whether he would return and, if so, when, was not sufficient ground for saying that the defendant "cannot be found" within the meaning of the phrase in O. 5, r. 14 of the Civil Procedure Rules.

Order that the decree be set aside on the terms stated in the judgment.

Judgment

Sir Audley McKisack CJ: This is an application to set aside an ex parte decree which was obtained in default of appearance on January 5, 1960. The ground of the application is that the defendant was not duly served.

Order 9, r. 3, of the Civil Procedure Rules is as follows:

> "3. Where any defendant fails to enter an appearance on or before the day fixed in the summons and the plaintiff is desirous of proceeding upon default of entry of appearance under any of the rules of this Order he shall cause an affidavit of service of the summons to be filed upon the record."

On December 29, 1959, the plaintiff's advocate applied, by letter, to the District Registrar of the High Court at Jinja asking that an affidavit of service be filed on the record, and that judgment be passed against the defendant as provided by O. 9, r. 4. On December 17, 1959, the defendant had lodged an application to set aside service of the summons, and this application had not been heard at the time the judgment was entered. It appears from the record that the application was heard on February 12, 1960, and that Keatinge, J., then made the following order:

> "This application would appear to be misconceived as the plaintiff did not rely on the service on the minor child of the defendant when applying for judgment; accordingly it is dismissed."

The affidavit of service, which was dated December 31, 1959, and filed upon the record to enable judgment to be entered ex parte, stated that service was effected as follows:

> "The said defendant and the shop in which he originally trades was at the time personally known to me. On the 16th day of December, 1959, I went to the said shop of the defendant situate at Main Street, where I did not find the defendant. I was told that the defendant is in India. I saw a lady in the shop who she states to be the wife of the defendant. I served the said summons of her at Jinja on the 16th day of December, 1959, by tendering a copy thereof together with the plaint and annexures thereto (the copy of the summons and plaint which was originally served in error on the minor son of the defendant named C. S. Mehta on the 14th day of December, 1959) and requiring her signature on the original one which she accepted but refused to sign, thereupon I left with her on the same date and place the copy of the summons and plaint together with its annexures with her."

Order 5, r. 14, is as follows:

> "14. Where in any suit the defendant cannot be found, service may be made on an agent of the defendant empowered to accept service or on any adult member of the family of the defendant who is residing with him."

In my view it is clear that the service which has been sworn to is service on December 16, and I do not consider that the plaintiff can now be heard to say that there was in fact good service on December 14. The court, in entering judgment ex parte, can have done so only on the strength of the service which the process server testifies to having effected on December 16. It is consequently unnecessary for me to consider whether the argument now advanced on behalf of the plaintiff that service on the "minor son" said to have been effected on December 14 was, as Mr. James now argues, service on an "adult" within the meaning of O.5, r. 14.

For the defendant it is said that the service on December 16 was bad because no duplicate of the summons was delivered or tendered to the person served as required by O. 5, r. 9. From what is said in the affidavit of the process server, which I have already set out, and from affidavits filed on behalf of the defendant and sworn by the defendant's wife, son and daughter, respectively, for the purposes of this application, I am satisfied that O. 5, r. 9 was not complied with in respect of delivering or tendering a duplicate, and that the service was therefore bad.

Mr. Joshi, for the defendant, also puts forward other grounds on which he says the service was bad. I think it is only necessary to deal with one of these arguments. It is based on the words "where . . . the defendant cannot be found" in O. 5, r. 14. All that the process server, in his affidavit, says on this point is that he went to the defendant's shop and

> "there I did not find the defendant; I was told that the defendant is in India."

This seems to me a most inadequate ground for saying that the defendant could not be found. The affidavit does not reveal whether or not any inquiry was made about the defendant's address in India, or whether it was expected that the defendant would return to Uganda from India, and if so, when. The attempt to find the defendant appears to me to have been most perfunctory. I cannot regard absence from Uganda, without any information about the defendant's address (if he has one) in the country to which he has gone, or whether or not he can be found there, and without any information as to the expected length

of his absence, or as to when he had left Uganda, as being sufficient grounds for saying that a defendant "cannot be found".

Consequently I do not consider that this was a case in which it was permissible to effect service on a member of the defendant's family under O. 5, r. 14. On that ground the service was bad, and this applies equally whether the service was attempted to be effected on the defendant's son on December 14 of on defendant's wife on December 16.

The ex parte decree must, therefore, be set aside, but I do not think that this should be unconditional. It appears that the defendant is still absent in India, and an affidavit filed on behalf of the plaintiff shows that there are grounds for believing that the defendant has transferred his trade goods, trading licence and motor car to his wife. I accordingly order that the decree shall be set aside upon condition that the defendant finds a surety (to be approved by the district registrar) who will be responsible for any amount that may be found due by the defendant under any decree that may be passed hereafter in this suit. There will be a stay of execution for twenty-one days from the date of this order, if the decree has not been set aside before then. Upon the condition as to the surety being complied with, the plaintiff will pay the defendant's costs of this application.

Order that the decree be set aside on the terms stated in the judgment.

For the plaintiff:
J. H. Bhatt, Jinja

For the defendant:
M. K. Joshi, Kampala

Re Epicure Ltd
[1960] 1 EA 308 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	6 April 1960
Case Number:	4/1960
Before:	Lewis J
Sourced by:	LawAfrica

[1] Practice – Order – Setting aside for re-hearing – Whether judge can re-hear application before order drawn up – When order becomes effective – English Rules of the Supreme Court O. LIV, r. 6.

[2] Judgment – Order – Recall for re-hearing – Powers of court.

Editor's Summary

On an application for the removal of the liquidator of the company the court made the order sought as neither liquidator nor his advocate appeared at the hearing although served with the copy of the summons. Before the order could be drawn up the liquidator applied to set it aside on the ground that his advocate had mistaken the hearing date.

Held –

(i) a judge can re-hear an application even when an order has been made thereon by either himself or any other judge if the order has not been drawn up and signed by a judge or the registrar.

(ii) an order of a kind that needs to be drawn up does not become effective until signed by a judge or the registrar.

(iii) the order sought required to be drawn up and since it had not been drawn up it had not become effective and accordingly the applicant was entitled to have the summons restored to the list.

Application allowed.

[Editorial Note: See also *Re Harrison's Share under a Settlement*, [1955] 1 All E.R. 185.]

Cases referred to in judgment:

(1) *Re Adam Eyton Ltd., Ex parte Charlesworth* (1887), 36 Ch.D. 299.

(2) *Preston Banking Company v. William Allsup & Sons*, [1895] 1 Ch. 141.

(3) *Re Thomas, Bartley v. Thomas*, [1911] 2 Ch. 389.

(4) *Rackham v. Tabrum* (1923), 39 T.L.R. 381.

Judgment

Lewis J: This is an application by the former liquidator of Epicure Ltd. (In Voluntary Winding-Up) to set aside an order made on March 24, 1960, removing him as liquidator. On the hearing of the application on March 24, neither the liquidator nor his advocate, although served with a copy of the summons, appeared. The liquidator now seeks to set aside the order removing him on the grounds that his advocate had mistaken the hearing date.

So far as I am aware there is no reported case in the East African courts on whether a judge has any jurisdiction to re-hear an order, whether made by himself or by any other judge. The Civil Procedure Rules only provide under O. 9 for setting aside ex parte judgments. The English Practice is to be found under O. LIV, r. 6. It is clear that in England there is power to re-hear an application whether made in court or chambers so long as the order has not been perfected. In *Re Adam Eyton Ltd., Ex parte Charlesworth* (1) (1887), 36 Ch. D. 299 it was left open whether a judge can re-hear in chambers an order which he has previously made in chambers, but which has not yet been drawn up. Fry, L.J., said:

> "I have an impression that he (judge) can re-hear it before the order has been drawn up."

Cotton, L.J., said:

> "I am disposed to hold that after an order has been pronounced, and nothing remains but to draw it up, it cannot be re-heard."

In *Preston Banking Company v. William Allsup & Sons* (2), [1895] 1 Ch. 141, it was held that the court had no jurisdiction to re-hear or alter an order after it has been passed and entered, provided that it accurately expresses the intention of the court. In *Re Thomas, Bartley v. Thomas* (3), [1911] 2 Ch. 389, it was held that a master's order not having been passed and entered, the matter was still open for re-consideration. Warrington, J., said at p. 396:

> "What is it that renders an order finally effective so that there is no longer any possibility of going back from it? It seems to me that it is the passing and entering of the order. It is the everyday practice that, until an order is passed and entered, the matter can be brought before the judge and if a mistake has been made it can be put right."

It is also clear that where a summons or case is not heard, but is merely struck out for non-attendance of a party, the court may afterwards, if it thinks fit, hear or entertain it, even though the order dismissing it has been drawn up. However, it is otherwise if there has been a hearing (*Rackham v. Tabrum* (4) (1923), 39 T.L.R. 381).

I think it is beyond argument that once an order has been passed and entered it cannot be re-considered. When is an order "passed and entered" in Uganda? I have made inquiries at the registry and find that there is no such thing as entering orders as no fees are payable thereon; but they are frequently settled by the registrar or a judge and then signed. Nor can orders be said to be passed, as this is only necessary when a clerk has to enter it in the registrar's books. (Seton's Judgments and Orders (7th Edn.), Vol. 1, 186, D.C.P. 703). The result, in my opinion, is that here, an order of a kind that needs to be drawn up – not all orders do (O. 52, r. 4, R.S.C.) – does not become effective until signed by a judge or the registrar.

In this particular case the order asked for was one which required to be drawn up, and the advocates for the respondent correctly submitted an order for signature, but this was not done until April 4. In the meantime the applicant had on March 30 taken out the summons to set aside. The applicant then had moved before the respondent's order had become effective, and is consequently entitled on paying the respondent's costs to have the summons dated February 19, 1960, restored to the list.

The applicant is entitled to the costs of this application.

Application allowed.

For the creditors:
Hunter & Greig, Kampala
J. F. G. Troughton

For the applicant:
M. P. Vyas Kampala

Sydney Grant Ralph v R

[1960] 1 EA 310 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	20 April 1960
Case Number:	1/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica

[1] Appeal – Jurisdiction – Application for leave to appeal out of time – Order of Supreme Court refusing leave – Appeal against order of Supreme Court refusing to extend time for appeal – Whether appeal competent – Criminal Procedure Code, s. 347, *s.* 349, *s.* 360 *and s.* 378 (*K.*).

Editor's Summary

The applicant was convicted by a magistrate upon a charge of obtaining money by false pretences and was sentenced to six months' imprisonment. Some four months after his release the applicant applied to the Supreme Court for and was refused leave to appeal to that court out of time. The applicant then sought to appeal against the order of the Supreme Court and the point in issue was whether an order of the Supreme Court refusing to admit an appeal under the proviso to s. 349 of the Criminal Procedure Code is itself appealable.

Held –

(i) the primary purpose of s. 360 (1) of the Criminal Procedure Code is to enable second appeals to be brought from decisions of the Supreme Court sitting as a court of appeal from subordinate courts.

(ii) the order of the Supreme Court refusing to admit an appeal out of time, though made in pursuance of powers incidental to the appellate jurisdiction of the Supreme Court was not itself the decision of an appeal but was the refusal of an application to extend time and did not fall within s. 360 of the Criminal Procedure Code.

(iii) the Court of Appeal had no jurisdiction to entertain the appeal.

Appeal struck out as incompetent.

Cases referred to in judgment:

(1) *R. v. Nealon* (1950), 17 E.A.C.A. 120.

(2) *Yusufu Mulindwa v. R.* (1950), 17 E.A.C.A. 131.

Judgment

Gould JA, read the following judgment of the court: This proceeding has been listed as "Criminal Application No. NAI. 1 of 1960", but purports to be an appeal from an order made by a judge of the Supreme Court of Kenya at Mombasa on November 27, 1959. Sydney Grant Ralph, who appeared in person before this court and to whom we shall refer as "the appellant" was convicted by a resident

magistrate on November 19, 1958, upon a charge of obtaining money by false pretences contrary to s. 308 of the Penal Code. He served the sentence of six months imprisonment imposed by the resident magistrate and, some four months after his release, applied to a judge of the Supreme Court for leave to appeal to that court out of time. His application was refused by the order of November 27, 1959, above mentioned, and the appellant now seeks to have that order reversed.

Before there can be any question of our considering the merits of the appeal we must be satisfied that we have jurisdiction to entertain it, and for that purpose it is necessary to examine the relevant sections of the Criminal Procedure Code. This court has no inherent power to exercise jurisdiction where

no right of appeal is provided (*R. v. Nealon* (1) (1950), 17 E.A.C.A. 120); and the right of appeal in criminal matters in Kenya is governed by the Criminal Procedure Code. Section 347 of the Code empowers a person convicted by a subordinate court to appeal to the Supreme Court. Section 349 (as amended) limits the time for bringing such appeals, and the proviso thereto, under which the appellant applied, enables an extension of time to be granted by the Supreme Court. The section reads:

> "349. Every appeal shall be entered within fourteen days of the date of the order or sentence appealed against.
>
> "Provided that a judge of the Supreme Court may for good cause admit an appeal after the said period of fourteen days has elapsed, and shall so admit an appeal if he is satisfied that the failure to enter the appeal within the said period has been caused by the inability of the appellant or his advocate to obtain a copy of the judgment or order appealed against, and a copy of the record, within a reasonable time of applying to the court therefor."

The question is whether an order refusing leave to admit an appeal under this proviso is itself appealable. There are two sections of the Criminal Procedure Code which deal with appeals from the Supreme Court to this court in criminal matters – viz. s. 360 and s. 378. The latter is so clearly inapplicable to the present case as to need no discussion. It deals exclusively with appeals by persons "convicted on a trial held by the Supreme Court"; the appellant was convicted by a resident magistrate. Of s. 360 it is sufficient to set out the first sub-section:

> "360(1) Any party to an appeal from a subordinate court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact."

Sub-section (2)-(5) of s. 360 set out in some detail the powers of this court in dealing with such appeals as are authorised by sub-s. (1) and tend to confirm what is indeed obvious, that the primary purpose of sub-s. (1) is to enable second appeals to be brought from decisions of the Supreme Court sitting as a Court of Appeal from subordinate courts. The marginal note itself is "Second appeals". The order of the Supreme Court in the present case refusing to admit an appeal out of time, though made in pursuance of powers incidental to the appellate jurisdiction of the Supreme Court, was not itself the decision of an appeal. It was an order refusing to extend the time within which an appeal might be brought, and as such it did not fall within what we have held to be the primary purpose of the section, the authorising of further appeals from the substantive decisions of the Supreme Court on appeals from lower courts.

The order from which appeal is now sought is not therefore appealable as falling within the primary scope of s. 360; nor does it, in our opinion, fall incidentally within the wording of the section so as to render it appealable. Sub-section (1) indicates that an appeal to this court may be brought by "any party to an appeal from a subordinate court". The appellant is not and never has been a party to such an appeal, as there never has been such an appeal in existence. He sought leave to institute an appeal out of time and, had he obtained leave, he would have become a party to it, and as such entitled to bring a further appeal on a matter of law if he was dissatisfied with the decision of the Supreme Court. The proceeding in the Supreme Court to which the appellant was a party was not an appeal but an application, which was refused, to extend time. In our opinion that order of refusal does not fall within the scope of s. 360.

Our attention was directed during argument to the decision of this court in the case of *Yusufu Mulindwa v. R.* (2) (1950), 17 E.A.C.A. 131 in which an

appeal was brought, (and decided) from an order of a judge of the High Court of Uganda refusing leave to appeal to that court out of time. Judgment in that case was, however, delivered on April 28, 1950, prior to the coming into force of the present Criminal Procedure Code which took effect from June 15, 1950. The relevant provision in the earlier enactment (then Cap. 41) was s. 320 of which the first and relevant sentence reads:

> "Any person aggrieved by a decision of the High Court in its appellate jurisdiction under this part may appeal to the Court of Appeal for Eastern Africa on a matter of law (not including severity of sentence) but not on a matter of fact."

This is a much wider provision than is contained in s. 360 of the Criminal Procedure Code of Kenya, and wider also than the present Uganda provision which is contained in s. 337 of Cap. 24. Section 320 of the earlier Uganda Code enabled an appeal to be brought from any decision of the High Court in its appellate jurisdiction; that would include an order refusing to extend the time for an appeal from a lower court, though the application for such an extension was not itself an appeal. This decision, therefore, is in no way in conflict with the opinion we have expressed.

For these reasons we find that we have no jurisdiction to entertain this appeal which is accordingly struck out as incompetent. We might add that had we been of the contrary opinion we did not find anything in the merits which would have inclined us to interfere with the discretion exercised by the learned judge in the Supreme Court.

Appeal struck out as incompetent.

The applicant in person.

For the respondent:
The Attorney-General, Kenya
F. de F. Stratton (Crown Counsel, Kenya)

William Menezes v Mrs Saraswati Gangaram

[1960] 1 EA 313 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	27 May 1960
Case Number:	897/1959
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Guarantee – Hire purchase – Default by hirer followed by guarantee for performance of agreement – Whether consideration given for guarantee – Whether guarantee applies to arrears of instalments – Indian Contract Act, 1872, *s.* 127.

Editor's Summary

The plaintiff by an agreement hired a car to the son of the defendant at a monthly rental. When the defendant fell into arrears with the instalments he promised by a supplemental agreement that he would pay regularly in future and would also pay the plaintiff a penalty should the car become liable to seizure. Some six months later the plaintiff threatened to seize the car on account of arrears of rent whereupon the defendant undertook to pay for the car in case of default by her son in paying instalments. The car was subsequently seized by the plaintiff when the defendant and her son admitted they could not pay arrears of instalments due under the agreement. The plaintiff then sued on the guarantee. The defendant contended that there was no consideration for the guarantee and that it did not cover arrears.

Held –

(i) when the defendant gave the plaintiff her guarantee she obtained consideration from him in return in the form of something that she wanted him to abstain from doing, namely, to seize the car.

(ii) the car was seized under the hire purchase agreement, which was supplemented and not superseded by the supplemental agreement and the guarantee covered both documents; accordingly the seizure did not discharge the defendant from liability.

(iii) the intention of the parties was that past defaults in payment of rent as well as future defaults should be guaranteed; the guarantee itself was capable of being so construed and on the authority of A.S. *Folkes & Co. v. Karsandas Purshottam Thakkar and Another*, [1959] E.A. 36 (C.A.) it should be so construed.

Judgment for the plaintiff.

Case referred to:

(1) *Hassanali Kurji Kanji v. Gailey & Roberts Ltd.*, [1959] E.A. 521 (P.C.).

(2) *A.S. Folkes & Co. v. Karsandas Purshottam Thakkar and Another*, [1959] E.A. 36 (C.A.).

Judgment

Sheridan J: The plaintiff sues on a guarantee dated September 13, 1957, (copy annexure B to the plaint) whereby she agreed to pay for the Opel Kapitan Car No. UFM 517

> "bought by my son Ramdas Gangaram in case of default of payment of instalments".

By a hire purchase agreement dated February, 5 1957, (copy annexure A to the plaint) the plaintiff let the car to Ramdas at a monthly rental of Shs. 538/-, payable on the last day of each month. He fell into arrears, and by a supplemental agreement dated March 16, 1957, (copy annexure "SGI" to the W.S.D.)

he promised that he would make regular payments and, further, that he would pay the plaintiff a penalty of Shs. 50/- per day should the car become liable to seizure. The guarantee came into existence because on September 12, 1957, the plaintiff had threatened to seize the car. By September 6, 1957, the arrears of payments were Shs. 6,770/-. According to the plaintiff Ramdas and the defendant said that they were unable to pay and so he seized the car. He now sues on the guarantee to recover the arrears. Some of the receipts for payments were made out in the defendant's name. The defendant admits that she owns land and that she is the trustee of Ramdas.

The main issue is whether or not there was any consideration for the guarantee. Mr. Pinto, for the plaintiff, relies on s. 127 of the Indian Contract Act 1872 which provides –

> "127. Anything done, or any promise made, for the benefit of the principal debtor may be a sufficient guarantee to the surety for giving the guarantee."

Illustration (*b*) to that section is relevant. It provides that if A sells and delivers goods to B and C afterwards requests A to forbear to sue B for the debt for a year and promises that, if he does so, C will pay for them in default of payment by B and A agrees to forbear as requested, that is sufficient consideration for C's promise. When the defendant gave the plaintiff her undertaking to be responsible for the debt of Ramdas she obtained consideration from him in return in the form of something that she wanted him to abstain from doing, i.e. to seize the car: *see Hassanali Kurji Kanji v. Gailey & Roberts Ltd*.(1), [1959] E.A. 521 (P.C.). The car was seized under the hire purchase agreement, which in my view, was supplemented and not superseded by the agreement "SGI" so I would say that the guarantee covers both documents and that the seizure did not discharge the defendant from liability.

Another issue is whether or not the guarantee covered arrears of instalments. It is in terms which can apply equally to defaults of payment of instalments in the past as to defaults in the future, and it seems to be a natural inference that it was intended to cover past defaults as well as defaults which might occur in the future. The defendant was already in default when it was entered into. According to the account (copy annexure C to the plaint), the accuracy of which is not in dispute, seven instalments totalling Shs. 3,766/- were then due and only Shs. 1,912/- had been paid. The plaintiff would have been just as anxious to have past defaults guaranteed as well as possible future defaults, and, as I see it, that was the intention of the parties and the guarantee is capable of being so construed and on the authority of *A.S. Folkes & Co. v. Karsandas Purshottam Thakkar and Another* (2), [1959] E.A. 36 (C.A.) it should be.

For these reasons there will be judgment for the plaintiff for Shs. 6,770/- with interest and costs.

Judgment for the plaintiff.

For the plaintiff:
S. A. Pinto, Kampala

For the defendant:
Wilkinson & Hunt, Kampala
B. E. D' Silva

Lalji Gangji v Nathoo Vassanjee
[1960] 1 EA 315 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	6 May 1960
Case Number:	61/1959
Before:	Windham JA
Sourced by:	LawAfrica

(Reference on taxation under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954, from the Acting Registrar's decision.)

[1] Costs – Further security – Application for additional security less than a month before date fixed for hearing appeal – Burden of proof that further security should be ordered – Effect of delay in making application – Eastern African Court of Appeal Rules, 1954 *r.* 6(2), *r.* 19(3) *and r.* 60 – *English Rules of the Supreme Court*, 1883, *O.LVIII*, *r.* 9(5).

Editor's Summary

The applicant who was respondent in a pending appeal applied less than a month before the date fixed for the hearing of the appeal for an order for further security for costs on the ground that the appellant had failed to comply with a bankruptcy notice served upon him by the applicant in respect of the costs in the lower court. The application was dismissed by the registrar on the grounds that the appellant's insolvency had not been proved and that the application was filed too late. On a reference to a judge of the appellate court it was argued, inter alia, that under r. 60 of the Eastern African Court of Appeal Rules, 1954, no burden lay on an applicant to show special circumstances why further security should be ordered but rather that he had a prima facie right to such further security, the burden being on the other side to show why it should not be ordered.

Held –

(i) under r. 60 of the Eastern African Court of Appeal Rules, 1954, the burden lies on the applicant for an order for further security and he cannot merely by averring that the security already deposited for costs is inadequate, or because the costs in the court below, ordered in his favour, have not yet been paid, impose any obligation upon the court or a judge or the registrar to grant his application.

(ii) the words "at any time" in r. 60 do not preclude a registrar from taking into account any delay by the applicant in making his application as a factor to be placed in the scales whose tilt may determine whether or not he will exercise his discretion in the applicant's favour.

(iii) the words "at any time" in r. 60 mean that subject to the specific provisions of r. 19 (3) no lateness in lodging an application shall itself preclude the registrar from granting the application.

(iv) The registrar in refusing the application had exercised his discretion judicially.

Reference dismissed.

Case referred to in ruling:

(1) *Smith v. Badham* (1892), 66 L.T. 822.

Ruling

Windham JA: The applicant, who is the respondent in an appeal pending in this court from a judgment of the Supreme Court of Kenya, applied to the acting registrar of this court, under r. 60 of the Eastern African Court of Appeal Rules, 1954, (hereinafter referred to as the Rules) asking that

the appellant should be ordered to furnish further security for the costs of the appeal; that is to say, security beyond the Shs. 1,500/- which he was obliged to lodge in court, and had already lodged in court, as security for the costs of the appeal under r. 58 of the Rules. The acting registrar, in a reasoned decision, dismissed the application. The applicant, being aggrieved by the decision, has now referred the matter to me, under r. 6(2) of the Rules, asking that the decision be set aside and that the appellant be ordered to furnish additional security as prayed.

Rule 60 reads as follows:

> "60 The court or a judge or registrar may at any time, in any case where it or he thinks fit, order further security for costs to be given, and may order security to be given for the payment of past costs relating to the matters in question in the appeal."

The application for further security was supported by an affidavit of the applicant's advocate which made the following allegations of fact and belief:

> "2. That there remains outstanding against the appellant bill of costs in the sum of Shs. 7,522/50 taxed in the above case and a further sum of Shs. 120/-being the cost in respect of attachment proceedings issued against the appellant.
>
> "3. That the appellant has committed an act of bankruptcy in that a Bankruptcy Notice No. 24 of 1959 dated the 19th day of November, 1959, was served on the appellant in Saba Saba at 6 p.m. on the 19th day of November, 1959, and the said appellant did not comply with the requirements of the said bankruptcy notice or satisfy the court that the said appellant has or had a counterclaim or set-off or cross-demand which equalled or exceeded the amount ordered to be paid by Her Majesty's Supreme Court pursuant to the said bankruptcy notice.
>
> "4. That the appeal herein is listed for hearing on the 10th and 11th day of May, 1960, and that numerous grounds of fact and law are set out in the memorandum of appeal filed herein and the security for costs in the sum of Shs. 1,500/-deposited by the appellant will be insufficient to meet the taxed costs should judgment be given against the appellant and as shown above there are no means of obtaining satisfaction from the appellant by execution."

No counter-affidavit was filed by the appellant.

The bankruptcy notice was served on the appellant on November 19, 1959, the appellant having not yet paid the applicant his bill of costs in the Supreme Court which had been taxed on June 3, 1959. Although the appellant did not comply with the bankruptcy notice, the applicant took no further action upon it before filing his application for further security on April 13, 1960. The learned acting registrar, in the light of this inaction on the applicant's part, and of the absence from the supporting affidavit of any assertion that the appellant was, or was believed to be, insolvent, held that there was no evidence before him of the appellant's insolvency. In so holding, he relied, rightly in my view, on *Smith v. Badham* (1) (1892), 66 L.T. 822, and he went on to say that:

> "on the ground of the service of bankruptcy notice, therefore, I dismiss the application."

In the context of the whole of his decision it would seem reasonably clear that, by those words, he meant, not that he dismissed the application because a bankruptcy notice had been served, but rather that he did not consider the

service of the bankruptcy notice to afford sufficient ground for allowing the application. He then proceeded to consider, as a positive ground for not allowing the application, the applicant's lateness in making it. As we have seen, the application was filed on April 13, 1960. This was less than a month before the dates (May 10 and 11) fixed for the hearing of the appeal; and the application was heard only some twenty days before those dates. The learned acting registrar, after considering a number of English authorities in which applications that an appellant should furnish security for an appeal had been dismissed on the ground that they had been filed too late, held that the lateness in the present case was such that it would be a great hardship on the appellant to order him to furnish additional security.

It is not, in my view, necessary to consider at length or in detail these English authorities concerned with delay in filing applications for the furnishing of security, nor the decision in *Smith v. Badham* (1); for learned counsel for the applicant does not dispute their authority under the relevant English law. What he contends is (*a*) that they are inapplicable here, having regard to the particular wording of r. 60 of the Rules, as compared to that of O. 58, r. 9 (5) of the English Rules of the Supreme Court; (*b*) that, under r. 60, no burden lies on an applicant to show special circumstances why further security should be ordered, but rather that he has a prima facie right to such further security, the burden being on the other side to show why in any particular case it should not be ordered.

With regard to the first of these two submissions, it is true that the English Order 58, r. 9 (5), which, unlike r. 60 of the Rules of this court, is concerned with the furnishing of initial security for costs of an appeal, and not the furnishing of further security, differs from r. 60, in that the English Rule (*a*) empowers the court to order the security only "in special circumstances"; and (*b*) does not expressly provide, as does r. 60, that the security may be ordered "at any time". But, in spite of these differences in wording, I think that, even under r. 60, the burden lies on the applicant to a court for any relief, to show cause why that relief should be granted, and that he cannot, merely by averring that the security already deposited for costs of the appeal is inadequate, or that costs in the action below, ordered in his favour, have not yet been paid, impose any obligation upon the court or judge or registrar to grant his application. And that is all that the applicant does allege in his supporting affidavit. For although para. 4 of that affidavit states that

> "as shown above there are no means of obtaining satisfaction from the appellant by execution",

there is in fact no statement to such effect earlier in the affidavit, but only the allegation that costs below remain outstanding.

Under r. 60 the court or judge or registrar has a discretion to order further security "in any case where it or he thinks fit". This discretion is unfettered, subject only to the implied fetter upon all such discretions, namely that they should be exercised judicially. Again, the words "at any time" in r. 60 do not mean that a registrar is precluded from taking into account any delay on the applicant's part in making his application, as a factor to be placed in the scales whose tilt may determine whether or not he will exercise his discretion in the applicant's favour. They only mean that no amount of lateness in the lodging of an application shall in itself preclude the registrar from granting the application. This must, of course, be read subject to the specific provision of r. 19 (3) of the Rules requiring the service of notices of motion and copies of affidavits on necessary parties not less than two clear days before the hearing.

Applying these considerations to the decision of the learned acting registrar, I am unable to say that, in refusing the application, he exercised his discretion

unjudicially or upon wrong principles, or that he took into account any factors which he should have ignored, or overlooked or gave insufficient weight to any that should have tipped the scale in the applicant's favour.

For these reasons I dismiss this application with costs.

Reference dismissed.

For the respondent/appellant:
Johar & Winayak, Nairobi
D. N. Khanna and J.K. Winayak

For the appellant/respondent:
J.S. Patel & Parikh, Nairobi
B. S. Parikh

Harilal & Co v Buganda Industries Ltd
[1960] 1 EA 318 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	5 May 1960
Case Number:	97/1960
Before:	Lewis J
Sourced by:	LawAfrica

[1] Execution – Attachment – Objector alleging property previously sold to him – Application for release – No evidence that objector had taken possession of property – Civil Procedure Rules O. 19, *r.* 55 (*U.*).

Editor's Summary

On February 16, 1960, the plaintiff applied for execution by way of attachment and sale of property of the defendants and on February 18, 1960, a warrant of attachment and sale was issued. That the property was seized was not in dispute but the objector claimed part of the property on the ground that he had bought the same on January 15, 1960, and applied to the court for its release from attachment under O. 19, r. 55 of the Civil Procedure Rules. The objector admitted that he took neither actual nor constructive possession of the property after the alleged sale.

Held – the objector had failed to establish that on the date of the attachment he was in possession actual or constructive of the property attached.

Application dismissed.

Judgment

Lewis J: This is an application under O. 19, r. 55 of the Civil Procedure Rules to release certain property from attachment.

The facts can be briefly stated. On November 28, 1959, the plaintiff obtained a decree in Mombasa, Kenya, against the defendants for Shs. 16,025.04. This decree was transferred here for execution. On February 16, 1960, the plaintiff applied for execution by way of attachment and sale of all the machinery, furniture, fixtures and other property of the defendants lying at No. 32 Bombo Road, Kawempe, Buganda. On February 18, a warrant of attachment and sale was issued to the attaching officer, an auctioneer named N. M. Patel. On February 18, the attaching officer signed the warrant of attachment. There was then nothing on record to show that O. 19, r. 40 had been complied with. However, the point was not taken as the fact that the property was seized was not in dispute. The correct practice is to state on the warrant the steps taken to effect “actual seizure”. On March 5, the objector preferred a claim to part

of the property attached on the ground that he bought the same from the defendant on January 15, 1960, for the sum of Shs. 12,300.

What has to be decided under O. 19, r. 55, which is the Indian O. 21, r. 58 is set out in Chitaley and Rao's Code of Civil Procedure (6th Edn.), p. 1880:

> "What is to be investigated is indicated by the next three following rules, viz. r. 59, r. 60 and r. 61. The question to be decided is, whether on the date of the attachment, the judgment-debtor or the objector was in possession, or where the court is satisfied that the property was in the possession of the objector, it must be found whether he held it on his own account or in trust for the judgment-debtor. The sole question to be investigated is, thus, one of possession. Questions of legal right and title are not relevant, except so far as they may effect the decision as to whether the possession is on account of or in trust for the judgment-debtor or some other person. To that extent the title may be part of the inquiry. But ultimate questions of trust, or complicated questions like the benami nature of a transaction, are not within the scope of the inquiry and are not intended to be gone into.
>
> "As pointed out by Mr. Justice Sadasiva Ayyar in *Ramaswami Chetty v. Mallapa*:
>
> > 'in summary proceedings held in accordance with certain statutory provisions intended for speedy disposal of "emergent" disputes, the court may be prohibited from going into complicated questions of title or investigating complicated questions like fraud, trust and so on, while giving the party defeated in the summary inquiry, the right to have the whole matter and all the questions which are in dispute fully investigated in an ordinary regular suit. . . . The court is bound to order the release of the attached property if it finds possession in the claimant on his own account, even if there is title and disposing power remaining in the judgment debtor'."

The evidence adduced on behalf of the claimant shows that on February 22 the defendants were in possession. The claimant admitted that after the so-called sale of the machinery on January 15, he took neither actual nor constructive possession. In fact the key remained, and still is, in the possession of the defendants.

I am also satisfied that the agreement exhibit A was entered into for the express purpose of saving the defendants movable property from execution.

The result is that the claimant having failed to establish that on the date of the attachment he was in possession either actual or constructive, the application must be dismissed with costs.

Application dismissed.

For the plaintiff:
Shaukat Virji Daphtary & Co., Kampala
R. J. Daphtary

For the objector:
Haque & Gopal, Kampala
F. Haque

Girdhar Dhanji Masrani v R

[1960] 1 EA 320 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	26 May 1960
Case Number:	282/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Criminal law – Bail pending appeal – Applicant sentenced to eighteen months' imprisonment – Lengthy record of appeal involving considerable delay before appeal heard – Whether ground for granting bail pending appeal – Criminal Procedure Code, s. 333 (2) (*U.*).

Editor's Summary

The applicant who had been sentenced by a magistrate to eighteen months' imprisonment for offences against the East African Customs Management Act 1952 applied for bail pending appeal on the grounds that the record was very lengthy and that there would be considerable delay before the hearing of the appeal. The applicant contended that the practice in England only to grant bail after conviction in exceptional circumstances did not apply in Uganda.

Held – delay before an appeal is heard is not, in itself, a good ground for granting bail pending appeal and the practice that the court is guided by United Kingdom precedents in the exercise of its discretion upon applications for bail is correct.

Application refused.

Judgment

Sheridan J: This is an application for bail pending appeal. The applicant was sentenced to 18 months' imprisonment on a conviction for offences contra the East African Customs Management Act, 1952. In a supporting affidavit the applicant avers (*a*) that as the sole active director of Dhanji Nagji Ltd., which was fined in the same case, he alone has knowledge of its affairs, (*b*) that the record is very lengthy and there must be considerable delay before the appeal is heard.

Mr. Wilkinson, for the applicant, goes further and submits that the United Kingdom precedents to the effect that the power of the court to grant bail after conviction and sentence will only be exercised in exceptional cases – they are collected in para. 882 of Archbold (34th Edn.) – do not apply in Uganda. He points out that cases in the United Kingdom are decided by the verdicts of juries who are not only the sole judges of questions of fact but do not have to give reasons for their verdicts, and that no appeal lies from their verdicts on questions of fact. In Uganda magistrates are judges of fact and law and they must give reasons for their findings on questions of fact. An appeal is in the nature of a re-hearing. Mr. Wilkinson relies on a recent order of Lewis, J., in Criminal Appeals Nos. 242-245 – a similar case – where bail was granted. His order reads as follows:

"Order.

"In my opinion the modern practice as to bail should be this. In bailable offences an accused should normally be granted bail unless there are exceptional circumstances against it. For example:

(1) Where there is a real likelihood that the accused will not appear at the trial;

(2) Where there is a real likelihood of the offence being committed while on release; and

(3) Where the accused has previous convictions.

"The old rule as to 'special circumstances' was from a harsher age and I am for a more humane approach. Bail is therefore granted."

Mr. Fuad, for the respondent, submits that this order departs from the hitherto prevailing practice of applying the United Kingdom precedents by refusing bail after conviction and sentence save in exceptional cases. I must confess that that has been my practice. Section 333 (2) of the Criminal Procedure Code is, mutatis mutandis, in the same terms as s. 14 (2) of the Criminal Appeal Act, 1907. It reads:

"333(2). The High Court or the subordinate court which convicted an appellant may, if it sees fit, admit an appellant to bail pending the determination of his appeal."

The court has a discretion in the matter. With respect to Lewis, J. his order appears to apply more to the considerations which should govern the grant or refusal of bail before conviction than after conviction. Different principles must apply after conviction. The accused person has then become a convicted person and the sentence starts to run from the date of his conviction. Here the applicant received a substantial sentence of 18 months' imprisonment and if he were granted bail pending appeal he might be sorely tempted to abscond, at any cost.

It is unfortunate that some delay must occur before this appeal is heard but that, in itself, is not a good ground for granting bail at this stage. It is with diffidence that I do not follow the order of Lewis, J. but I consider that the previous practice of this court in being guided by the United Kingdom precedents in the exercise of its discretion on these applications to be correct. This application is refused.

Application refused.

For the applicant:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q.C.

For the respondent:
The Attorney-General, Uganda
K. T. Fuad (Crown Counsel, Uganda)

Re an Application by the Trustees of the Lugave Clan

[1960] 1 EA 322 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	20 May 1960
Case Number:	27/1960
Before:	Bennett J
Sourced by:	LawAfrica

[1] Land registration – Application for vesting order – Agreement to transfer land to trustees – Transfer executed by grantor and trustees but not registered – Application by trustees after death of grantor for vesting order – Registration of Titles Ordinance (*Cap*. 123) *s*. 175 (*U*.).

Editor's Summary

By an agreement in writing A. had promised to transfer certain land to the applicants upon trust for the Lugave clan and pursuant thereto A. and the applicants signed and lodged the transfer at the office of the Registrar of Titles but the transfer was never registered because part of the registration fees were not paid. Subsequently A. died and the applicants applied to the court for a vesting order under s. 175 of the Registration of Titles Ordinance.

Held –

(i) a vesting order can only be made under s. 175 of the Registration of Titles Ordinance when (1) there has been a sale of registered land, (2) payment of the whole price, (3) possession taken by the purchaser with the acquiescence of the vendor and (4) the transfer has not been executed and is unobtainable because the vendor is dead, out of the jurisdiction or cannot be found.

(ii) a voluntary settlement of land by way of trust is not a sale within s. 175 of the Ordinance, and in any event since the applicants had never taken possession of the land, a vesting order could not be made.

Application dismissed.

Judgment

Bennett J: This is an application for a Vesting Order under s. 175 of the Registration of Titles Ordinance, Cap. 123.

From the affidavit in support of the application it appears that in 1952 one, Aligizanda Ndugwa, by an agreement in writing promised to transfer certain Mailo land to the three applicants on trust for the Lugave clan. It is said that the trusts were charitable.

In pursuance of the agreement, on May 13, 1953, Ndugwa and the three applicants signed a transfer and lodged the transfer together with the certificates of title in the office of the Registrar of Titles. The transfer was never registered because only part of the registration fees were paid. On December 6, 1956, an advocate purporting to act on behalf of Ndugwa and the three applicants called at the titles office and asked for the return of the agreement, the transfer and the certificates of title, and they were handed to him. On January 14, 1958, Aligizanda Ndugwa died.

The three applicants now claim that these documents were withdrawn from the titles office without their knowledge or consent and they claim the right to be registered as proprietors of the land.

Since misunderstanding of the requirements of s. 175 of the Registration of Titles Ordinance appears to be widespread, I take this opportunity to state what, in my judgment, are the circumstances which must be proved to exist before the court can make a vesting order. They are as follows:

(*a*) that there has been a sale of land the title to which is registered under the Ordinance;

(*b*) that the whole of the purchase price has been paid;

(*c*) that the purchaser (or those claiming under him) has taken possession of the land;

(*d*) that entry into possession by the purchaser has been acquiesced in by the vendor or his representatives;

(*e*) that a transfer has not been executed and cannot be obtained because:

(i) the vendor is dead; or

(ii) the vendor is residing out of the jurisdiction; or

(iii) the vendor cannot be found.

These circumstances do not exist in the instant case.

A voluntary settlement of land by way of trust is not, in my opinion, a sale within the meaning of the section. Moreover, it is conceded by counsel for the applicants that the applicants have never taken possession of the land.

The application is accordingly dismissed.

Application dismissed.

For the applicants:
E. S. Mbazira, Kampala

Yokoyadi Lakora s/o Omeri v R
[1960] 1 EA 323 (CAK)

Division:	Court of Appeal at Kampala
Date of ruling:	23 June 1960
Case Number:	71/1960
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Uganda – Lyon, J.

[1] Criminal law – Murder – Provocation – Accused aware of previous adultery of his wife with paramour – Subsequent discovery of wife and paramour in flagrante delicto – Whether sufficient provocation to reduce murder to manslaughter – Penal Code, s. 187 *and s.* 188 (*U.*).

Editor's Summary

At his trial on a charge of murder the appellant said that he had killed the deceased when he found him having intercourse with his (the appellant's wife). The trial judge was of the opinion and also directed the assessors that the defence of provocation and reduction of the offence to manslaughter was not open to

the accused because the appellant in a statement to the police and in his evidence had admitted having previous knowledge of adultery between the deceased and his wife and had twice before found them in adultery. On appeal.

Held –

(i) prior knowledge by a husband of his wife's adultery with a paramour does not necessarily and in all cases disable the husband from pleading provocation and reducing the offence to manslaughter, if the killing was done upon finding his wife and her paramour in the act of adultery.

(ii) whether the defence of provocation is available to a husband or not depends upon the facts of the particular case; and the question in each case is whether or not upon the facts the killing was done (or there was a reasonable

doubt that it might have been done) in the heat of passion caused by sudden provocation as defined by s. 188 of the Penal Code and before there was time for passion to cool.

Appeal dismissed.

Case referred to:

(1) *Yolamu Arua v. R.*, [1960] E.A. 146 (C.A.).

(2) *R. v. Yafesi Nabende* (1948), 15 E.A.C.A. 71.

(3) *R. v. Jack Jezelani* (1947), 14 E.A.C.A. 70.

Judgment

Sir Kenneth O'Connor P, read the following judgment of the court: The appellant was convicted by the High Court of Uganda on April 7, 1960, of the murder, on February 5, 1960, of one Jamesi Lakoma and was sentenced to death. At the trial the appellant alleged that he had killed Jamesi because he found him having sexual intercourse with his wife. Since, however, the assessors and the learned judge disbelieved the appellant's story of having found his wife committing adultery with Jamesi, no question of provocation sufficient to reduce the offence to manslaughter arose.

On June 16, 1960, we dismissed the appeal, considering that there was evidence to support the conviction and that the learned judge was justified in disbelieving the story of the appellant.

There is, however, a passage in the judgment of the learned judge upon which we desire to comment. That passage reads:

> "The defence – if it is a defence – is that he killed Jamesi because he found him having sexual intercourse with his (accused's) wife. In my opinion, and I so directed the assessors, the defence of provocation and reduction of the offence to manslaughter is not open to the accused, because, even if his evidence and his statement to the police were believed, on his own statement he had previous knowledge of adultery between the deceased and his wife and on his own statement he had twice before found them in adultery.
>
> "In a recent case No. 9 of 1960, E.A.C.A., it was held that where an accused had merely a suspicion of adultery and then found his wife in adultery with the deceased, the defence of manslaughter is open to the accused."

We desire to guard against any impression that this court has decided that previous knowledge by a husband of adultery by his wife with a paramour necessarily disables a husband who kills the paramour from setting up provocation and reducing the offence to manslaughter, if the killing was done upon finding his wife and the paramour in the act of adultery. In the case cited by the learned judge (*Yolamu Arua v. R.* (1), [1960] E.A. 146 (C.A.)), this court said (referring to the facts of that case) that the prior suspicion of the husband was not knowledge, and that to find his wife and Daniel in an act of adultery might well engender ungovernable rage and constitute grave and sudden provocation sufficient to reduce the killing to manslaughter. Per contra this court held in *R. v. Yafesi Nabende* (2) (1948), 15 E.A.C.A. 71 that where a husband had actual prior knowledge of his wife's adulterous association and went with others to a house at night where he knew that he would catch her in an act of adultery and, after a kind of trial, put her paramour to death, the provocation was not sudden. Clearly, in that case, not only was there prior knowledge, but the killing was a premeditated act of punishment.

So far as we are aware, this court has never held that prior knowledge of adultery necessarily and in all

cases disables the husband from pleading

provocation. Where a husband has prior knowledge of an adulterous association, the provocation caused by a statement by the wife that she has committed adultery may not be "sudden provocation"; *R. v. Jack Jezelani* (3) (1947), 14 E.A.C.A. 70. On the other hand, cases can be imagined (e.g. where a husband having had prior knowledge of an adulterous association and having been assured by the wife, and believing, that the association had ceased, unexpectedly finds the parties again in the act) where the provocation might be held to be grave and sudden notwithstanding knowledge by the husband of the prior association. Each case must depend upon its own facts; and the question in Uganda in each case is whether or not, upon the facts of the particular case, the killing was done (or there is a reasonable doubt that it may have been done) in the heat of passion caused by sudden provocation as defined by s. 188 of the Uganda Penal Code and before there was time for the passion to cool: (Uganda Penal Code. s. 187).

From the appellant's demeanour in court, we thought it desirable that his mental condition should be investigated before the sentence is carried out.

Appeal dismissed.

The appellant in person.
for the respondent.

For the respondent:
The Attorney-General, Uganda
K. T. Fuad (Crown Counsel, Uganda)

Abdala Habib v Harban Singh Rajput
[1960] 1 EA 325 (HCU)

Division:	HM High Court of Uganda at Mbarara
Date of ruling:	17 May 1960
Case Number:	13/1958
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Practice – Adjournment – Application for adjournment of trial – No explanation given for absence of plaintiff – Whether application for adjournment should be granted – Civil Procedure Rules, O. 15, *r.* 1 (*U.*).

Editor's Summary

When the plaintiff's case came on for hearing his advocate applied for an adjournment on the ground that his client, who lived in Ruanda-Urundi, was for some unexplained reason absent. The defendant

objected, as his witness had come at the cost of Shs. 800/- from great distances, and because the plaintiff had been dilatory.

Held – no sufficient cause had been shown for granting an adjournment and accordingly the application would be dismissed.

Application dismissed.

Judgment

Sheridan J: This is an application by the plaintiff's advocate for an adjournment on the ground that his client, who lives in Ruanda-Urundi, is for some unexplained reason, absent. It is opposed by the defendant who, with his five witnesses, comes from as afar afield as Kabale, tiak and Mbarara. His advocate states that it has cost him Shs. 800/- to assemble them here today.

This suit has had a chequered career.

The plaint was filed as long ago as October 16, 1958 in the district registry

of the High Court at Mbarara. By it the plaintiff claimed Shs. 10, 150/- which he alleges the defendant stole when he broke into his shop at Kabale in July, 1958. No appearances was entered by the defendant and on February 19, 1959 the district registrar, Mbarara, in pursuance of the powers conferred on him by the Civil Procedure Rules, O. 46, r. 2, entered judgment for the plaintiff for the amount claimed with interest and costs. On August 25, 1959, under O. 9, r. 9, Bennett, J., set aside the ex parte judgment for reasons which it is not necessary to repeat. An order was made that the plaintiff's costs be taxed and paid into court. These costs were taxed at Shs. 430/-. On November 25, 1959 a written statement of defence was filed. It traverses the plaint and raises a plea in bar that as it alleged a felony criminal proceedings must precede the determination of the civil claim. The plaintiff did not set down the suit for hearing and the defendant made an application under O. 15, r. 5 before Lyon, J., for it to be dismissed for want of prosecution. The learned judge observed that no satisfactory reason had been given for the absence of a police prosecution. In the exercise of his discretion he dismissed the application and on February 11, 1960 he ordered the plaintiff to set down the suit for hearing within two days and before doing so to pay into court all the costs incurred by the defendant since August 25, 1959. On April 7, 1960 these costs were taxed at Shs. 624/-. There is nothing on the file to indicate that in compliance with the orders of the court, the two sets of costs have been paid into court.

When the suit came on for hearing today the present application was made. Under O. 15, r. 1 the court may, if sufficient cause is shown, grant an adjournment. The corresponding Indian provision is O. 17, r. 1. In Chitaley & Rao's Code of Civil Procedure (6th Edn.) Vol. 2, p. 2631 instances are given of what has been held to be a sufficient cause. Here there is no suggestion that the plaintiff has been taken by surprise or was unaware of the hearing date. All that can be said on his behalf is that for some unexplained reason he has failed to communicate with his advocate. Generally his conduct has been dilatory and since the defendant has been granted leave to defend he has shown a lack of zeal in prosecuting his claim. Apart from the fact that it is probably not maintainable in the absence of a satisfactory explanation for the absence of a criminal prosecution it would be unfair to penalize the defendant further. No sufficient cause has been shown for granting this application. It is dismissed with the result that the suit is also dismissed with costs.

Application dismissed.

For the plaintiff:
Wilkinson & Hunt, Kampala
R. E. Hunt

For the defendant:
Singh & Treon, Kampala
Gurdial Singh

Elfie Heinrichsdorff-Gies and another v Henry George Dodd and another
[1960] 1 EA 327 (CAD)

Division: Court of Appeal at Dar-Es-Salaam

Date of judgment: 15 June 1960

Case Number:	28/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica

[1] Trust and trustee – Breach of trust – Loan of trust funds without independent valuation of security – Security later realising less than sum lent – Negligence but no dishonesty alleged against trustee – Provision in trust deed relieving trustee from liability for acts not attributable to dishonesty – Whether trustee entitled to be relieved from liability – Trustee Act 1893, *s.* 8 (1) – *Judicial Trustee Act* 1896, *s.* 3 – *Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114), *s.* 2, *s.* 3, *s.* 10 (*T.*) – *Land Ordinance* (*Cap.* 113), *s.* 16 (*T.*).

Editor's Summary

The appellants were the beneficiaries under a settlement made in 1951 which appointed two trustees of whom one was the first respondent. The second original trustee retired in 1952 and the second respondent was in 1953 appointed in his place. The appellants alleged breaches of trust by the first respondent and joined the second respondent for accounting purposes only. The breaches of trust alleged that in 1952 the original trustees had lent Shs. 200, 000/- of trust monies on the security of an unauthorised investment, namely, a right of occupancy, and without having an independent valuation of the security made. Damages were claimed because the security when realised fetched only Shs. 148, 000/-. The first respondent claimed that he was relieved from liability by s. 8 (1) of the Trustee Act, 1893 and by the terms of the settlement itself.

Held –

(i) since the valuation obtained was not made by a valuer "instructed and employed independently of any owner of the property" the first respondent was not entitled to the protection of s. 8 (1) of the Trustee Act, 1893.

(ii) there had been a breach of trust but the first respondent had not acted with such a high degree of recklessness that knowledge that his action constituted a breach of trust must be imputed to him and accordingly the first respondent was absolved from liability by the terms of clause 5 of the trust deed.

(iii) the submission for the appellants that the right occupancy was itself an unauthorised security was not open to the appellants on the pleadings.

Appeal dismissed.

Cases referred to in judgment:

(1) *In re Pawson's Settlement: Higgins v. Pawson,* [1917] 1 Ch. 541.

(2) *Re Walker* (1890), 59 L.J. Ch. 386.

(3) *In re Vickery: Vickery v. Stephens,* [1931] 1 Ch. 572.

(4) *Palmer v. Emerson,* [1911] 1 Ch. 758.

(5) *Heinrichsdorff-Gies v. Dodd*, [1957] E.A. 869 (C.A.).

(6) *Director of Lands and Mines v. Sohan Singh* (1952), 1 T.L.R. (R.) 631.

The following judgments were read by direction of the court:

Judgment

Gould JA: The two appellants are the only beneficiaries under a Trust Deed executed in the month of October, 1951, whereby a sum of Shs. 250,000/-

was deposited by the settlor with trustees upon certain trusts for the appellants' benefit. The appellants brought action against the two respondents, who were the trustees at the date of the plaint, alleging against the first respondent various breaches of trust in the year 1952. No breach of trust was alleged against the second respondent, who was not a trustee at the relevant time, and it would appear that he was made a defendant for the purpose of accounts if necessary. The action was dismissed by the learned trial judge with costs and it is against that judgment and decree that the present appeal has been brought.

Some of the allegations in the plaint were not pursued, and the following passage from the judgment of the learned judge defines the position at the trial:

> "The agreed issues between the parties are:
>
> 1. Did the investment of Shs. 200,000/- in the properties mentioned in para. (6) (*d*) of the plaint constitute a breach of trust?
> 2. If so, is the first defendant liable in respect of such breach and to what extent?
> 3. If the answers to issues 1 and 2 are in the affirmative, to what relief are the plaintiffs entitled?

The allegations of breach of trust in these proceedings are now confined to those pleaded in para. 6 (*d*) of the plaint, which reads:

> 'On the 30th day of October 1952 or thereabouts the first defendant invested a principal sum of Shs, 200,000/- (Shillings Two hundred thousand) upon the security of the right of occupancy of the land and buildings comprised in Title Nos. 6524, 6982 and 6989. No, or no proper independent valuation of the property was made at the time of the said investment and the amount of the said loan exceeded the value of the said security. The said security was not a proper investment for the sum of Shs. 200,000/- (Shillings Two hundred thousand) or any other sum at all. On the 2nd May, 1955, the said property was valued by Messrs. Cassam Satchu & Company Limited of Dar-es-Salaam at a total of Shs. 149,000/- (Shillings One hundred and forty nine thousand)'."

It is common ground that the investment of Shs. 200,000/- above-mentioned was made by the first respondent and his then co-trustee and that, some time later, when substantial arrears of interest were due, all that was realised on the sale of the property was Shs. 148,000/-.

The relevant portion of the investment clause in the Trust Deed is as follows:

> "4. Money liable to be invested under the trust hereof may be invested in any securities for the time being authorised by law for the investment of trust money or on legal mortgage or charge of freehold or leasehold property in the United Kingdom or Tanganyika such leasehold property having not less than sixty (60) years to run at the time of such investment being made. . .".

Clause 5 of the deed provided:

> "5. No trustee purporting to act in the execution of the trusts and powers hereof shall be liable for any loss not attributable to his own dishonesty or to the wilful commission or omission by him of an act known by him to be a breach of trust and in particular shall not be bound to take any proceedings against a co-trustee for any breach or alleged breach of trust committed by such co-trustee."

It was also provided that any trustee being a solicitor or person engaged in a profession might be paid all professional and other charges for work done by himself, his firm or any partner in connection with the trust. It is also relevant,

when considering this deed, to note that it was before this court in Civil Appeal No. 80 of 1956, when a finding of the High Court that the plaint in the present proceedings disclosed no cause of action, was reversed. The (then) learned Vice-President, with whom the other members of the court agreed, observed with relation to cl. 5 of the deed –

> "The phraseology of that clause is nonsensical. It should read: 'the wilful commission of an act, or a wilful omission, known by him to be a breach of trust'. I construe the clause as having that meaning."

Counsel on the present occasion have not sought to quarrel with this observation which, I may say with respect, appears to me to be plainly correct.

In the judgment under appeal the learned judge first approached the question of whether there had been a breach of trust by the first respondent, in relation to the provisions of s. 8 (1) of the (English) Trustee Act, 1893, which he held to be applicable. He found that the first respondent was not entitled to the protection afforded by s. 8 (1) with which he had failed to comply. He held however that such non-compliance was not necessarily fatal to an application for relief, in which he was referring to the power given to a court by s. 3 (1) of the (English) Judicial Trustee Act, 1896, to relieve a trustee from personal liability for a transaction alleged to be a breach of trust if he has acted honestly and reasonably. The learned judge rejected a submission by counsel for the appellants that a trustee is not entitled to relief under s. 3 (1) of the Judicial Trustee Act, 1896, unless he has made a formal application for relief; the decision in *In re Pawson's Settlement: Higgins v. Pawson* (1), [1917] 1 Ch. 541 does not appear to have been cited but it supports the learned judge's decision on this point. The learned judge found, nevertheless, bearing in mind that the onus under the section was on the trustee and acknowledging that it was not for a moment suggested that the first respondent had acted other than honestly, that he had no sufficient material to enable him to relieve the first respondent under that section. The learned judge then proceeded to the consideration of cl. 5 of the Trust Deed which he held was sufficient to absolve the first respondent from any liability for any breaches of trust which may have been committed in making the investment of Shs. 200,000/-.

Before going further it is necessary to ascertain under what law the questions in issue fall to be decided. The governing provision is s. 2 (1) of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114) which reads:

> " 2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the territory."

Section 10 of the same Ordinance reads:

> "10. The Governor may, if he thinks fit, from time to time by order published in the *Gazette* declare that any English Act of Parliament or part of an Act is or is not by virtue of this Ordinance in force in the territory, and every such declaration shall be conclusive."

By an order made under that section (G.N. 168 of 1943) the Governor declared

the Acts specified in the First Schedule to the order to be in force and those in the Second Schedule, not to be in force in the territory. The First Schedule referred only to portions of the Mortmain and Charitable Uses Acts, 1888 and 1891, while the Second Schedule included among a number of other Acts, the Judicial Trustee Act, 1896. It is apparently intended to amend this order by Ordinance No. 11 of 1958 but that Ordinance has not yet been brought into effect.

In the court below it was accepted that both the Trustee Act, 1893, and the Judicial Trustee Act, 1896, were in force. I would agree that the former is so, as the wording of s. 10 of the Land (Law of Property and Conveyancing) Ordinance, is not in my opinion such as to lead to the conclusion that the specifying of one series of Acts in the First Schedule to the order of 1943, in any way negatived the operation of other Acts or laws which fell within the general purview of s. 3 of the Ordinance. It is otherwise, however, with the Judicial Trustee Act, 1896; that has been declared not to be in force and such declaration is conclusive. Possibly it was overlooked, when the whole Act was included in the Second Schedule to the Order, that while the Act related particularly to the appointment and functioning of judicial trustees, the protection of s. 3 thereof extended to trustees generally. However that may be, the Act does not appear to be in force in Tanganyika, though I come to this conclusion with some diffidence as no counsel in either court has referred to the order of 1943. I do not however think that anything turns on the non-availability of the Judicial Trustee Act in the present case. The wording of cl. 5 of the Trust Deed is such, in my opinion, as to afford a wider protection than might have been available under that Act, and it follows that unless cl. 5 affords a good defence to the first respondent the Act could not have availed him.

I turn now to the facts. Counsel for the appellants suggested that this court might be inclined to place less confidence in one or two portions of the evidence of the first respondent than the learned trial judge appeared to have done. The submission appeared to me to be made with little confidence and I find in it nothing of such weight as to induce me, particularly in a case where an allegation of breach of trust is made, to depart from the ordinary rule that the findings of fact and the assessment of credibility of the witnesses of the judge who heard and saw them, are to be accepted.

The first respondent was called to the English bar in 1944 but until 1950 he held " posts in the City". In 1950 he commenced practice in Tanganyika where he has practised ever since, and the loan of Shs. 200,000/- the subject of these proceedings was made in October, 1952, rather less than three years after he commenced practice. The first respondent claimed to have a general but not a special knowledge of trusteeship and had had no experience of trust law at the relevant time. In the circumstances he said that he relied upon his partner, Mr. Morrison, who later became a trustee and who is the second respondent, to do the "legal work" in connection with the trust.

When the question of investment arose the first respondent asked Mr. Morrison to write to other lawyers to ascertain whether a suitable investment could be found. The properties which later became the security were offered, and the first respondent asked Mr. Morrison and the managing clerk to obtain a valuation from Mr. L. V. Watkins. Mr. Watkins was the only man that the witness knew at that time as a professional valuer and was the only one he could entertain; he knew nothing of Mr. Culham, who gave evidence for the appellants, being available, as he regarded him as a quantity surveyor. That is in fact how Mr. Culham described himself when giving evidence. A valuation by Mr. Watkins was forthcoming and indicated a total value of Shs. 306,380/-. It will

be necessary to refer to the question of this valuation in greater detail, but I will first mention other steps taken by the first respondent in his inquiries. He visited the property – the buildings impressed him very favourably; they were new and appeared to be a hive of industry. He made inquiry about the tenants and the rentals. The tenants were substantial people and the total rentals from them were about £140 per month; the mortgagors themselves occupied a portion of the property. If the first respondent's information concerning rentals was accurate, and it does not appear to have been challenged, something less than the whole property was bringing in £1,680 per year – the investment eventually made of Shs. 200,000/- at 9% per annum required £900 per annum to cover the interest. The first respondent also said that he made inquiries as to the financial standing of the proposed mortgagors – it is implied in his evidence that he was satisfied with the result but the details of the inquiries were not given, apparently because certain letters had been excluded from evidence.

To complete the evidence concerning the valuation it is necessary to refer first to one passage in the cross-examination of the first respondent and then to the evidence of Mr. Watkins. The first respondent said that he did not know of his own knowledge how the valuation was obtained; he accepted the valuation as coming from Mr. Watkins to the firm of Morrison and Dodd and believed Mr. Watkins to be completely independent. Mr. Watkins gave his qualifications as five years experience as a valuer in England prior to 1951, and consistent and regular practice as an estate agent and valuer in Dar-es-Salaam since that date. The date of the valuation in question is October 8, 1952. Mr. Watkins said that he prepared the valuation on the instructions of Mr. Dharsee of Dharsee, McRoberts & Co., Advocates, and that he was paid for the work by one M. G. Abdulhusein, for whom he understood that Mr. Dharsee was acting. He was unaware of the purpose for which the valuation was required (it was accepted at the bar that Mr. Abdulhusein was the father of the mortgagors). Later Mr. Watkins said that he was requested by Mr. Morrison to do a valuation of the same properties; this was an oral request and he was asked to advise what it would be safe to advance against the property. He said to Mr. Morrison that he had already done a valuation for Mr. Dharsee and he asked leave of the latter to send a copy to Messrs. Morrison & Dodd. A copy was sent under cover of a letter of October 8, 1952: it contained simply descriptions of the land and buildings, valuations of three component portions and a summary showing a total valuation of Shs. 306,380/-. Mr. Watkins had no communication with the first respondent whom, he stated, he did not know at that time. As some point was made of this by counsel, I should say that although the first respondent is recorded as having said he knew Mr. Watkins, I do not think the passage should really be read as indicating more than that he knew of Mr. Watkins as a valuer.

I do not propose to go into the evidence given by the various valuers. It was considered carefully by the learned trial judge who expressed his conclusion in these words:

> "As already remarked, it is far from easy to decide between the valuations made and determine which to adopt, but if only by analogy with a judicial tribunal where the majority decision is adopted and, on due consideration of all the evidence, including the prices obtained on the sale of the properties, though not attaching undue weight to such value in view of the lapse of time, I find as a fact, without as I have indicated giving an exact figure for the value of these properties, that such value was appreciably, even considerably, less than Shs. 200,000/-, which would make the margin of safety less than the one-third postulated in the Act, and which I consider would be the minimum in such a case as the present."

Section 8 (1) of the Trustee Act, 1893, reads:

> "A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report."

It is quite obvious that the conditions referred to in that section as those upon which a trustee will be relieved were not fulfilled. I do not think that, on the evidence, any quarrel could be had with the first respondent's selection of Mr. Watkins as a valuer. Apparently the choice was a very limited one and the first respondent appeared to think that there was no choice at all. But no instructions, written or otherwise, were given to the valuer to advise upon the amount which he considered could be safely lent as a trustee investment, and no such advice was therefore given. More important than that is the fact that the valuation actually produced by Mr. Watkins was not one in which he acted in the independent capacity required by the section. It was prepared for and paid for by the father of the mortgagors. The first respondent may not have known this personally but that is immaterial – the report, to be within the section, must be a valuer who was in fact independent of the owner – *Re Walker* (2) (1890), 59 L.J. Ch. 386. The learned trial judge in these circumstances was amply justified in coming to the conclusion that he did, namely, that the first respondent was not entitled to the protection which s. 8 (1) might have afforded him had he acted with greater prudence.

It is also clear from the facts set out above, as to which there is no contest, that a breach of trust was committed, in that trust funds had been invested upon a security the value of which was disproportionate to the amount invested. Before coming to the next question, which is whether the first respondent is protected by the indemnity clause in the Trust Deed, it is necessary to refer to s. 24 of the Trustee Act, 1893, which is as follows:

> "24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers."

This section is designed to protect a trustee from the default or neglect of agents properly and not unnecessarily employed, and in *In re Vickery; Vickery v. Stephens* (3) (1931), 1 Ch. 572 at 582 Maugham, J. said:

> "I have now to consider s. 30, sub-s. 1, of the Trustee Act, 1925, a section which replaces s. 24 of the Trustee Act, 1893, which in its turn re-enacted Lord Cranworth's Act, s. 31. It is in the following terms: (His Lordship read the sub-section, and continued:) Reliance has been

> placed on the words concluding the sub-section 'nor for any other loss, unless the same happens through his own wilful default.' To avoid misconception I wish to say that, having regard to the numerous decisions since the enactment of Lord Cranworth's Act in relation to the liability of trustees for innocent breaches of trust, it is impossible now to hold that the words 'for any other loss' are quite general, with the result that no trustee is ever liable for breach of trust unless the breach is occasioned by his own wilful default. In my opinion the words are confined to losses for which it is sought to make the trustee liable occasioned by his signing receipts for the sake of conformity or by reason of the wrongful acts or defaults of another trustee or of an agent with whom trust money or securities have been deposited, or for the insufficiency or deficiency of securities or some other analogous loss. It may be noted that if the phrase is not so limited it is difficult to see how there could have been any need for s. 3 of the Judicial Trustee Act, 1896, now re-enacted as s. 61 of the Trustee Act, 1925, or for s. 29 of that Act; nor would it be possible to explain the numerous cases before 1896 where trustees were made liable for honest mistakes either of construction or fact."

I do not think that the fact that the Judicial Trustee Act, 1896, has been declared to be not in force in Tanganyika in any way lessens the effect of what is said in that passage so far as this territory is concerned. It does not appear that the protection afforded by the section is relevant in the present case, but it will be convenient to set out from the same judgment a description of what is to be understood by "wilful default". At p. 583 Maugham, J. said:

> "Now the meaning of the phrase 'wilful default' has been expounded by the Court of Appeal in the case of *In re Trusts of Leeds City Brewery, Ltd's, Deed* (1925) Ch. 532 n, and in the case of *In re City Equitable Fire Insurance Co*. (1925) Ch. 407. It should be noted that in both those cases the indemnity, given to the trustees in the first case and to the directors and officers of the company in the second case, was worded in a general form so that it could not be contended that they were liable for any matter or thing done or omitted unless it could be shown that the loss so occasioned arose from their own wilful default. This, as I have said, is not true of an ordinary executor or trustee; but the exposition of the phrase 'wilful default' is not the less valuable. The Court of Appeal held, following in the case of *In re City Equitable Fire Insurance Co*. the decision of Romer, J., that a person is not guilty of wilful neglect or default unless he is conscious that, in doing the act which is complained of or in omitting to do the act which it is said he ought to have done, he is committing a breach of his duty, or is recklessly careless whether it is a breach of his duty or not."

The wording of cl. 5 of the Trust Deed, which has been set out above, is very wide. The trustee is relieved in the first place of liability for any act not attributable to his own dishonesty. As the learned judge pointed out, there was no suggestion or imputation of dishonesty against the first respondent by anyone. That, in fact, almost answers the whole question, for the following words of the clause are to be read as stating that the trustee is not to be liable except for the wilful commission of an act known by him to be a breach of trust, or a wilful omission of the same kind. It is hard to see how a man could perform such an act, or be guilty of such an omission, knowing it to be a breach of trust, and still be acting honestly. The protection given by the clause is, I think, even wider than that contemplated when relief is to be given for acts not attributable to "wilful default", which imports consciousness of negligence or recklessness in the performance of a duty. Neither such consciousness or recklessness would necessarily result in the trustee knowing that his act was a breach of trust though, if the negligence or recklessness were shown to be of a very high degree they

might provide evidence that the trustee must have had such knowledge. The learned judge said on this aspect of the case:

> "Even if there is a presumption that in general an advocate must be deemed to be versed in this branch of the law and to know the law of trusts to a degree demanded by this instant case, such presumption is not, I think, a presumption of law, nor will it be contended, I think, that in the particular (sic) such presumption is irrebuttable. Mr. Dodd in the witness box has rebutted any such presumption in so far as he is concerned and has stated on oath that he was not aware of committing any breach of trust in making this investment and, that if there was any breach of trust, it was unwitting and not within his knowledge. There is nothing on the record to contradict Mr. Dodd's evidence and from a common sense point of view it may well be asked: is there any reason at all why Mr. Dodd should knowingly commit a breach of trust which may render him liable to make good any damage sustained".

It is clear from the judgment that the learned judge accepted this evidence from the first respondent, and I see no reason to say, from my perusal of the record, or by reason of any submission made by counsel, that he was wrong in doing so. The breach of trust lay essentially in the act of lending money upon an inadequate security. There is no doubt whatever that the first respondent was unaware that he was doing so – that is unchallenged – and therefore had no knowledge that he was committing a breach of trust. The first respondent was negligent in accepting and acting upon a valuation which he knew (or must be deemed to have known, for he must be regarded as having the knowledge acquired by his partner) was not one which was made independently and for the purpose of the trust investment. When regard is had to the fact that he made enquiries as to the standing of the prospective mortgagors, that he inspected the property personally and went into the question of the rents being returned, it was not a high degree of negligence. The fact that an amount almost equal to two-thirds of the valuation was advanced on the security although the premises were business premises is not, to my mind, of great moment in the particular circumstances; there were a number of tenants, most of whom were well known and well established firms, and there was no reason to expect any substantial decline in the returns from the property. The buildings were not of a nature which were appropriate only to one class of business, and it was not a case in which only one business was being carried on, with consequent risk of sudden depreciation if that business were to fail. The facts are more favourable to the first respondent than were those in the case of *Palmer v. Emerson* (4) (1911), 1 Ch. 758, which was relied on by counsel for the respondents, to the trustees there concerned. The headnote gives the essential features of the case in concise form:

> "There is no fixed rule that in all cases where a portion of the premises upon which mortgage money is lent is utilized for business purposes, trustees would be guilty of a breach of trust in advancing more than a moiety of the value of the property; but if the mortgaged premises and the business are so inseparable that the discontinuance of the business may result in depreciation of the premises, trustees ought not to advance more than one half.
>
> "Section 8 of the Trustee Act, 1893, is a relieving section and does not impose a statutory obligation upon trustees to take a valuation, and the neglect to do so does not exclude them from the benevolent operation of s. 3 of the Judicial Trustee Act, 1896.
>
> "In April, 1899, the trustee of a settled legacy of £3,500 invested this

> trust money upon mortgage of two blocks of freehold house property in Norwich, a portion of the premises being used for the purposes of a butcher's business of forty years' standing. A bank had previously allowed an overdraft of £6,000 upon the security of a deposit of the title deeds of the same property.
>
> "No independent valuation was made on behalf of the trustees at the time of making the advance. They relied upon a valuation made in September, 1896, for a different purpose, by a highly skilled valuer at Norwich, who valued the whole of the premises at £6,550. The butcher's business subsequently failed, and the premises became much depreciated in value and wholly insufficient to pay the settled legacy.
>
> "In an action by the beneficiaries under the settlement seeking to make the trustee liable for a breach of trust in investing upon an insufficient security:
>
> "*Held*, on the evidence, that the value of the property at the time of the advance in 1899 was £5,500, and having regard to all the circumstances which the trustees were entitled to take into consideration, they were justified in lending more than one half the value upon the portion used for business purposes, in order to make up the full loan of £3,500, and were not liable for a breach of trust.
>
> "*Held*, further, that, even assuming that they had advanced a larger sum than was justifiable, they had acted reasonably within the Judicial Trustee Act, 1896, s. 3, and should be relieved from liability."

There it will be seen that there was the same feature of lack of an independent valuation, and more than half of the amount of the valuation was advanced though there was only one business carried on in the premises. The trustees were held to have acted reasonably in the circumstances of the case. Likewise in the present case I do not think it can be said that the first respondent acted with such a high degree of recklessness that knowledge that his actions constituted a breach of trust must or ought to be imputed to him. For these reasons I agree with the learned trial judge that the first respondent was absolved from liability for any breach of trust in relation to the amount advanced upon the security.

There is another point. It has been argued that, quite apart from the amount advanced, a breach of trust was committed in lending upon the particular security at all. The trust deed authorised investment on the security of

> "leasehold property . . . having not less than sixty years to run at the time of such investment . . .".

The security actually accepted for mortgage was a Right of Occupancy, but no point is now taken that such a right was not, in Tanganyika, the equivalent of a leasehold. The complaint was that the rental payable under a Right of Occupancy was subject to periodic review by the Governor, and that by s. 16 of the Land Ordinance (Cap. 113) the occupier, if the rental was raised, was empowered to surrender his rights and became entitled to compensation for unexhausted improvements. Thus, it was argued, there was no lease for a term certain of 60 years.

Objection had been taken in the court below to this point being taken at all on the ground that it was not open on the pleadings. The learned trial judge did not rule on that question as he was of opinion that if a breach of trust did take place, the first respondent, on the basis of the acceptance of his evidence that if there was a breach of trust he was unaware of it, was protected by the indemnity clause in the Trust Deed. I do not need to consider that matter as I am firmly of the opinion, having regard to the history of the matter, that it is not open to the appellants to rely on this ground.

In the early stages of these proceedings an application was made to set aside the plaint as not disclosing a cause of action. The application was allowed, but that decision was reversed on appeal to this court. The following passages from the judgment of the (then) learned Vice-President are relevant. *Heinrichsdorff-Gies v. Dodd* (5), [1957] E.A. 869 (C.A.) at p. 872.

> "As to sub-para. (*d*), it was contended that a breach of trust is pleaded in three alternative ways:
>
> "(1) that a right of occupancy was not an authorised security for the investment of the trust funds in that the investment clause of the Trust Deed does not authorise investments on the security of a right of occupancy which, it was said, is not leasehold;
>
>
>
> I shall deal seriatim with these alternatives.
>
> "In my view sub-para. (*d*) does not raise any question as to a right of occupancy being an unauthorised security. It was argued that the words 'The said security was not a proper investment for the sum of Shs 200,000/- (Shillings Two hundred thousand) or any other sum at all' must be read as meaning that the property was an unauthorised security; but when the sub-paragraph is read as a whole I cannot construe those words as alleging that the security itself was unauthorised. This argument appears to have been merely an afterthought. It was never advanced before the High Court and it is obvious from the defence filed by the first respondent that he did not think there was any allegation that the property was not a form of security authorised by the Trust Deed. It was unjust to lead him to think that the investment was being challenged only on the ground that an unauthorised amount had been lent on the security of the property and then suddenly to face him with a suggestion that the security itself was being challenged as unauthorised.
>
>
>
> "I would add that nothing I have said should be taken as limiting the right of either party to apply at any stage for leave to amend the pleadings or the power of the High Court to allow amendments."

In the judgment of the (then) learned President he quoted a decision of the High Court of Tanganyika (*Director of Lands and Mines v. Sohan Singh* (6) (1952), 1 T.L.R. (R.) 631) as authority for saying that for all general purposes there was no distinction between a right of occupancy and a lease. The relevant paragraph from the plaint is 6 (*d*):

> "(*d*) On the 30th day of October, 1952 or thereabouts the first defendant invested a principal sum of Shs. 200,000/- (Shillings Two hundred thousand) upon the security of the right of occupancy of the land and buildings comprised in Title Nos. 6524, 6982 and 6989. No, or no proper, independent valuation of the property was made at the time of the said investment and the amount of the said loan exceeded the value of the said security. The said security was not a proper investment for the sum of Shs. 200,000/- (Shillings Two hundred thousand) or any other sum at all. On the 2nd May, 1955 the same property was valued by Messrs. Cassam Satchu and Company Limited of Dar-es-Salaam at a total of Shs. 149,000/- (Shillings one hundred forty nine thousand)."

Portion of para. 6 of the written statement of defence of the first respondent reads:

> "As to para. 6(*d*) of the plaint, the first defendant admits the investments

> therein referred to but denies that they or any of them constitute a breach of trust. The plaintiffs' allegations as to valuations are denied. A proper valuation was made before the investment aforesaid was effected and the value of the security exceeded the amount of the investment. The investments were made with the consent of the settlor and were in accordance with the terms of the Trust Deed."

Despite what was said in the passage from the judgment of the learned Vice-President last above quoted, no amendment of the pleadings was applied for. At the trial of the action counsel for the appellants, no doubt taking note of the authority referred to by the learned President altered his submission to the one above-mentioned – that the right of occupancy did not create a certain term of not less than sixty years.

I do not think that the appellants are entitled to rely upon this submission any more than they were upon the original argument that a right of occupancy is not a lease. It was not pleaded in the plaint as a breach of trust, and the plaint gave no indication of any allegation that the security itself was unauthorised. Counsel for the appellants contended that he was not limited by the judgment of this court in the earlier appeal because this court was then only considering the plaint, whereas at the trial the written statement of defence could also be considered. This is not quite a complete statement of the position. Although the written statement of defence was not essential to the consideration of the plaint in the earlier appeal it was undoubtedly looked at by the court and drew the comment from the learned Vice-President that –

> "it is obvious from the defence filed by the first respondent that he did not think there was any allegation that the property was not a form of security authorised by the Trust Deed".

In the face of that comment how can the appellants be permitted to persist in an allegation of exactly the same nature, based on a submission that it was let in by the identical written statement of defence? I consider that, having regard to the earlier judgment of this court, containing as it did, the reference to amendment above quoted, the first respondent was quite entitled, in the absence of any application to amend, to assume that any such allegation was not being persisted in.

I do not in any event find that the pleadings as a whole support the appellants' submission that this allegation is let in by the written statement of defence. The plaint alleges a breach of trust which is limited to the question of the amount of money advanced on the security. That is the material fact pleaded and the cause of action. The written statement of defence denies the allegation and adds that

> "the investments were . . . in accordance with the terms of the Trust Deed" –

which is undoubtedly intended to refer to the allegation made in the plaint and should in my opinion be so construed. If, literally, the words quoted are capable of a wider meaning, I do not think that even in that sense they let in every allegation of breach of trust that the appellants care to make at the trial. The plaint alleges a specific breach of trust; the defence denies that or any breach, the latter being an immaterial averment; but because that assertion is deemed to be traversed in the absence of a reply it does not follow that the plaintiff may rely on other breaches at his will. That would be to introduce a new cause of action by the traverse. In my opinion the appellants, the action being one in which the serious allegation of breach of trust is made, are confined to the allegations in the plaint, and cannot be permitted to rely upon an alleged breach of another nature.

For all of these reasons I am of opinion that the appeal fails and should be dismissed with costs.

Sir Alastair Forbes VP**:** I agree and have nothing to add. The appeal is dismissed with costs.

Windham JA: I also agree.

Appeal dismissed.

For the appellants:
Donaldson & Wood, Tanga
R. N. Donaldson

For the respondents:
Fraser Murray, Thornton & Co, Dar-es-Salaam
K. A. Master, Q.C. and *W. D. Fraser Murray*

Seifu s/o Bakari v R
[1960] 1 EA 338 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 April 1960
Case Number:	19/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Court of Tanganyika – Simmons, J.

[1] Criminal law – Sentence – Alternative counts founded on same act – Conviction on both counts with concurrent sentences of imprisonment – Whether conviction on two counts founded on same act is lawful – Penal Code, s. 21, *s.* 211 *and s.* 222 (*T.*) *– Criminal Procedure Code, s.* 171 (*T.*).

Editor's Summary

The appellant was convicted of attempted murder and on a second count of attempting to strike with an arrow with intent to do grievous harm. The second count was in the nature of an alternative, both being founded upon the same act of the appellant, namely, the shooting of the arrow at the complainant. The appellant, having been convicted of both the counts, was sentenced to six years' imprisonment on the first count and to four years' imprisonment on the second count the sentences to run concurrently. On appeal.

Held –

(i) where charges against an accused person are alternative, the proper course, upon conviction of the accused on one count, is for the court to refrain from entering a verdict or finding on the other count.

(ii) as both counts on which the appellant was convicted were founded upon the same act and the greater offence in the first count included the lesser offence in the second count, the sentence in respect of the second count contravened the provisions of s. 21 of the Penal Code.

Conviction and sentence in respect of second count set aside.

Cases referred to in judgment:

(1) *Kagoye s/o Bundala v. R.*, [1959] E.A. 900 (C.A.).

(2) *Dede s/o Tilibuju v. R.*, E.A.C.A. Criminal Appeal No. 164 of 1959 (unreported).

(3) *R. v. Seymour*, [1954] 1 All E.R. 1006.

(4) *Wachira s/o Njenga v. R.* (1954), 21 E.A.C.A. 398.

(5) *Cosma s/o Nyadago v. R.* (1955), 22 E.A.C.A. 450.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant was convicted by the High Court of Tanganyika on two counts, first of attempted murder, contrary to s. 211 (1) of the Penal Code, and second, of attempting to strike with an arrow with intent to do grievous harm, contrary to s. 222 of the Penal Code. He was sentenced to six years' imprisonment on the first count and to four years' imprisonment on the second count, the sentences to run concurrently. We dismissed the appeal in respect of the first count, but set aside the conviction and sentence in respect of the second count. We now give our reasons.

So far as the conviction of attempted murder and sentence of six years' imprisonment was concerned, we saw no ground for intervention. It is true that the judgment was scarcely adequate to comply with the provisions of s. 171 of the Criminal Procedure Code. We have had occasion recently to comment on the need for a judgment which meets the requirements of that section – *Kagoye s/o Bundala v. R.* (1), [1959] E.A. 900 (C.A.), *Dede s/o Tilibuju v. R.* (2), E.A.C.A. Criminal Appeal No. 164 of 1959 (unreported). In the instant case, however, the prosecution case depended on the evidence of certain eyewitnesses, and the learned judge stated categorically that he believed their evidence. We saw no reason to differ from this conclusion, which necessarily involved rejection of the appellant's defence and a finding that he was guilty. It may be noted that the assessors, to whom the learned judge put the case for the defence, also, as is evident from their opinions, accepted the evidence of the eye-witnesses. As regards sentence, on the facts as given by the eye-witnesses, whose evidence was accepted, the sentence was not excessive.

The second count, however, was in the nature of an alternative count, both counts being founded upon the same act of the appellant, namely, the shooting of an arrow at the complainant. Where charges against an accused person are alternative, the proper course, upon conviction of the appellant on one count, is for the court to refrain from entering a verdict or finding on the other count (*R. v. Seymour* (3), [1945] 1 All E.R. 1006; *Wachira s/o Njenga v. R.* (4) (1954), 21 E.A.C.A. 398; *Cosma s/o Nyadago v. R.* (5) (1955), 22 E.A.C.A. 450). In any event s. 21 of the Penal Code provides that a person shall not be punished twice for the same offence; and "offence" is defined in s. 5 of the Penal Code as "an act, attempt or omission punishable by law". As stated, both counts were founded upon the same act, and the greater offence, of which the appellant was convicted, included the lesser offence charged in the second count. In our view the sentence in respect of the second count contravened the provisions of s. 21. Crown Counsel conceded that the counts must be deemed to be alternative, and did not seek to support the conviction on the second count. In all the circumstances we thought it proper to set aside both the conviction and sentence on the second count.

Conviction and sentence in respect of second count set aside.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

W Elkan v Narshibhai Patel and Another

[1960] 1 EA 340 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	7 June 1960
Case Number:	232/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Practice – Service – Appearance entered by advocate for defendant – Advocate ceases to act for want of instructions – No fresh address for service furnished by defendant or former advocate – Whether service of hearing notice at address of defendant's former advocate sufficient – Civil Procedure Rules, O. 3, *r.* 4 (*U.*).

Editor's Summary

The court was asked to rule it is sufficient to leave a hearing notice at the only address furnished by the defendant, namely, the office of the advocate who entered appearance on his behalf, even when the advocate has ceased to act for the defendant for want of instructions.

Held – service of the hearing notice at the address of the former advocate for the defendant was good service because his address was the only address of the defendant on the record, and the defendant had taken no steps to get any other address on the record.

Order accordingly.

Case referred to:

Meyrck v. Meyrick (1943), 20 K.L.R. (Part II) 36.

Judgment

Sir Audley Mckisack CJ: In the absence of any requirements in our Civil Procedure Rules equivelant to O. 7 of the Rules of the Supreme Court, I accept that, for an advocate to be treated as having ceased to act for a party, for want of instructions, it is sufficient for him to notify the registrar, with reasons, and for the registrar to make an entry in the record accordingly, as has been done in this case.

Mr. Hunt for the plaintiff, asks me, on the authority of our O. 3, r. 4, and of the Kenya case of *Meyrick v. Meyrick* (1) (1943), 20 K.L.R. (Pt. II) 36, to say that the leaving of the hearing notice at the only address for service furnished by the defendant, i.e. that of the advocates who entered an appearance on his behalf, is sufficient. I think Mr. Hunt is right, and that service of the hearing notice in this case is good, not because Hunter & Greig are still the defendant's advocates, but because their address is the only address of the defendant on the record, and, as was said in the Kenya case above cited, the defendant has taken no steps to get any other address on the record. I accordingly rule that service of the hearing notice on defendant No. 2 in this case is good.

Order accordingly.

For the plaintiff:
Wilkinson & Hunt, Kampala
R. E. Hunt

For the first defendant:
Manubhai Patel & Son, Kampala
M. C. Patel

For the Second defendant:
Hunter & Greig, Kampala
H. S. Sparrow

R v Aluwa Otavio

[1960] 1 EA 341 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	12 April 1960
Case Number:	14/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Young person – Irregularity – Order for detention in reformatory school made by third class magistrate – Subordinate Courts Ordinance (*Cap.* 4), *s.* 6 (3) (*U.*) – *Reformatory Schools Ordinance* (*Cap.* 61), *s.* 5, *s.* 6 (1) *and s.* 8 (*U.*) – *Subordinate Courts* (*Amendment*) *Ordinance*, 1955 (*U.*) – *Approved Schools Ordinance*, 1951, *s.* 2 *and s.* 7 (*U.*).

Editor's Summary

The accused was convicted of theft by a servant by a third class magistrate at Arua. The record stated that the accused was only thirteen years old. The order made that the accused be detained in a reform school for one year was later altered by changing the period of detention to three years and by deleting "3rd" before the word "magistrate". The formal order was signed by the first class magistrate. Section 6 (3) of the Subordinate Courts Ordinance (Cap. 4) as amended by Subordinate Courts (Amendment) Ordinance, 1955 provides that in the absence from the place where the court usually sits of a person upon whom powers of a first class magistrate have been conferred, the senior administrative officer shall, during such absence, be deemed to be vested with the powers of a first class magistrate. In revision,

Held –

(i) there was nothing on the record to indicate that the third clas magistrate in this case was the senior

administrative officer present at Arua a the time and accordingly he was not empowered to pass a detention order under s. 5 of the Reformatory Schools Ordinance.

(ii) the proper procedure for the magistrate was to act under s. 6 (1) of the Reformatory Schools Ordinance by recording his opinion that the accused was a proper person to be an inmate of a reformatory school and then to submit his proceedings and to forward the accused to the first class magistrate to whom he is subordinate.

(iii) the order was also defective in that no sentence of imprisonment was first imposed before the order was made as required by s. 5 (1) of the Reformatory Schools Ordinance.

(iv) the accused appeared to be between the ages of twelve and sixteen years and came within the definition of a "young person" in s. 2 of the Approved Schools Ordinance 1951; accordingly the accused should be sent to an approved school under s. 7 thereof.

Order accordingly.

Judgment

Sheridan J: Aluwa Otavio was convicted on his plea of theft by a servant contra s. 252 and s. 258 of the Penal Code by a third class magistrate at Arua. It was recorded that he was only thirteen years old and it was ordered that he should be detained at a reform school for a period of one year. This order was later altered by changing the period of detention to three years and by deleting "3rd" before the word "magistrate". The formal order as signed by the first class magistrate recited that Otavio had been convicted in the absence of the first class magistrate and had been sentenced to three years' detention in a reformatory school as he is under the age of eighteen. Section 6 (3) of the Subordinate Courts Ordinance (Cap. 4) as amended by the Subordinate Courts (Amendment) Ordinance 1955 provides that in the absence

from the place where the court usually sits of a person upon whom powers of a first class magistrate have been conferred, the senior administrative officer shall, during such absence, be deemed to be vested with the powers of a first class magistrate. There is nothing on the record to indicate that the third class magistrate in this case was the senior administrative officer present at Arua at the time. If he had been, there would have been no reason why he should not have signed the order for detention himself. The order in fact states that he was a third class magistrate. In these circumstances, not being a first class magistrate, he was not empowered to pass a detention order under s. 5 of the Reformatory Schools Ordinance. He should have acted under s. 6 (1) of the Ordinance by recording his opinion that Otavio was a proper person to be an inmate of a reformatory school and submitting his proceedings and forwarding Otavio to the magistrate of the first class to whom he is subordinate.

The order is also defective in that no sentence of imprisonment was first imposed before the order was made as is required by s. 5 (1) of the Ordinance.

It is not clear from the record whether there was a preliminary inquiry and finding as to Otavio's age under s. 8 of the Ordinance. As he appears to be between the ages of twelve and sixteen years he comes within the definition of a "young person" in s. 2 of the Approved Schools Ordinance 1951. Instead of remitting the case to Arua for the proper procedure to be carried out, which would involve returning him there from the reformatory school, I think it would be more suitable to substitute for the detention order, an order under s. 7 of the 1951 Ordinance, that he be sent to an approved school, and I order accordingly.

Order accordingly.

Re an Application by Ali Rehman
[1960] 1 EA 343 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	11 June 1960
Case Number:	29/1960
Before:	Lyon J
Sourced by:	LawAfrica

[1] Costs – Habeas corpus – Whether a successful applicant is entitled to costs.

Editor's Summary

The applicant had obtained a writ of habeas corpus and asked for the costs of the application which the Crown opposed on the grounds that the Crown had not acted unreasonably and that the point of law involved was new requiring a decision of the High Court.

Held – there were no sufficient reasons to depart from the general rule that the costs of an application for habeas corpus should normally be awarded to the applicant, if successful, and to the respondent, if

unsuccessful.

Order accordingly.

[**Editorial Note:** See also [1960] E.A. 302 (U).]

Cases referred to in judgment:

(1) *Anand v. Home Secretary and Minister of Defence of Royal Netherlands Government*, [1943] A.C. 147; [1942] 2 All E.R. 381.

(2) *Secretary of State for Home Affairs v. O'Brien*, [1923] A.C. 603.

(3) *In the matter of Moti Bhimji Jivanji* (1947), 6 U.L.R. 192.

Judgment

Lyon J: On May 23, 1960, an application for a writ of habeas corpus was heard and was granted for the reasons set out in my order of that date.

Mr. Starforth then asked for leave to appeal, although expressing the view that he had no right of appeal. At the same time Mr. D'Silva, for the successful applicant, asked for costs. Mr. Starforth has now informed the court that he no longer seeks leave to appeal. He is, in my opinion, quite right, because this application arose out of proceedings in a criminal cause or matter, namely, a prosecution and conviction before a magistrate; a successful appeal to this court, and a successful appeal by the Crown to Court of Appeal for Eastern Africa.

As the local Ordinance relating to the old writs does not include the writ of habeas corpus, I am governed by the principles in the United Kingdom.

There are two decisions, both of the House of Lords, which are relevant – *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* (1), [1943] A.C. 147, and *Secretary of State for Home Affairs v. O'Brien* (2), [1923] A.C. 603. There is no right of appeal in the instant application, because there is no express provision in the Uganda legislation giving any right of appeal; and right of appeal is the creature of statute. I am left, therefore, with the question of costs only.

It was agreed that the result in Miscellaneous Cause No. 29 of 1960 should also be the result in Miscellaneous Cause No. 30 of 1960. These applicants were in custody in Luzira prison when their applications were heard; both were successful and their release was ordered and carried out on the same day – May 23, 1960. The reasons for their release were unusual. Mr. Starforth conceded

that they had been at large for 135 days during the term of their nine months' sentence imposed by the learned magistrate on September 10, 1959. They were therefore at liberty under a lawful order of this court, which was made when their appeals succeeded here. Mr. Starforth has conceded that costs are in my discretion. Indeed, the learned Editors of Halsbury's Laws of England (3rd Edn.), Vol. 11, at p. 50, para. 101, say –

> "Costs are in the discretion of the court. The costs of an application for habeas corpus will normally be awarded to the applicant, if successful and to the respondent if unsuccessful: *Reg. v. Jones*, [1894] 2 Q.B. 382."

That is the general rule. On the other hand, Mr. Starforth asserts that the Attorney-General had to get this court's ruling because he, the Attorney-General, could not release these men; that the Crown had not acted in any unreasonable way; the point was quite new and therefore this court's decision was necessary. Mr. Starforth also again referred to *In the Matter of Moti Bhimji Jivanji* (3) (1947), 6 U.L.R. 192 where costs were refused to a successful applicant. I have considered that judgment. There the learned judge merely observed –

> "I am quite satisfied that this is not a case in which such an order should be made, and I decline to make an order for costs in favour of the prisoner."

Having considered what happened in that application, I can see that the learned judge had in mind that the application had no real merit. There the applicant had been at liberty during the term of a sentence under a magistrate's order granting bail which, at that time, was illegal. In the instant applications both the men were at liberty during the term of the sentence under a lawful order of this court. It seems to me, therefore, that the two applications are distinguishable on merit.

I am also of opinion that these applicants before me were successful partly because of a hiatus in the local legislation, particularly in s. 298 of the Criminal Procedure Code. I have borne in mind Mr. Stanforth's forceful submissions, but, in my view, they are not sufficient to persuade me to depart from the general rule as set out in Halsbury's Laws of England (3rd Edn.), Vol. 11 at p. 50, para. 101.

For all these reasons, the Attorney-General will pay the costs of these two applications.

Order accordingly.

For the applicant:
Wilkinson & Hunt, Kampala
B. E. D'Silva

For the respondent:
The Attorney-General, Uganda
M. J. Starforth (Crown Counsel, Uganda)

Lombard Banking (U) Ltd v Vithaldas Gordhandas and another
[1960] 1 EA 345 (HCU)

Division: HM High Court of Uganda at Kampala

Date of judgment: 20 May 1960

Case Number: 29/1960.

Before: Sheridan J

Sourced by: LawAfrica

[1] Bill of Exchange – Requirements of form – Document in form of promissory note omitting "promise" or undertaking to pay – Whether a promissory note – Indorsement – Plaintiff suing as holders in due course – Allegation that plaintiffs took note in bad faith – Whether plaintiffs holders in due course – Bill of Exchange Ordinance (*Cap.* 217), *s.* 55 *and* 83 (1) (*U.*).

Editor's Summary

Claiming to be holders in due course the plaintiffs sued for Shs. 10,000/- from the first defendant as maker and the second defendants as endorsers of two promissory notes. The relevant portion of the first note read "At one hundred twenty (120) days after date I pay to . . . " and the same portion of the second note was in identical terms save that the word "pay" was omitted. The defendants contended that the documents were not promissory notes as defined by the Bills of Exchange Ordinance but were merely receipts for goods supplied and that the plaintiffs were not holders in due course because their manager had not acted in good faith when accepting for value the notes which had been offered to him a week earlier to discount.

Held –

(i) as the words "I pay" in the first promissory note could fairly be construed as saying colloquially "I promise to pay" it was a valid promissory note.

(ii) the omission of the words "promise to pay" in the second promissory note was vital and it could not be considered a valid promissory note.

(iii) since the manager of the plaintiffs had no reason to be suspicious of the circumstances in which the note was offered to the plaintiffs they were holders in due course of the first promissory note and the defendants were liable as maker and endorsers respectively.

Judgment for the plaintiffs accordingly.

Cases referred to in judgment:

(1) *Akbar Khan v. Attar Singh*, [1936] 2 All E.R. 545.

(2) *Re Normans Trust* (1853), 3 De G.M. & G. 965; 43 E.R. 378.

(3) *Re Hargraves Trusts, Leach v. Leach*, [1937] 2 All E.R. 545.

(4) *Jesse Jones v. John Gordon* (1877), 2 App. Cas. 616 H.L.

Judgment

Sheridan J: The plaintiffs claim Shs. 10,000/- as the holders in due course of two promissory notes

(exhibits A and B) dated August 19, 1959, against the 1st defendant as maker thereof and against the 2nd defendants as endorsers.

The agreed issues are (1) are the documents, or either of them, valid promissory notes; (2) are the plaintiffs holders in due course?

The alleged promissory notes are in the following terms:

"Shs. 5,000/- K'la 19th August, 1959

At one hundred twenty (120) days after date I pay to M/S Ghusalal Ravji & Sons Ltd. K'la the sum of Shs. five thousand only for the value received as per invoice No. 45.

Mr. Vithaldas Gordhandas, Stamp 5/-

P.O. Box 641,

Kampala. Sgd. Vithaldas Gordhandas.

Endorsements

Ghusala Ravji & Sons Ltd.
B. G. Ruparelia, Director
For and on behalf of
Eastern Province Motors Ltd.
Amritlal Lakhani, Director
For and on behalf of
The Uganda Car Exchange
Amritlal, Director."

(Exhibit A)

Exhibit B is in identical terms save that the word "pay" in the second line thereof is omitted. For the defendants it is argued that exhibits A and B, particularly exhibit B, are not promissory notes as defined by s. 83 (1) of the Bills of Exchange Ordinance (Cap. 217), which reads as follows:

> "83(1) A promissory note is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of a specified person or to bearer."

The defendants rely on the dictum of Lord Atkin in *Akbar v. Attar Singh* (1), [1936] 2 All E.R. 545 at pp. 549, 550:

> "It is doubtful whether a document can properly be styled a promissory note which does not contain an undertaking to pay, not merely an undertaking which has to be inferred from the words used. It is plain that the implied promise to pay arising from an acknowledgment of a debt will not suffice, . . . Their Lordships prefer to decide this point on the broad ground that such a document as this is not and could not be intended to be brought within a definition relating to documents which are to be negotiable instruments. Such documents must come into existence for the purpose only of recording an agreement to pay money and nothing more, though of course they may state the consideration. Receipts and agreements generally are not intended to be negotiable, and serious embarrassment would be caused to commerce if the negotiable net were cast too wide. This document plainly is a receipt for money containing the terms on which it is to be repaid."

It is said that exhibits A and B are merely receipts for goods supplied. On the other hand, it clearly emerges from the evidence of Mr. Ruparelia (D.W.1), the managing director of the 2nd defendant company, that exhibits A and B were part of an intended set of eight promissory notes for Shs. 40,000/- which the 1st defendant gave him for discounting purposes as his company was in need of money. In Uganda High Court Civil Case No. 1005 of 1959 between the same parties the plaintiffs recovered judgment on three of this set of promissory notes for Shs. 15,000/-. In two of them the wording is "I pay" and in the third the common form "I promise to pay" is used. I note that all the promissory notes have the correct ad valorem stamp affixed to them. To quote from Chalmers' Bills of Exchange (11th Edn.), p. 268:

> "No particular form of words is essential to the validity of a note provided the requirements of this section be fulfilled . . . It must be such as to show the intention to make a note."

As regards exhibit A I am satisfied that the words "I pay" can be construed as a colloquial way of saying "I promise to pay". It is no more than a case of faulty grammar.

> "The rules of grammar must give way to the rules of good sense, and, where a reasonable interpretation of the whole instrument requires that grammar should be departed from, it must be, and constantly is, departed from"

per Knight-Bruce, V.C., in *Re Normans Trust* (2) (1853), 3 De G.M. & G. 965 at pp. 967-8. I find that exhibit A is a valid promissory note.

Exhibit B raises a much more difficult problem. Mr. Troughton, for the plaintiffs, asks me to supply the words "promise to pay" as it is clear from the instrument itself that they have been omitted by inadvertence. He relies on *Re Hargraves Trusts, Leach v. Leach* (3), [1937] 2 All E.R. 545 where words were supplied to give effect to a settlement. I do not find any real analogy between the case of a settlement where the paramount consideration is the intention of the settlor and a promissory note which not only has to be in writing but is negotiable in the hands of third parties. The fact that Mr. Ruparelia volunteered the circumstances in which the promissory notes came into existence cannot render admissible evidence which is otherwise inadmissible. I cannot find any provision in s. 90, s. 91, s. 92, s.93, s.94, s. 95, s.96 and s. 97 of the Evidence Ordinance which would entitle me to supply the vital words "I promise to pay" in order to validate exhibit B. This fasciculus of sections point the other way. In particular s. 92 provides that when the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. I find that exhibit B is not a valid promissory note.

On the second issue the evidence is that in August, 1959, Mr. Ruparelia tried to discount the set of promissory notes with the plaintiffs through their broker, Jashabhai Gordanbhai Patel (P.W.1). Jashabhai referred the matter to Mr. Birdsey (P.W.2), the plaintiffs' manager, who declined to discount them unless he first saw the holder or a signatory. At about the same time Uganda Credit Exchange & Eastern Province Motors Ltd. (I will refer to them by their initials) owed the plaintiffs Shs. 42,000/- on monthly hire purchase instalments and Shs. 385,000/- under a general indemnity in respect of other hirers. The plaintiffs were pressing them for payment as they appeared to be getting into financial difficulties. One Amritlal Lakhani was a director of U.C.E. and of E.P.M. which is now being compulsorily wound up. Mr. Ruparelia was also a director of E.P.M. A week later Jashabhai and Mr. Birdsey saw Lakhani in Jinja. Lakhani offered him the set of promissory notes for Shs. 40,000/- and having satisfied himself that Lakhani had a good title to them he secured his endorsement on them and accepted them towards a reduction of the indebtedness of U.C.E. and E.P.M. with the plaintiffs. I am satisfied that neither Mr. Birdsey nor Jashabhai knew, as the defendants contend, that the promissory notes had been given to Lakhani so that he might discount them for the 2nd defendants. Apparently Lakhani has found it advisable to take up residence in India. Mr. Ghelani, for the defendants, submits that Mr. Birdsey was not acting in good faith when he accepted for value the promissory notes which had been offered to him a week earlier to discount. He relied on *Jesse Jones v. John Gordon* (4), (1877) 2 App. Cas. 616 H.L., but here there was nothing to show that Mr. Birdsey knew of the circumstances in which Lakhani acquired the notes or that he was aware of any defect in his title to them. He had no reason to be suspicious, even if he remembered that he had seen the bills before, once he had satisfied himself that Lakhani was entitled to endorse them over to the plaintiffs. I find that the plaintiffs are holders in due course of exhibit A and that the 1st defendant is liable, under s. 55 of the Ordinance, as the drawer

and the 2nd defendants are liable as the endorsers thereof, having received notice of dishonour.

There will be judgment for the plaintiffs for Shs. 5,084/50 (including Shs. 84/50 noting charges) with interest and costs.

Judgment for the plaintiffs accordingly.

For the plaintiffs:
Hunter & Greig, Kampala
J. F. G. Troughton

For the defendants:
M. C. Ghelani, Kampala

The Descendants of Sheikh Mbaruk Bin Rashid v The Minister for Lands and Mineral Resources

[1960] 1 EA 348 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of ruling:	17 June, 1960
Case Number:	23/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Crawshaw Ag. CJ

[1] Land – Possessory title – Arabs settled on land by German Administration of Tanganyika – No documents of title – Descendants of Arabs in occupation fifty years later – No other claimant to land – Whether occupiers have acquired right to permanent occupation – Land Ordinance (*Cap.* 113), *s.* 2, *s.* 3 (*T.*) *– German Imperial Ordinance*, 1895, *s.* 1 (*T.*).

[2] Compulsory purchase – Arabs settled on land by German Administration of Tanganyika – Descendants still in occupation fifty years later without any documents of title – Whether occupiers are owners with title of freehold nature and entitled to compensation – Land Acquisition Ordinance (*Cap.*118), *s.* 5, *s.* 9, *s.* 18, *s.* 20, *s.* 29 (*T.*) *– Indian Land Acquisition Act*, 1894 *– Lands Clauses Consolidation Act*, 1845, *s.* 79 *– Land Ordinance* (*Cap.* 113), *s.* 2, *s.* 3 (*T.*) *– German Imperial Ordinance*, 1895, *s.* 1, *s.* 6 (*T.*).

Editor's Summary

In 1896 the German Administration of Tanganyika settled certain Arab immigrants on land at Ukonga in

the District of Kisarawe. Although these Arabs and their descendants had occupied the land since the original settlement they had never had any documents of title but no one had ever claimed the land. In 1952 the Member for Lands and Mines gave notice under s. 5 of the Land Acquisition Ordinance of his intention to acquire inter alia this land and called upon all parties concerned to specify the nature of their interest thereon. Claims were made by the appellants and negotiations about compensation followed. When the negotiations broke down the Minister for Lands and Mineral Resources took out a summons under s. 9 of the Ordinance which was served upon the appellants, and they filed a defence, to which the Minister filed a reply. At the hearing before the High Court the judge held that the court had no jurisdiction, but he also held that, apart from the question of jurisdiction, the appellants had established their claim to the land and assessed the compensation. On appeal the appellants sought to reverse the judge's decision upon the question of jurisdiction whilst supporting his assessment of the compensation payable. The respondent cross-appealed, contending that the findings of the judge that the appellants had been granted permanent occupation of a freehold nature and were lawfully entitled to the land and to compensation, were erroneous.

Held –

(i) in view of the express terms of s. 29 of the Ordinance, the High Court of Tanganyika had jurisdiction to deal with the matter.

(ii) although by the Land Ordinance rights of occupancy are recognised as the normal title of a native community, the appellants, as Arabs, were excluded, and could not have a legal right of occupancy under the Ordinance; there was no reason to suppose that the German Administration intended to give the original Arab settlers anything more than permission to occupy the land, and accordingly the appellants and their predecessors were not in possession "as the owners therof".

(iii) the land was public land and the appellants were rightfully in possession thereof as licensees, but were not thereby entitled to rely on s. 20 of the Ordinance so as to be entitled to compensation.

Appeal allowed. Judgment and decree of the High Court set aside. Declaration that the land is public land.

Cases referred to in judgment:

(1) *Gedye v. Commissioners for her Majesty's Works and Public Buildings*, [1891] 2 Ch. 630.

(2) *Ex parte Burdett Coutts*, [1927] 2 Ch. 98.

(3) *Muhena bin Said v. The Registrar of Titles and Land Officer* (1949), 16 E.A.C.A. 79.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: The appellants have appealed against a decision of the High Court of Tanganyika on an application by the Minister for Lands and Mineral Resources under s. 9 of the Land Aquisition Ordinance (Cap. 118) (hereinafter referred to as "the Ordinance"), and the respondent has filed a cross-appeal. The proceedings were initiated by a notice dated September 17, 1952, published in the *Official Gazette* on September 26, 1952, by the then Member for Lands and Mines, giving notice under the provisions of s. 5 of the Ordinance, of his intention to acquire compulsorily certain areas of land, including the land to which these proceedings relate, and calling on any person claiming to be interested in the land to specify such interest. Claims were made by the seventeen appellants in pursuance of the notice. Negotiations for the award of compensation for the land in question took place but finally broke down; though, it may be mentioned, compensation was in fact paid in respect of improvements on the land.

In due course a summons was taken out by the Minister for Lands and Mineral Resources under s. 9 of the Ordinance. The summons was served on the appellants who filed a written statement of defence, to which a reply was filed by the Minister. In due course the matter was heard by the High Court when four questions were posed for determination, namely:

> "1. Who is the person or persons entitled to all those three pieces or parcels of land situate at Ukonga on the District of Kisarawe and described in a Notice of Intention to Take Land dated the 17th day of September, 1952, and the plan No. E. 1. 249 referred to therein (copies of which notice and plan are attached hereto marked 'A' and 'B' respectively) but excluding that portion of the land verged in red which is hatched in blue on the plan. The Governor has not entered into possession of such portion and

does not intend to proceed with its acquisition.

"2. What is the estate or interest of such person or persons in the

land acquired?

"3. Did the person or persons entitled to the land acquired have beneficial use thereof for cultivation or habitation or for collecting or storing water or for any industrial purpose for a continuous period of at least six months during the period of ten years immediately preceding the publication of the Notice of Intention to Take Land, to wit the 26th day of September, 1952?

"4. If the answer to question 3 above is in the affirmative, then what is the amount of compensation payable therefor to such person or persons for his, her or their interest in the land acquired or any part thereof?"

By its decision on January 28, 1960, the High Court held that it had no jurisdiction to determine the foregoing questions. However, notwithstanding this decision, the learned judge who heard the application went on in his judgment to consider the merits of the case, and apart from the question of jurisdiction, concluded that the appellants had substantiated their claim to be entitled to the lands and found that the compensation payable for the land ought to be a sum of £7,445. On the question of costs, the learned judge, after hearing argument, made no order saying, inter alia,

"Had I not held that I had no jurisdiction, I would certainly have made no order as to costs, for the land office would have brought this matter before the court under the provisions of the Ordinance."

The appellants' memorandum of appeal contains six grounds, but these may be summarised as follows:

(*a*) the decision of the learned judge that he had no jurisdiction to deal with the matter was wrong and should be set aside;

(*b*) the learned judge's award of £7,445 as compensation should be upheld and enforced by this court; and

(*c*) that the learned judge, on the basis of the award of such compensation, should have awarded costs in favour of the appellants.

The first ground of appeal, that is to say, the question of jurisdiction, was also set out as a ground of appeal in the cross-appeal filed by the respondent.

The learned judge, in reaching his conclusion on this aspect of the matter, relied on the view taken by Indian courts in relation to the Indian Land Acquisition Act, 1894, and considered that s. 9 of the Ordinance was inappropriate in a case where the Government itself claimed title to the land which was the subject of the application.

The learned judge said:

"This attitude as to procedure appears to have been taken also by the courts in India in regard to the Land Acquisition Act, 1894, which, as a matter of interest, applies, or used to apply I think, in Zanzibar. The wording of our Ordinance is very different to that Act, but the general purposes of the provisions would appear to be very similar. In Donogh, (2nd Edn.), at p. 24 it is said: –

'But the provisions of the Act would not be applicable to a case when the Government claimed the land as their own. In the case cited above (which is not available to me) Straight, J., observed: "I do not think it was ever intended to be extended to a case in which the collector claims the land on behalf of the Government or the Municipality, and denies the title of other claimants to the land. Such a position would be inconsistent with the applicability of the Act, for it denies the right of any person to compensation. It seems a contradiction in terms to speak of the collector as seeking the acquisition of the land when he asserts that

the land is his own, and that no other person has any interest in it".'

"I am inclined to the view that I have no jurisdiction in the circumstances, and if that is so then the fact that the preliminary point was not taken by the claimants would not give it to me."

The case which is referred to in the passage cited from Donogh, and which was not available to the learned judge, turned on the specific words of the Indian Act, which differ from the corresponding provisions of the Ordinance. Apart from this, the matter is, in my view, concluded so far as this Territory is concerned by the provisions of s. 29 of the Ordinance, a section which, I think, escaped the attention of the learned judge. That section reads as follows:

"29. The fact that a notice has been served upon any person under s. 5 or s. 7 shall not be taken as an admission by the Governor that the person on whom such notice has been served or any other person has any estate or interest in the land or any part of the land specified in the notice, or debar the Governor from alleging in any proceedings under this Ordinance or otherwise that all rights in or in relation to such land are vested in the Governor."

In view of this express provision I have no doubt that the application was properly made under the Ordinance and that the High Court had jurisdiction to deal with the matter.

As regards the second point raised by the appeal, Crown Counsel who appeared for the respondent conceded that if he failed on the cross-appeal an order should be made awarding compensation in accordance with the learned judge's finding. The cross-appeal challenged the appellants' entitlement to compensation but not the quantum of compensation.

Crown Counsel also conceded that in view of the provisions of s. 18 of the Ordinance, if the cross-appeal failed and the appellants therefore succeeded in obtaining the award of compensation, costs ought to be awarded against Government since the appellants' right had been contested by the Government.

It follows that the substantial point for consideration arises on the cross-appeal, the relevant grounds being 2, 3 and 4, which read as follows:

"2. The learned judge erred in fact in finding that the German Government had granted to the appellants permanent occupation which was freehold in nature.

"3. The learned judge erred in law in concluding that the appellants were lawfully entitled to the land within the meaning of s. 20 of the Land Acquisition Ordinance (Cap. 118).

"4. The learned judge erred in law in concluding that the appellants were entitled to compensation."

The appellants are the descendants of certain Arabs who, with their followers, entered Tanganyika Territory, which was then under German control, after certain fighting in or near Mombasa. The original Arabs were permitted to remain in Tanganyika, and in 1896 were settled by the German Administration on land which includes that which is the subject of these proceedings. The appellants and their predecessors have been in continuous occupation of the land since the original settlement in 1896. Although they had been settled on the land, no conveyance or other document of title was ever issued to the original Arabs or their successors in respect of the land. Other relevant facts appear from the passages of the judgment which I cite below.

The learned judge concluded that the claimants had established a possessory title under s. 20 of the Ordinance. He said:

"13. In the instant case there has never been any question of anyone,

excluding the Government, claiming the land other than the claimants. It is clear, I think, that if a claimant is put to proof under s. 20 and fails to satisfy the court that he has an interest in the land, and there is no other claimant, then the land must pass to Government which has a residuary title to all the land in the territory. It seems to me that the position in the instant case is largely, if not entirely, governed by the construction of s. 20 of the Ordinance, which reads as follows:

> '20. If any question arises respecting the title to the lands to be acquired under this Ordinance, the parties in possession as being the owners thereof, or in receipt of the rents of such lands as being entitled thereto at the time of such lands being purchased or taken shall be deemed to have been lawfully entitled to such lands unless the contrary be shown to the satisfaction of the court; and they and all parties claiming under them or consideration or compensation money, but without prejudice to any subsequent proceedings against such parties at the instance of any person claiming to have a better right thereto.'

"14. I have already held that the claimants were in possession at the time of acquisition and in receipt of and entitled to the fruits of the land, excluding of course any patches of crops which individual persons had been permitted to grow. I think that the word 'rents' must be held to include 'fruits', even including 'firewood'. I am also satisfied that the claimants must be deemed 'to have been lawfully entitled to the land, unless the contrary be shown to the satisfaction of the court.' The question, which is not an easy one, is what is meant by the words 'unless the contrary be shown'. Miss Sleigh would argue, I think, that all she has to do is to be able, after the close of the claimant's case, to show to the court (if indeed the court was in any doubt of it) that the claimant had failed to prove freehold title, for if he had not proved freehold title and there was no other claimant she would then say that the land belonged to Government. I am not considering any lesser terms, such as leaseholds, as they do not arise. I do not personally think that this can be the intention of the section for otherwise it could have been quite clearly stated. The section as I read it does not go so far. The expressions are 'the parties in possession as being the owners thereof', and 'in receipt of the rents of such lands as being entitled thereto' and 'shall be deemed to have been lawfully entitled to such lands.'

"15. Section 20 is similar to s. 79 of the English Land Clauses Consolidation Act, 1845. Miss Sleigh has argued that this section merely lays down when a person may be paid compensation direct, in the same way that s. 6 and s. 21 of an Ordinance provide how compensation shall be paid. With respect I think that although they do contain such provisions, s. 20 goes further and states the qualifications for a claim to compensation in disputed cases. It is interesting to observe that the headnote to that part of the Act which contains s. 79 reads, 'Payment to persons having limited interests or under disability, or whose title is defective', whilst the marginal note reads, 'Party in possession to be deemed the owner', the marginal note to our s. 20 reads, 'Parties in possession as owners to be deemed entitled to lands.' As Miss Sleigh point out, marginal notes are not of course part of the Ordinance.

"16. To my mind the claimants have shown a right of title which comes within the meaning of the section, although I am certainly not prepared to specify precisely what interests would and what interests would not come within the section. The claimants' family had been in occupation of the lands for some fifty-six years prior to the acquisition

proceedings in 1952, and during the whole of that period it would appear likely that they had been regarded by the local people as the owners of it. Their possessions had never been questioned by Government. The circumstances of their settlement are, I think, most significant, as the extracts which I have cited from the *German Gazette* and the Annual Report show. They were settled there because the soil was fertile and the area particularly suitable for cultivation. The Africans living on the land were removed and sent to live elsewhere. The name of the village was recognised as Mbaruk village. The 'Mbaruk people' were described as quiet and industrious, and it was said that the settlement would from a very welcome increase in the population of this deserted area. It was also said, 'it is hoped that through these people a gradual opening of the depopulated fertile Pugu Mountains will take place', and 'the Mbaruk question, as such, has therefore found a most satisfying solution in the German colony.' It seems to me that although no title deeds were issued, the circumstances indicated quite clearly that at that it was intended that the settlement should be a permanent one and that the Mbaruk families were fully entitled to be regarded as permanent settlers, and that their descendants, fifty-two years later after continuous occupation, should be deemed to have been lawfully entitled to the land within the meaning of s.20. It may be that the cultivation and development of the land has not been as intense as was originally hoped for by the German Government, but that I cannot say, nor do I think it material.

"17. Having held that the claimants have substantiated their claim to have been lawfully entitled to the lands, the onus of showing that the contrary is so, under s. 20 must I think in the circumstances of this case be on the Crown, and it is therefore for the Crown to satisfy the court that the original possession was permissive only. In Rustomji on the Law of Limitation (5th Edn.), Vol. II, p. 1387, et seq., it is said, 'When plaintiff comes into court alleging that defendant's original possession was permissive, it is for the plaintiff to establish his allegation before defendant can be called upon to substantiate his plea of adverse possession . . .'This opinion of the learned author was arrived at after considering the effect of the judgment of the Privy Council in *Secretary of State for India v. Chellikani Rama Rao* (1916) 39 I.L.R. (Mad.) 617, to which further reference will be made below.

"18. I have been referred to the case of *Muhena bin Said v. Registrar of Titles and Land Officer*, E.A.C.A. No. 20 of 1948. In that case application had been made for first registration of freehold title under s. 5 of the Land Registry Ordinance of 1923 (since repealed and replace). Registration was refused, and its refusal was upheld by the Court of Appeal. Title was claimed, it would seem, from an Arab who had been in occupation since about 1890, prior to the Germans taking over what is now Tanganyika Territory. There was no evidence how he came into possession, and it was presumed by Sir John Gray, than C.J., Zanzibar, who was one of the members of the Court of Appeal, that he had therefore entered under some sort of agreement with the chief or representative member of the tribe, who under native law and custom would have had no 'freehold' to give. The question therefore was whether the applicant had a right by adverse possession. Sir John Gray, C.J., said:

'Section 1 of the German Imperial Ordinance of November 26, 1895, enacted that except where claims to ownership and to real rights in land could be proved by private persons and certain other specified persons all land in what was then German East Africa was to be deemed to be unowned and to be regarded as Crown land and the ownership to such

> land was vested in the Reich. The Land Ordinance of 1923 declares the whole of the lands of Tanganyika Territory, whether occupied or unoccupied, to be public lands, with a proviso that nothing shall affect the validity of any title to or interest in land lawfully acquired before January 26, 1923.'

and later:

> 'In order, therefore, to succeed in respect of his claim to adverse possession the appellant must show user of the land by himself or his predecessors in occupancy in a manner which is inconsistant with the enjoyment by the Tanganyika Government of its interest in such land as public land. All the acts alleged by him are consistent with his right of occupancy and none of them are inconsistent with the rights of the Tanganyika Government in such land as public land. I am therefore of opinion that the claim of adverse possession fails.'

Graham Paul, Acting President, said:

> '. . . the obviously difficult thing is to prove *adverse* possession as against the German or British Governments who undoubtedly as a matter of policy permitted the inhabitants generally of the territory to the use land for their reasonable requirements of residence and sustenance without any special grant to any individuals. To satisfy the registrar that the possession was adverse in this case evidence would in my view be required of something definite in the occupation of the applicant or his predecessors to take that occupation out of the category of the admitted general permissive occupation by all the inhabitants of the Territory. There is nothing so far as I can see in the evidence to show that the occupation by the applicant or his predecessors was in any way special, or different from that of any other inhabitant of the territory, or inconsistent with it being just the general permissive occupation enjoyed by all inhabitants.'

"19. The requirements for registration under the Land Registry Ordinance were in terms very different to those relating to claims under the Land Acquisition Ordinance. Section 11 of the former read with s. 23 (3) (*b*) of the Land Ordinance of 1923 provided for registration of title by adverse possession, 'either under the Limitation Act, 1908, or by proving thirty years adverse possession prior to the 26th day of January 1923.'

"20. As I have said, I am satisfied that at the time the intention of the German Government was permanent occupation and not, as Miss Sleigh maintains, a tenancy at will. There was, to use the words of Graham Paul, Ag. P., something 'definite' and 'special' in the occupation which took it out of the category of any general or even special permissive occupation, and in my opinion the Government, by its apparent intention and its actions, is estopped from denying the freehold nature of the claimants' title. In passing I would observe that a tenancy at will terminates on the death of a party, but I am not saying that it could not by implication be renewed in favour of descendants of the original tenant, although there is no evidence that this was specifically done. As distinct from tenancy at will tenancy on sufferance (by its nature adverse to the landlord) cannot it seems apply, for the learned author in Woodfull's Landlord and Tenant (25th Edn.), at p. 812, says 'Against the Crown there can be no tenant on sufferance, for the Crown not being capable of committing laches, such person will be an intruder'. One thing is quite certain, the claimants were not intruders. The Crown has failed to satisfy me that possession was permissive only. No subsequent change of animus by the German or British Government could alter the position. It cannot be said, I think,

> that such generosity by a government would be incredible, for there is nothing to suggest that the land was then regarded as of any particular value: on the contrary, it seems clear that the Government welcomed the opportunity of handing it over to the newcomers for 'opening up the depopulated' area."

I have with regret, come to the conclusion that the learned judge's view cannot be supported. Section 79 of the English Lands Clauses Consolidation Act, 1845, is, as the learned judge remarked, very similar to s. 20 of the Land Acquisition Ordinance, which appears in the passage from the learned judge's judgment which I have set out. In particular, the words:

> "the parties respectively in possession of such lands, as being the owners thereof, or in receipt of the rents of such lands, as being entitled thereto at the time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the court."

are common to both sections. The interpretation of those words has been considered in two cases to which we were referred by Crown Counsel, namely, *Gedye v. Commissioners for Her Majesty's Works and Public Buildings* (1), [1891] 2 Ch. 630; and *Ex Parte Burdett Coutts* (2), [1927] 2 Ch. 98. The gist of the decision in those cases in relation to the words set out sufficiently appears in the following passage from the judgment of Romer, J., at p. 104 of the report of the *Burdett Coutts* case (2):

> "But in a case that came before the Court of Appeal of *Gedye v. Commissioner of Her Majesty's Works and Public Buildings*, the person was in possession at the time the land was taken was a person who at that time seemed to have been claiming to be in possession as the owner thereof, but on investigation of his title it appeared that he was in possession of the land by virtue of a long term of years which had not then expired. The court held that he was not a person who was in possession of the land 'as being the owner thereof' at the time the land was taken, and so when after twelve years had elapsed from the expiration of his term he applied for payment but his application was dismissed. It follows from that case, as it seems to me, that the mere fact that the person in possession claims to be there as the owner thereof is not sufficient to bring him within the section if in point of fact it turns out that he was rightly in possession under a title less than one that gave him complete ownership."

In the instant case, as it seems to me, it has been shown that the appellants' predecessors entered into possession of the land by permission of the then government of the territory. It must be remembered that in Tanganyika rights of occupation are recognised. The Land Ordinance (Cap. 113), which was originally enacted in 1923, declares by s. 3 that, subject to any title or interest to land lawfully acquired before the date of commencement of that Ordinance, the whole of the lands of the Territory, whether occupied or unoccupied, on the date of such commencement are to be public lands; and makes provision for the grant by the Governor of "rights of occupancy" for terms not exceeding ninety-nine years, such rights so granted being analogous to leasehold interests. Section 2 of the Land Ordinance, however, defines "a right of occupancy" and "occupier" as follows:

> "'a right of occupancy' means a title to the use and occupation of land and includes the title of a native or of a native community lawfully using or occupying land in accordance with native law and custom;
>
> 'occupier' means the holder of a right of occupancy and includes a

> native or a native community lawfully using or occupying land in accordance with native law and custom."

Since the definition of "native" excludes persons of Asiatic origin or descent, and the appellants are Arabs, they cannot be said to have a legal right of occupancy under the Ordinance. But I stress the existence of such rights of occupancy as the normal title of a native community. That this legislative provision merely gives legal effect to a policy pursued from German times is, I think, clear from the passage cited by the learned judge from the judgment of Sir Graham Paul in *Muhena bin Said v. The Registrar of Titles and Land Officer* (3) (1949), 16 E.A.C.A. 79. Sir Graham Paul says that the German and British Governments at p. 80:

> ". . . undoubtedly as a matter of policy permitted the the inhabitants generally of the territory to use land for their reasonable requirements of residence and sustenance without any special grant to any individuals."

Sir John Gray in his judgment in the same case, in the passage cited by the learned trial judge which is set out above, draws attention to the German Imperial Ordinance of November 26, 1895, s. 1 of which makes provision not dissimilar to s. 3 of the Lands Ordinance. That German Ordinance also provides in s. 6 that

> "the transfer of Crown Land is effected through the Governor either by conveyance of ownership or by lease".

It is to be noted that that Ordinance was in force when the appellants' predecessors were settled on the land, and that, as found by the learned judge, and, indeed, I think, conceded, no documents of title were issued. I feel little doubt that in settling the appellants' predecessors on the land the German Government were doing no more than giving them permission "to use the land for their reasonable requirements of residence and sustenance". Had any other form of title been intended a document of title would have been issued; indeed, must have been issued to create a valid title under the German Ordinance. The learned judge found something "definite" and "special" in the occupation granted which "took it out of the category of general or even special permissive occupation" and held that the Government was estopped from denying the freehold nature of the claimants' title. With respect, I cannot see any reason to suppose that the German Government should intend to give a better title to a wandering group of refugees, which is what the original persons settled were, than that enjoyed by the ordinary inhabitants of the country to land on which they had been settled for generations and in any case I do not think they could legally give such a title without a grant by conveyance. This view is, I think, supported by the minute of the Acting Governor of January 18, 1910, to which the learned judge refers in his judgment, which reads:

> "Rights of ownership of Sheikh M baruk to the ground and soil on which his village is built do not exist."

The learned judge merely commented as to this that he did not consider himself bound by the opinion of the then Acting Governor. That, no doubt, is so, but the minute shows that in 1910 the German Government did not consider that the Mbaruk community had been granted a freehold.

The learned judge held that the Government was estopped from denying the freehold nature of the claimants' title. But in the view I take I do not think any question of estoppel arises. The appellants' predecessors were, as I see it, permitted to occupy the land on terms similar to those on which the inhabitants of the territory generally were permitted to occupy land. I can see nothing to suggest that it was the intention to give them a freehold title.

In the view I have taken the appellants and their predecessors were not in possession of the land "as the owners thereof". They were lawfully permitted to enter and occupy the land. The permission to occupy had never been revoked and they were in occupation by virtue of that permission. While I have no doubt that the intention of the German Government was to put the Mbaruk community in exactly the same position as regards the land on which it was settled as that of other inhabitants of the territory generally, the Lands Ordinance does not carry out this intention since, as I have indicated, it does not give to the Mbaruk community such a "right of occupancy" as is conferred on "native" communities. In these circumstances I think the appellants are to be regarded as occupants of the land by licence of the Government. If that is so, and they are rightfully in possession as licensees, then I think the position is that they are in possession under a title giving less than complete ownership and the principle of the passage cited from the *Burdett Coutts case* (2), applies; and that accordingly the appellants cannot rely on s. 20 of the Ordinance to give them entitlement to compensation.

For these reasons I think the appeal should be allowed. I would say that though I have come to the conclusion that the appellants legally are mere licensees, I think they have a strong moral claim to be treated as if they possessed a right of occupancy of the nature enjoyed by "native" communities under the Lands Ordinance. If this were done I do not know how it would affect the amount of the compensation already paid, but, in any case, if Government did consider that increased compensation should be awarded on this basis, it would be a matter for an ex gratia payment only.

The application to the High Court proceeded on the basis that the question in issue, apart from quantum of compensation, was the ownership of the freehold, and the learned judge observes that the question of the existence of lesser terms such as leaseholds does not arise. In view of this I think the answer to the first question posed in the summons must be that the land is public land. The other questions then do not arise. I would add, however, that in my view the appellants have for 56 years been in lawful occupation of the land as licensees and that, on the basis of such occupation, the answer to the third question posed would be in the affirmative.

I would allow the appeal, set aside the judgment and decree of the High Court except as to costs, and substitute a declaration that the lands the subject of the application are public lands. In view of the conclusion I have reached I do not think the order of the High Court as to costs should be disturbed. Crown Counsel did not indicate whether the respondent was claiming costs in this court in the event of the cross-appeal succeeding, but I think costs must follow the event if the respondent does claim them. I would accordingly order that the costs of the appeal and cross-appeal be paid by the appellants unless abandoned by the respondent.

In view of the fact that I would answer the third question in the affirmative, and that this question was not canvassed in the court below, there should be liberty to apply if it is contended that any legal right to compensation arises out of the answer now given.

Gould JA: I agree and have nothing to add.

Windham JA: I also agree.

Appeal allowed Judgment and decree of the High Court set aside. Declaration that land is public land.

For the appellants:
Grimble & Co. and *G. Kaderbhoy, Ali & Patel*, Dar-es-Salaam
A. S. Grimble and Baloo Patel

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

Kanji Naranji Lakhani v Salim Mohamed Bin Name
[1960] 1 EA 358 (HCU)

Division:	HM High Court of Uganda at Jinja
Date of ruling:	28 April 1960
Case Number:	26/1956
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Infant – Capacity to contract – Claim against Mohamedan youth for goods other than necessaries sold in Uganda – Age of majority – Whether youth an infant – Whether Mohamedan law as to majority applies – Bills of Exchange Ordinance (*Cap.* 217), *s.* 22(1) *and s.* 89 (*U.*) *– Indian Contract Act*, 1872, *s.* 11.

[2] Domicil – Domicil of origin in Arabia – Residence in Uganda – Intention formed to stay permanently in Uganda – Whether evidence sufficient to establish acquisition of domicil of choice.

Editor's Summary

The plaintiff sued for trade goods sold to the defendant, a Mohamedan, in December, 1955, and for promissory notes then made by the defendant. The defendant's case was that he was at the material time an infant and that although his domicil of origin was Quaiti, he had resided in Uganda for some years and had acquired a domicil of choice in Uganda and accordingly his capacity to contract was not governed by Mohamedan law but by the law of Uganda. There was meagre evidence that at the material time the defendant was sixteen years whereas according to the plaintiff the defendant was eighteen or nineteen.

Held –

(i) the meagre evidence advanced by the defendant was insufficient to satisfy the court that he was at the material time under eighteen.

(ii) the presumption of law is always against a change of domicil and there was not sufficient evidence to outweigh that presumption; accordingly the defendant was domiciled in Quaiti at the material time and by Mohamedan law he was competent to contract, and the defence of infancy was not open to him.

Judgment for the plaintiff.

Case referred to:

(1) *P. B. Damani v. S. A. Zangie* (1948), 6 U.L.R. 179.

Judgment

Sir Audley Mckisack CJ: The plaintiff claims for trade goods sold to the defendant in December, 1955, and for promissory notes dated December 24, 1955, which were dishonoured. The only defence is that at the time of making the promissory notes, and of contracting the debt for the trade goods, the defendant was an infant.

The defendant has not been able to produce any very precise evidence as to his age. He himself says he does not know when he was born or what age he was when he came to join his father in Uganda from his home in Arabia in 1947. He says that he married in 1956, and has three children by that marriage. The defendant's father has returned to his home in Arabia and did not give evidence. The only witness apart from the defendant himself was a friend of the defendant's father, who gave rather unconvincing evidence to the effect that he does not remember what year the defendant came to Uganda, but does remember that he was eight years old at the time. Mr. Hunt, for the defendant,

also relied on a trading licence issued to the defendant on September 14, 1954, which is endorsed with the words "under eighteen years of age". The printed footnote on this licence requires the licensing officer, in the case of a licensee aged under eighteen years, to state the fact on the licence. If the evidence of the defendant's father's friend is to be relied on, defendant would have been only fifteen years old when the licence was issued. The plaintiff put in two subsequent trading licences issued to the defendant in 1955 and 1956 respectively, neither of which bears any note as to the defendant's age. If these licences are to be relied on as evidence of age, it would appear that the defendant had attained the age of eighteen years between September 14, 1954, and January 21, 1955 (the date of issue of the 1955 licence).

According to this very meagre evidence, therefore, the defendant's age at the material time – December, 1955 – was, according to the defendant, sixteen years and, according to the plaintiff, eighteen or nineteen years. Thus, according to either version, he was still under the age of twenty-one years at the time he made the promissory notes and contracted the debt for trade goods.

But the matter does not end there. The question of domicil has been raised, and for the plaintiff it is contended that the defendant's domicil is in Quaiti State in Hadhramaut, Arabia, where he was born. For the defendant it is said that, although the defendant's domicil of origin was Quaiti, he has changed his domicil to Uganda. The importance of the question of domicil is that the answer determines the age at which the defendant acquired the capacity to contract.

It is not disputed that the debt contracted by the defendant was for goods other than necessaries, so that, if the defendant is subject to the English common law, he is not liable for the debt. As to the promissory notes, s. 22 (1) of the Bills of Exchange Ordinance (Cap. 217) provides that

> "capacity to incur liability as a party to a bill is co-extensive with capacity to contract";

and this provision also applies to promissory notes, by virtue of s. 89 of the same Ordinance. The reference to "capacity to contract" throws us back on s. 11 of the Indian Contract Act (which is in force in Uganda); that section is as follows:

> "Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

In *P.B. Damani v. S.A. Zangie* (1) (1948), 6 U.L.R. 179, Ainley, J., dealt with the question of the law to which a person is subject in relation to the capacity to contract. Construing s. 11 of the Indian Contract Act he came to the conclusion that

> "the section has been framed upon the basis that there are a variety of ages of majority to be considered, that capacity to contract varies with the particular age of majority applicable to particular persons";

and he added

> "I think that sense cannot be made of the section unless regard is had to the personal law or lex domicilii of the contracting parties".

It was proved by the defendant's witness that Mohamedan law is in force in Quaiti, though it was not shown to which of the schools of Mohamedan law the defendant belonged. According to the text-books, the minority of a person under that law terminates when he or she attains puberty. And among the Hanafis and the Shias puberty is presumed on the completion of the fifteenth

year; among the Malikis on the completion of the eighteenth year. Any person who has attained puberty is entitled to act in all matters affecting his or her status, or his or her property. These rules of Mohamedan law are as stated in Mulla's Principles of Mohamedan Law (13th Edn.) at p. 294; Vesey-Fitzgerald's Mohamedan Law (1931 Edn.) at p. 103; and Syed Ameer's Mohamedan Law (5th Edn.) at p.535.

If, therefore, the defendant was, as is contended on his behalf, no more than sixteen years old when he contracted the obligations which are the subject of this suit, he nevertheless had the necessary contractual capacity if he was subject to Mohamedan law – or, at any rate, if he belonged to the Hanafi or Shia school (and it has not been shown that he does not). If, as the plaintiff contends, the defendant had attained eighteen years before January 29, 1955, then he had contractual capacity according to all three schools of Mohamedan law, and on the very meagre evidence adduced the defendant has failed to satisfy me that he is any younger than that.

The next question is whether he was still subject to Mohamedan law in December, 1955, when he became indebted to the plaintiff.

In the instant case the evidence clearly shows that the domicil of origin of the defendant was in Quaiti. Consequently, if that domicil has not been changed he is subject to the Mohamedan law relating to the age of majority. The defendant's evidence was that, when his father returned in 1951 to live permanently in Quaiti, he (the defendant) remained in Uganda; that he has never gone back to Quaiti; that he resides and is employed in Uganda, and that he intends to stay permanently in Uganda, where he has married. On that evidence Mr. Hunt asks me to say that there has been an abandonment of the Quaiti domicil and that Uganda has become the defendant's domicil of choice. But for the purpose of the present case I am concerned with the question whether he had acquired a Uganda domicil in December, 1955 (when he contracted the obligations to the plaintiff), and not with any question of change of domicil after that date. If he has acquired a Uganda domicil subsequently to December, 1955, that means that in December, 1955, he still had his domicil of origin and was still subject to the Mohamedan law of majority. Now in December, 1955, he was, as I have said, at the most, nineteen years old, and he had not yet married. Having attained his majority according to Mohamedan law he would, I think, be capable in law of acquiring a domicil of choice. His evidence is that he resides in Uganda with his wife and family, that he works there and that he intends to remain there permanently. But he has not said in his evidence at what stage he made the decision to live permanently in Uganda, and I am not satisfied that, if he has made that choice at all, he had made it as early as December, 1955. The presumption of law is always against a change of domicil, and I am left unsatisfied that there is sufficient evidence to outweigh that presumption. Apart from the fact that he works and resides in Uganda there is no independent evidence to support the declaration of his intention. Indeed, I think it unlikely that, at any rate before he had married in Uganda, the defendant would have arrived at any settled intention of changing his domicil at so early an age.

In the result, therefore, I find that at the time he contracted the obligations to the plaintiff the defendant was subject to Mohamedan law, and, having attained his majority, he was (in the words of s. 11 of the Indian Contract Act) "competent to contract". Accordingly, the defence of infancy fails and, as there is no other line of defence, there will be judgment for the plaintiff for Shs. 5,568/-, with costs, as prayed.

Judgment for the plaintiff.

For the plaintiff:
Patel & Shah, Jinja
J. M. Shah

For the defendant:
Wilkinson & Hunt, Kampala
R. E. Hunt

Govindji Popatlal v Nathoo Visandjee

[1960] 1 EA 361 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	10 June 1960
Case Number:	41/1959
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Mayers, J.

[1] Mortgage – Enforcement of security – Action against transferee of equity of redemption – Whether original borrowers must be parties to action – Whether witnesses to attestation of charge by borrowers must give evidence proving execution – Indian Transfer of Property Act, 1882, *s.* 85 – *Indian Evidence Act*, 1872, *s.* 68 – *Registration of Titles Ordinance* (*Cap*. 160), *s.* 1, *s.* 23, *s.* 32, *s.* 46, *s.* 58 (*K*.) – *Indian Acts* (*Amendment*) *Ordinance* (*Cap.* 2), *s.* 2 (*K*.).

Editor's Summary

In 1953 the registered owners of a property each of whom held an undivided one third share therein borrowed Shs. 200,000/- from the respondent on the security of a registered charge. Between 1954 and 1956 all these shares were acquired by the appellant who became the sole registered owner subject to the charge. In 1957 the respondent sued the appellant for enforcement of the charge alleging default in insurance of the property and payment of interest, and claiming an account, payment of the amount thereby found due and sale of the property in default. The trial judge accepted that there had been default as alleged and granted the respondent the relief prayed. On appeal the arguments of the appellant were that the respondent had not complied at the trial with s. 68 of the Indian Evidence Act 1872, that the action was not maintainable in the absence as parties of the original borrowers who gave the charge, that there was no allegation in the plaint that the original mortgagors had defaulted nor was there any privity between the respondent and himself to provide a cause of action as the suit was framed and that the trial judge had erred in holding that the original borrowers had at the material times no interest in the property.

Held –

(i) the joint effect of s. 1 (2), s. 23 and s. 32 of Registration of Titles Ordinance was to override s. 68 of the Indian Evidence Act, 1872 and whilst registration did not afford irrebutable proof of due execution, it raised a presumption thereof which could only be rebutted by pleading and proving lack of due execution.

(ii) since the respondent had abandoned any claim founded upon the personal covenants and had proceeded solely by way of enforcing his security, and since upon the assignment of their respective shares in the property the original mortgagors had parted with the only interest they had retained, namely, the equity of redemption, the argument of the appellant that the original mortgagors should have been joined as defendants was irrelevant. Dictum of Stirling, J., in *Kinnaird v. Trollope* (1888), 39 Ch. D. 636 at p. 642 adopted.

(iii) although the plaint had not specifically alleged that no-one had paid interest or effected the insurance, but only that the appellant had failed to do so, it was implicit in the plaint that no-one had done so since otherwise the respondent would have had no cause of action; in any event the defence had not taken these points and the respondent's evidence thereon had not been challenged.

Appeal dismissed.

Cases referred to in judgment:

(1) *Ponnammal v. Kalithitha*, 13 M.L.J. 143.

(2) *Baijnath Singh v. Brijraj Kuer* (1922), A.I.R. Pat. 514.

(3) *In re Errington*, [1894] 1 Q.B. 11.

(4) *Kinnaird v. Trollope* (1888), 39 Ch.D. 636.

The following judgments were read:

Judgment

Windham JA: The respondent successfully sued the appellant in the Supreme Court of Kenya for the enforcement of a legal charge dated October 10, 1953, hereinafter referred to as "the charge", over a plot of land, hereinafter called the "suit property", the charge being by way of security for the repayment of Shs. 200,000/- (together with interest) lent by the respondent to the then registered owners of the suit property, hereinafter referred to as the "original mortgagors". The three mortgagors each held a one-third undivided share in the suit property. Between 1954 and 1956 the shares of all the original mortgagors in the suit property came, by registered transfers, into the ownership of the appellant, who thus became sole owner of the property, subject to the charge.

The plaint, after alleging default on the appellant's part in the payment of interest and in complying with obligations to insure, as stipulated in the charge, sought the usual relief upon a mortgage suit, namely the taking of an account, the payment by the appellant, within a time to be fixed, of the amount found due to the respondent upon the taking of the account, and in default the sale of the suit property. The plaint also contained the usual prayer for a personal decree against the appellant for any balance remaining due to the respondent over and above the net proceeds of sale; but this prayer for a personal decree was abandoned by learned counsel for the respondent at the outset of the hearing.

The written statement of defence was rightly castigated by the learned trial judge as being drafted

> "in terms so vague that . . . it appears to me by no means unlikely that had steps been taken to strike out the defence as embarrassing most, if not all of it, would have been so struck out."

In it, default on the covenants in the charge was not specifically denied, but the validity of the charge was challenged in general terms, the appellant pleading that

> "he does not admit that the so-called 'legal' charge is legal or valid or conforms to the requirements of the law so as to create the security . . ."

The appellant's liability to the respondent was denied in terms equally evasive.

The findings of fact of the learned trial judge which supported his granting of the relief sought by the respondent are contained in the following passage from his judgment:

> "The charge was tendered in evidence as exhibit 1. Clause 8 of exhibit 1 in substance provides that the principal sum of Shs. 200,000/- together with interest thereon, shall become payable 'in the event of the borrowers' (a term which is by the preamble expressed to include their heirs' executors, administrators and assigns) 'making default in the payment of interest or outgoings'. In the absence of any evidence to the contrary, I have no hesitation in accepting that of the plaintiff, that the defendant through his then advocate in

fact paid interest upon the loan up to the year 1956 but has subsequent thereto failed to pay any interest and that in contravention

> of a provision contained in cl. 3 of the charge the defendant has failed to keep the building upon the suit premises insured against loss or damage by fire."

The appellant, through his advocate, did not deny his failure to comply with the covenants in the charge, as distinct from his liability to comply with them. But his advocate raised a number of legal arguments to show that the charge was invalid or that the suit was not maintainable. None of these contentions were acceded to by the learned trial judge, and some of them have been abandoned upon appeal. With the latter I will not deal. To the contentions which have not been abandoned, and which are embodied in the memorandum of appeal, appellant's counsel has, by leave reluctantly granted by this court, added a fresh ground of appeal, namely that:

> "the respondent has . . . failed to prove his case, by non-compliance with the mandatory requirements of s. 68 et seq. of the Indian Evidence Act, and omitting to prove the execution or attestation of the material instrument or instruments of charge, whereon his claim in the suit was founded."

This contention was not raised specifically in the court below, although it does fall within the general terms of one of the issues which were there framed by the court, namely:

> "Is the document of charge relied on by the plaintiff validly executed and registered?"

The learned trial judge's finding on this issue, at the conclusion of his judgment, was "Yes". It is contended for the appellant that, while this answer was right as regards the registration, it was wrong as regards the execution. Neither the execution nor the attestation was admitted by the appellant on pleadings or in evidence.

The remaining grounds of appeal are in the following terms:

> "1. The learned trial judge erred in law in holding that the respondent's suit as framed and filed was competent or maintainable in the complete absence as a party, of the original borrowers, who were the contracting parties to the charge (sued on, being exhibit 1 in the suit), and against whom only the respondent could have had any cause of action based on any of the alleged breaches of the terms or conditions thereof agreed thereby to be performed and observed by them and them alone; and he should therefore not have ordered accounts to be taken, in their absence, between the respondent and the appellant against whom latter no personal decree could be passed in law.
>
> "2. The learned trial judge overlooked the fact that any payment by the appellant to the respondent could only have been made for the protection of the charged property, but the same did not raise any such privity between them as would accelerate the respondent's right to claim or enforce the payment before the 31st day of October, 1957, fixed by the instrument of the charge, on account of the alleged non-performance by the appellant of the conditions of the contract of charge relating to insurance and interest.
>
> "3. The learned trial judge erred in holding that the aforesaid original borrowers had at the material times to the suit no interest in the charged property and that therefore they were not necessary parties to the action under s. 85 of the Transfer of Property Act – since the original borrowers on account of their personal covenant to repay the principal amount with interest when legally due, had a right to redeem the charged property and should, as such, have been joined as defendants to the suit – for their non-joinder was a denial of natural justice and fatal to the suit."

I will consider first the ground of appeal added by leave of this court. It is founded on the requirements of s. 68 of the Indian Evidence Act, which reads as follows:

> "68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."

A proviso to s. 68, which excepts from its operation registered documents (other than wills) unless their due execution has been specifically denied, and which would thus have afforded a complete answer to the respondent's submission was added by the Indian legislature in 1926; but the text of the Indian Evidence Act operative in Kenya being the text as it stood in 1907 (vide s. 2 of the Indian Acts (Amendments) Ordinance, Cap. 2), that proviso has no application.

The following facts, relevant to the submission with which I am dealing, are now common ground:

(*a*) the charge is "a document required by law to be attested" by virtue of the requirements of s. 58 of the Registration of Titles Ordinance (Cap. 160) because it is one which requires to be registered by virtue of s. 46 of that Ordinance;

(*b*) it was duly registered in the manner provided in s. 46;

(*c*) it appears on the face of it to have been executed by the parties to it, and their signatures appear to have been attested by two witnesses, one of whom is described as a Nairobi advocate, who as such would be a person competent to attest under s. 58 (1);

(*d*) neither of the attesting witnesses was called for the purpose of proving the execution, as required by s. 68 of the Indian Evidence Act;

(*e*) no evidence was adduced by either side as to whether either of the attesting witnesses was still "alive, and subject to the process of the court and capable of giving evidence".

On these facts I would incline with some hesitation to hold that, but for the operation of certain further provisions of the Registration of Titles Ordinance to which I will presently refer, the charge, upon which the respondent's case was entirely founded, would have been inadmissible in evidence by reason of neither attesting witness having been called as required by s. 68 of the Indian Evidence Act. The requirements of the section are mandatory, and "cannot be relaxed except in circumstances provided for in the Act itself": vide Sarkar on Evidence, (10th Edn.), at p. 593, and the Indian decisions there cited. Even on this point, however, the Indian authorities (as so often) are in conflict; and at least one case, *Ponnammal v. Kalithitha* (1), 13 M.L.J. 143, decided in 1903 before the enactment of the proviso of 1926 to which I have earlier referred and which relaxed the strict rule, favours the respondent. In that case, where a mortgage document had been tendered in evidence and an attesting witness was not called to prove execution as required by s. 68, it was held that since no objection had been taken on that score in the court below, it must be taken to have been waived, and the objection could not be taken on appeal. And see also, in support of this same proposition, *Baijnath Singh v. Brijraj Kuer* (2) (1922), A.I.R. Pat. 514, at pp. 523 – 4.

But, quite apart from the lack of unanimity in the Indian decisions, I would add a further qualification to the strict interpretation of s. 68 in the majority of those decisions; namely that the requirements of that section, which relate only to mode of proof, may be overridden by specific and conflicting provisions of substantive law contained in some other enactment. And I here refer particularly to those of s. 1 (2), s. 23 and s. 32 of the Registration of Titles Ordinance.

Section 1 (2) lays down that:

> "Except so far as is expressly enacted to the contrary, no Ordinance in so far as it is inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance".

There is no such express provision in the Indian Evidence Act (as applied to Kenya) to the contrary; and the Registration of Titles Ordinance is moreover the later of the two enactments. Therefore, in the event of any inconsistency, the provisions of the latter Ordinance will prevail. In relation to the present case there are such inconsistencies between s. 68 of the Indian Evidence Act on the one hand and s. 23 and s. 32 of the Registration of Titles Ordinance on the other.

Section 23 of that Ordinance provides:

> "23. The duplicate certificate of title issued by the registrar to any purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of such proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party. And a certified copy of any registered instrument, signed by the registrar, and sealed with his seal of office, shall be received in evidence in the same manner as the original."

In the present case the original of the charge, and a certificate of title endorsed with a memorial of the charge, both signed by the registrar and sealed with his seal of office, were duly produced in evidence. Section 32 of the same Ordinance provides:

> "32. No instrument, until registered in manner hereinbefore described, shall be effectual to pass any land or any interest therein, or render such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed the land specified in such instrument shall pass, or, as the case may be, shall become liable as security in manner and subject to the agreements, conditions and contingencies set forth and specified in such instrument, or by this Ordinance declared to be implied in instruments of a like nature."

The effect of these two sections of the Registration of Titles Ordinance, as I see it, is that, subject to the provisions regarding the rectifications or setting aside of registration contained in Parts XIII and XIV of the Ordinance, and to the exception of fraud or misrepresentation as set out in s. 23 itself, the registration under the Ordinance of a mortgage or charge on land, if duly proved, shall be accepted by the courts as conclusive of the validity of the document effecting it, including that which is a pre-requisite of its validity, namely its due execution; and such proof of execution dispenses, to my mind, with the conflicting and more general requirements regarding proof of execution of certain documents laid down by s. 68 of the Indian Evidence Act. While registration does not afford irrebutable proof of due execution, it raises a presumption which can only be rebutted if lack of due execution is specifically pleaded and proved within the framework of the Ordinance. Any other conclusion would violate the general principle of the sanctity of the register, which is the foundation of all legislation based, as the Registration of Titles Ordinance is, upon the Torrens system of registration. For these reasons this ground of appeal must in my opinion fail.

I turn now to the remaining grounds of appeal. Of these, the point most strenuously argued, both here and in the court below, and which is covered by para. 1 and para. 3 of the memorandum of appeal, was that the suit was misconceived because the original mortgagors were not joined as defendants. Counsel for the appellant relied on the requirement in s. 85 of the Indian Transfer of Property Act, 1882, (as applied to Kenya) that in a mortgage suit all persons "having an interest in the land the subject of the mortgage" are necessary parties. He contended that the original mortgagors retained such an interest. He also pointed to the fact that the privity of contract lay between the respondent and the mortgagors, and not between the respondent and the appellant, and to the trite rule of law that, in general, a person cannot sue, upon a contract, one who is not privy to it. This might have been a relevant proposition if the respondent had been suing not only on the charge but on the personal covenants contained in it, liability upon which, as learned counsel for the respondent rightly conceded on the authority of such cases as *In re Errington* (3), [1894] 1 Q.B. 11, did not pass to the appellant when the mortgaged property came into his ownership but remained with the original mortgagors. But, as we have seen, the claim on the personal covenants was dropped, and the respondent proceeded solely by way of enforcing his security against the suit property. The point therefore loses all relevance. Upon the assignment of their respective shares in the suit property the mortgagors parted with the only interest which they had until then retained in the "land the subject of the mortgage", namely their equity of redemption. The legal position, which would seem to afford the answer also to the rather obscurely worded ground 2 of the memorandum of appeal, is stated succinctly in the judgment of Sterling, J., in *Kinnaird v. Trollope* (4) (1888), 39 Ch.D. 636, at p. 642, in the following words:

> "I have now to inquire how the law stands where the mortgagor has parted with his interest in the mortgaged property. If, for example, the mortgagor has assigned absolutely his equity of redemption in the mortgaged property it was conceded in argument that so long as the mortgagee abstained from suing, [sc: the mortgagor] the mortgagor cannot bring an action to redeem; and, further, that if the mortgagee chooses to assert his right to foreclose, the mortgagor is not a necessary party to the foreclosure action."

Counsel for the appellant has drawn our attention, however, to a defect in the plaint, in that it contains no specific allegation that the original mortgagors have defaulted on their covenants to pay interest and to insure the suit property, but only an allegation that the appellant has defaulted. Since the obligation under those personal covenants remains that of the original mortgagors, and since only upon a failure by anyone to fulfil them does the respondent's cause of action on the charge arise, it is contended that default merely on the appellant's part cannot be a basis for the suit as framed, and that the respondent is estopped from averring that the original mortgagors are not necessary parties to the action, or that the respondents were not really being sued on the contract. With regard to this, I would hold as follows. First, although there is no specific allegation in the plaint that the interest has not been paid, nor the insurance effected, by anyone, but only that the appellant has failed to pay or effect them, the allegation is implicit in the plaint, read as a whole, that they have not been paid or effected at all, whether by the respondent or the original borrowers; for if they had been paid and effected by the latter, the respondent could not and would not have sued to enforce the charge at all. Secondly, failure to plead default on the original borrowers' part was not specifically raised in the written statement of defence as a ground for the dismissal of the suit. If it had been, the plaint might have been amended to that end, and the true issue between the parties, already implicit, made explicit. Nor, in answer to the plaints allegation

of failure by the appellant to pay interest or effect insurance, did the statement of defence allege or suggest that these had been paid or effected by anyone else. It merely did not admit liability on the appellant's part. This court will not allow a party to take advantage of the results of the evasiveness of his own pleadings in such a way. Lastly, the respondent in evidence, upon which he was not cross-examined, stated that on the date of filing the suit there was owing to him the said arrears of interest and the amount of the insurance premium which he had had to pay himself, thereby establishing that there had been no payment by anyone, and bringing cl. 8 of the charge into operation. This point accordingly fails.

For these reasons I would dismiss this appeal with costs. I do not, however, think that the case is of such difficulty or complexity as to justify the engagement of two counsel by the respondent, and I would therefore decline to grant a certificate for the costs of two counsel.

Sir Alastair Forbes VP: I agree, and have nothing to add. There will be an order in the terms proposed by the learned justice of appeal.

Gould JA: I also agree.

Appeal dismissed.

For the appellant:
G. R. Mandavia, Nairobi

For the respondent:
Johar & Winayak, Nairobi
J. M. Nazareth, Q.C. and *J.K. Winayak*

Haji Ibrahim Mutyaba v Arthur Asaph Kalanzi
[1960] 1 EA 367 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	25 April 1960
Case Number:	195/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Jurisdiction – Native court – Action begun in High Court alleging negligence – Both parties Africans – Application for transfer of action to Principal Court of Buganda – Whether Principal Court has jurisdiction – Buganda Courts Ordinance (*Cap.* 77), *s.* 2, *s.* 7 *and s.* 9 (*U.*).

Editor's Summary

The plaintiff filed a plaint in the High Court claiming damages from the defendant for negligent driving. The defendant applied for transfer of the suit to the Principal Court of Buganda. The application was opposed by the plaintiff on the ground that the action was taken under the English common law and therefore excluded from the jurisdiction of the Principal Court by s. 9 of the Buganda Courts Ordinance.

Held –

(i) although the plaintiff's advocate had framed his plaint as a common law action for negligence, it was not thereby a proceeding taken under common law for the purposes of the Buganda Courts Ordinance, the parties being persons subject to the jurisdiction of the Buganda courts, and the cause of action being known to Buganda customary law as well as to the common law.

(ii) section 7 of the Buganda Courts Ordinance applied and it was mandatory to transfer the case for trial to a Buganda court.

Order for transfer of suit to the Principal Court.

Cases referred to in judgment:

(1) *E. K. Muwanga v. R. Mukuta* (1957), Buganda Customary Law Reports 97.

(2) *Fabiano Bukenya v. David Mukebi*, [1959] E.A. 366 (U.).

(3) *Mugwanya v. A. Tamali*, Uganda High Court Civil Case No. 42 of 1957 (unreported).

(4) *E. Wamala v. A. Musoke*, Uganda High Court Civil Case No. 203 of 1957 (unreported).

Judgment

Sir Audley McKisack CJ: This is an application by the defendant for the transfer to the Principal Court of Buganda of a suit filed in the High Court of Uganda. The application is opposed on the ground that the Principal Court would have no jurisdiction to hear this suit because it is a claim for damages based on negligence, and is consequently a claim founded on the common law of England.

The respondent does not dispute that both parties to the suit are persons subject to the jurisdiction of the Principal Court, being "Africans", as defined by s. 2 of the Buganda Courts Ordinance (Cap. 77). Nor is it disputed that the subject matter of the case, which is a claim for damage to the plaintiff's motorcar arising out of the allegedly negligent driving of the defendant, is of a kind which has been before the Principal Court on a previous occasion: see *E. K. Muwanga v. R. Mukuta* (1) (1957), Buganda Customary Law Reports 97. But it is said for the respondent that this is a case taken under the English common law and therefore excluded from the jurisdiction of the Principal Court by reason of s. 9 of the Buganda Courts Ordinance. The relevant part of that section is:

> "Subject to any express provision to the contrary, no court shall have jurisdiction in any proceedings –
>
>
>
> "(*c*) taken under any Ordinance or any English or Indian law in force in the Protectorate unless such court has been authorised to administer or enforce such Ordinance or law by the terms of an Ordinance or under s. 12 of this Ordinance."

The respondent says that this case is "taken under" the English common law. He further says – quite correctly – that the Principal Court has never been empowered to administer the English common law; consequently, he argues, the instant suit is excluded from the jurisdiction of the Principal Court.

The question whether the words "any English law in force in the Protectorate", which occur in the passage I have cited from s. 9 of the Buganda Courts Ordinance, cover the English common law as well as any English statutes has not, so far as I am aware, been expressly considered hitherto, but in *Fabiano Bukenya v. David Mukebi* (2), [1959] E.A. 366 (U.), Lewis, J., referred to the common law when considering the meaning of s. 9 (*c*) of the Ordinance in relation to a claim in contract; he observed:

> "Under what circumstances is a plaintiff justified in saying that the proceedings are 'taken under' this or that Ordinance or English common law?".

From this it appears that Lewis, J., took the view that "any English law" would include the common law and was not confined to statutory law. I am certainly of the same opinion, since the common law has been expressly declared to be

in force in the Protectorate by the Uganda Order in Council, 1902, art. 15 (2).

But the fact that the plaintiff, in framing his plaint, had in mind a common law cause of action is not an end of the matter. Section 7 of the Buganda Courts Ordinance provides that:

> "Where any proceedings of a civil or criminal nature which a court has jurisdiction to try are commenced in a subordinate court or the High Court they shall be transferred for hearing to a court having jurisdiction".

I have omitted the proviso to this section, since it is not material to the present case. The term "court" in the expression "a court having jurisdiction" means a Buganda court (see the definition of "court" in s. 2). The respondent's argument in the instant case ignores the decisions of this court in which it has been held that, where Buganda customary law provides a remedy, a suit filed in the High Court must be transferred to the Principal Court (provided the parties are Africans). In *Mugwanya v. A. Tamali* (3), Uganda High Court Civil Case No. 42 of 1957 (unreported), it was held that defamation was known to customary law, and consequently a suit for libel filed in the High Court had to be transferred to a Buganda court. And in *E. Wamala v. A. Musoke* (4), Uganda High Court Civil Case No. 203 of 1957 (unreported), Bennett, J., held that malicious prosecution was a wrong for which customary law provided a remedy and, consequently, the suit was within the jurisdiction of the Principal Court and must be transferred to that court. He said:

> "This is not a proceeding taken under any Ordinance or any English or Indian law in force in the Protectorate, since whether the case is tried in this court or in the Principal Court, the court of trial must be guided by native law having regard to s. 20 of the Uganda Order in Council, 1902."

If the principles of those previous decisions are applied to the instant case, the result is that, although the plaintiff's advocate framed his plaint as a common law action for negligence, this does not constitute it a proceeding taken under the common law for the purposes of the Buganda Courts Ordinance, the parties being persons subject to the jurisdiction of the Buganda courts, and the cause of action being known to Buganda customary law as well as to the common law. Consequently s. 7 of the Buganda Courts Ordinance applies, and it is mandatory to transfer the case for trial to a Buganda court. It would be otherwise if this were a case founded on a cause of action known to the common law but unknown to customary law, since it would then come within s. 9 (*c*) of the Ordinance and be excluded from the jurisdiction of the Buganda courts.

Another ground on which the respondent based his objection to this application was that of expediency, but it cannot avail him in the face of the express provisions of s. 7 of the Buganda Courts Ordinance. He argued that cases arising out of motor accidents are of a kind that can more appropriately be tried in the High Court than in the Principal Court, since advocates are not allowed to appear in the Principal Court. Consequently, parties to a motor accident case – and insurance companies which stand behind them – are handicapped in the presentation of their cases. That may be so, but there is nothing in the Buganda Courts Ordinance which deprives a Buganda court of jurisdiction merely on the ground that it is a less suitable forum for certain kinds of cases than a British court.

The application for transfer to the Principal Court is accordingly granted. The respondent will pay the applicant's costs.

Order for transfer of suit to the Principal Court.

For the plaintiff:
Singh & Treon, Kampala

Gurdial Singh

For the defendant:
J. A. Patel, Kampala

W J Tame Ltd v Zagoritis Estates Ltd
[1960] 1 EA 370 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	17 June 1960
Case Number:	17/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Spry, Ag.J.

[1] Arbitration – Award – Setting aside award – Error of law on face of award – Question of law submitted to arbitration – Whether question solely one of law – Mistake as to territorial law applicable – Whether error is one of construction of clause in arbitration agreement – Whether error justifies setting aside award – Arbitration Ordinance (*Cap.* 15) (*T.*).

Editor's Summary

This appeal arose from an action concerning the arbitration agreement referred to in *Zagoritis Estates Ltd. v. W. J. Tame Ltd.*, [1960] E.A. 384 (C.A.). The appellant petitioned the High Court for the award filed by the respondent to be set aside on the ground that there was an error of law on the face of the award. The judge held that although there was such an error he could not set aside the award since the error was on a point of law specifically referred to the arbitrators and on that account the court had no power to set aside the award. On appeal it was argued inter alia that in the instant case the question referred to the arbitrators was not a specific question of law but involved findings of fact.

Held –

(i) having regard to the terms of the reference as a whole, the question submitted to the arbitrators was by its terms a question of law and if that were the only question in issue, the decision of the judge was correct.

(ii) however, on a true construction of the arbitration agreement the question stated to have been referred to a legal adviser never arose and ought not to have been referred; a mistake as to the territorial law applicable is such an error of law as will justify the court in setting aside the award.

(iii) (Per Gould, J.A.), the arbitrators went outside the terms of the submission and made a fundamental error in answering (wrongly) a question, whether one of law or of mixed law and fact, which was not referred to them at all; i.e. whether the law of Kenya or Tanganyika applied.

Appeal allowed. Award set aside in respect of the rail claim.

[**Editorial Note:** See also [1960] E.A. 194 (T.).]

Cases referred to in judgment:

(1) *Zagoritis Estates Ltd. v. W. J. Tame Ltd.*, [1960] E.A. 384 (C.A.).

(2) *Absalom Ltd. v. Great Western Garden Village Society Ltd*., [1933] A.C. 592.

(3) *Re King and Duveen*, [1913] 2 K.B. 32.

(4) *Kelantan Government v. Duff Development Co. Ltd*., [1923] A.C. 395.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from an order of the High Court of Tanganyika refusing to set aside under s. 15 of the Arbitration Ordinance (Cap. 15) an arbitration award filed in that court. An appeal (Civil Appeal No. 105 of 1959) against an order of the High Court allowing the award

to be filed was argued at the same time. The facts leading up to the appeals are stated in my judgment in *Zagoritis Estates Ltd. v. W. J. Tame Ltd*. (1), [1960] E.A. 384 (C.A.), and I will not set them out again. In my judgment in that appeal I expressed the view that upon a true construction of the arbitration agreement between the parties, notwithstanding the fact that the arbitrators were resident in Kenya and the arbitration award was made in Kenya, the intention of the parties was that Tanganyika law and procedure were to govern the submission, and that the award was properly filed in Tanganyika.

In that judgment also I referred to counsel's opinion obtained and relied on by the arbitrators for their decision that a claim arising out of the sale agreement between the parties in respect of a deficiency of railway line of the value of £5,280 was not time-barred; the basis of the opinion being that the Kenya law of limitation applied and not the Tanganyika law. In the instant case the learned judge of the High Court reached the conclusion that counsel's opinion on this matter was wrong. For the reasons given in my judgment in *Zagoritis Estates Ltd. v. W. J. Tame Ltd*. (1) I agree with that conclusion. The learned judge, however, held that, though there was an error of law on the face of the award, he could not set the award aside since the error was on a point of law specifically referred to the arbitrators and the court had no power on that account to set aside the award. It is the correctness of this decision which is challenged on this appeal.

The learned judge was also asked to set aside the award on the grounds:

(i) that the award was bad as being out of time; and

(ii) that the arbitrators misconducted themselves in referring to an advocate the question whether the law of Kenya or Tanganyika on the limitation of actions should be applied and in accepting his advice.

On these two points the learned judge held:

(*a*) that the time for making the award was, or must be deemed to have been, extended by the parties and that the award is therefore not bad for lack of jurisdiction;

(*b*) that the arbitrators were not guilty of misconduct in referring to and accepting the advice of counsel.

The memorandum of appeal contains grounds challenging the correctness of these conclusions, but these grounds were abandoned at the hearing by Mr. Slade, who appeared for the appellant. The only grounds he relied on were ground 7 and ground 8 which read as follows:

"7. The learned acting judge erred in law and in fact in not setting aside the award after holding that there is an error of law on the face of the award.

"8. The learned acting judge erred in law and in fact in not following the principle laid down and upheld in the case of '*British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railway Co. of London Ltd*, [1912] A.C. 673'."

Mr. Dodd, for the respondent, argued that there was not an error of law on the face of the award but, as I have already indicated, I agree with the learned judge of the High Court that there is such an error. Counsel's opinion, on which the arbitrators relied, was made part of the award, and as I have said, I think, with respect, that that opinion is wrong.

There is no doubt that an arbitration award can be set aside by the court if an error of law appears on the face of the award (*Absalom Ltd. v. Great Western Garden Village Society Ltd*. (2), [1933] A.C. 592). There is, however, an exception to this rule, and that is where the parties have specifically referred

a question of law to arbitration (*Re King and Duveen*, (3) [1913] 2 K.B. 32; *Absalom Ltd. v. Great Western Garden village Society Ltd*. (2) and the learned judge held that this exception applied in the instant case. Mr. Slade has argued, however, that there is an "exception to the exception", that is, that the rule does not apply where the question referred is not a specific question of law, though it may be one which involves the decision of a point of law; he relied on the judgment of Lord Wright in *Absalom Ltd. v. Great Western Garden Village Society Ltd*. (2) and argued that the instant case was one where the question referred was not a specific question of law but involved findings of fact. Mr. Dodd does not, I think, dispute the proposition that the court can set aside an award for an error of law appearing on its face in a case where the question submitted is not a specific question of law as such; but he argues that the specific question referred here was a question of law.

The question referred was, in relation to a claim in respect of an alleged deficiency in the length of rails handed over under the sale agreement between the parties:

> "8. Is the claim, if any, barred by limitation?"

I confess I find the question whether this is a reference of a specific question of law difficult to answer. It is true that, as argued by Mr. Slade, the answer must depend on certain facts, and there is nothing to indicate whether those facts were admitted, or self-evident, or had to be found by the arbitrators. On the whole, however, I am inclined to the view, having regard to the terms of the reference as a whole, that the question is by its terms a question of law, and that therefore, if that were the only question, the decision of the learned judge of the High Court ought not to be disturbed.

However, I do not think that this concludes the matter. Mr. Slade argued that even if this were so the matter fell within the principle stated by Lord Cave in *Kelantan Government v. Duff Development Co*. (4), [1923] A.C. 395 at p. 409. Lord Cave said:

> "No doubt an award may be set aside for an error of law appearing on the face of it: and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the court only because the court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally – for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is an error in law which may be ground for setting aside the award; but the mere dissent of the court from the arbitrator's conclusion on construction is not enough for that purpose."

In the instant case the award states, in the answer to question 8 set out above:

> "8. We are of the opinion and find
>
> (*a*) That according to law relating to limitation in force in Tanganyika the claim in respect of rails is time-barred.
>
> (*b*) That according to the law in force in Kenya the claim is not time-barred. We have referred the question of which law is applicable to a legal adviser whose opinion we accept and which opinion is annexed hereto and forms part of this award."

Paragraph 4 of the arbitration agreement gave the arbitrators liberty to, inter alia, "take the opinion of any counsel and to act upon the opinion so taken". But in my view on a true construction of the arbitration agreement the question

stated to have been referred to a legal adviser never arose and ought not to have been referred. I think a mistake as to the territorial law which is applicable under the arbitration agreement is such an error of law as will justify the court in setting aside the award. It is to be noted that the error of law is not an error as to the law of limitation, but is an error in the construction of a clause in the arbitration agreement.

For this reason I think the appeal should be allowed.

The award in the instant case relates to two quite separate matters, namely, the alleged shortage of rails, and questions relating to a D.6 tractor. The award in respect of the rails, with which alone the application to set aside is concerned, is quite separate and distinct from the other awards, except the award under para. E, which is a mere summary of the other awards. In the circumstances I think the part of the award relating to the rail claim is separable from the rest and that part only need be set aside (Russel on Arbitration (16th Edn.) p. 291). The parties indicated that if it could be done, they would prefer that the whole award should not be set aside.

In the result I would allow the appeal, set aside the order of the High Court and order that the award of the arbitrators in respect of the rail claim under paragraph A of the arbitration agreement be set aside, with costs to the petitioners.

The particular ground on which I have come to the conclusion that the award should be set aside does not appear to have been canvassed in the court below. In the circumstances, I would make no order for cost in this court.

Gould JA: I have had the advantage of reading the judgment of the learned Vice-President and concur in his reasoning and conclusions. I would add only that whether a reference of a question of limitation of action to arbitration is a question of law, or one of mixed law and fact appears to me one which must be decided in the particular circumstances of the individual reference. In the present case I do not think that it is necessary to decide the question as, in my opinion, the arbitrators went outside the terms of the submission and made a fundamental error in answering (wrongly) a question, be it one of law or mixed fact and law, which was not referred to them at all; i.e. whether the law of Kenya or the law of Tanganyika applied. I think that must vitiate that portion of the award which stems from the wrong answer, which, I agree, is separable from the remainder.

I agree with the orders proposed in the judgment of the learned Vice-President.

Windham JA: I too have had the advantage of reading the judgment of the learned Vice-President, and I have also read that of my brother Gould, J.A. I agree with their reasoning and conclusions, save that on one point, immaterial to the result, I would with some hesitation differ from the view of the learned Vice-President, namely as to whether the question referred to arbitration, – “Is the claim if any barred by limitation?” – was a specific question of law, unmixed with fact. Such a question must, as the learned Vice-President points out, depend on certain facts. In particular, it must depend on the determination of certain dates, namely when the cause of action arose, and when the claim was instituted. Unless these appear as admitted facts on the face of the award, they must be determined by the arbitrator, albeit they may be agreed in the proceedings before him. That being so, I would incline to the view that the question referred is not purely one of law, but is one of mixed fact and law.

Appeal allowed. Award set aside in respect of the rail claim.

For the appellant:

Donaldson & Wood, Tanga
Humphrey Slade and *R. N. Donaldson*

For the respondent:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

Jeraj Shariff & Co v Chotai Fancy Stores
[1960] 1 EA 374(CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	7 April 1960
Case Number:	77/1959
Before:	Sir Kenneth O' Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Keatinge, J.

[1] Attachment – Order for warrant of attachment before judgment to issue made by district court – Satisfaction of claim after entry by broker but before execution of warrant – Action in superior court for damages for abuse of process of court and trespass – No prior application to district court to set aside its warrant of attachment – Whether plaint disclose cause of action – Civil Procedure Rules, O. 36, *r.* 5 (*U.*) *– Indian Code of Civil Procedure, s.* 95 (1) *– Civil Procedure Ordinance, s.* 66, *s.* 83 *and s.* 101 (*U.*).

Editor's Summary

In an earlier action in a district court the appellants had obtained a warrant of attachment of the respondents' goods before judgment. It was common ground that the court broke, in execution of the warrant, entered the respondents' shop, but before he could attach the goods therein, the respondents, without having taken any steps to set aside or impugn the validity of the warrant of attachment, filed proceedings claiming damage from the appellants as a result of the broker's action on the ground that the warrant had been wrongfully obtained. A defence was filed and at the trial the appellants submitted that the plaint disclosed no cause of action. The trial judge ruled that the plaint disclosed no cause of action for damages for abuse of the process of the court, but that it did disclose a cause of action for trespass. On appeal by the appellants against the latter part of that ruling it was argued that the respondents were precluded from bringing any suit for damages or compensation against the appellants by virtue of the provisions of s. 66 of the Civil Procedure Ordinance and that the respondents' only remedy was an application for compensation under s. 66 (1) of the Ordinance.

Held –

(i) s. 66 of the Civil Procedure Ordinance does not bar a suit for compensation where no order upon

an application under sub-s. (1) of that section has been obtained, the two remedies being alternative; still less does it bar an action other than for compensation.

(ii) the warrant of attachment having been pleaded in the plaint and not having been set aside by the court which granted it, the broker's entry, as pleaded in the plaint, was lawful and therefore no cause of action in trespass was disclosed.

(iii) it cannot be pleaded in a superior court, nor can that court be asked to declare, that an attachment order granted by an inferior court and not yet set aside is bad as having been improperly obtained.

(iv) the proper course in this case would have been, first, to apply to the district court to set aside ab-initio the warrant of attachment issued by it under O. 36, r. 5 of the Civil Procedure Rules, as having been improperly obtained, and then, should that court grant the application, either to apply for compensation under s. 66 (1) of the Civil Procedure Ordinance or to file an action for compensation or damages.

Appeal allowed. Plaint rejected as disclosing no cause of action.

Cases referred to in judgment:

(1) *Gyan Prakash Mital and Another v. Kishori Lal* (1942), A.I.R. All 261.

(2) *Satishchandra Banerji v. Lala Munilal* (1932), 59 Cal. 1073.

(3) *Jonesco v. Beard*, [1930] A.C. 298.

The following judgments were read by direction of the court:

Judgment

Windham JA: The respondent firm was the defendant in a suit filed in the district court at Busoga, at Jinja, Uganda, in which the appellant firm (the plaintiff in that suit) claimed payment of a debt of Shs. 500/-. The appellants obtained against the respondents in that suit a warrant of attachment of goods before judgment, under O. 36, r. 5, of the Civil Procedure Rules, upon an affidavit alleging that the latter were about to dispose of their goods with intent to obstruct or delay execution of the decree which might be passed against them. It is common ground that the court broker, in execution of the warrant, entered the respondents' shop, but that before he could take further action to attach the goods therein, the respondents paid him the Shs. 500/- which was the subject matter of that action.

Thereupon the respondents, without having taken any steps to set aside or impugn the validity of the warrant of attachment, which had now achieved its purpose, instituted against the appellant the suit to which this appeal directly relates, claiming damages suffered as a result of the broker's action, on the ground that the warrant had been wrongly obtained. The suit was brought in the High Court. A defence was filed; but on the case coming for trial counsel for the appellants submitted that the plaint disclosed no cause of action. The learned trial judge, in a considered ruling, held that the plaint disclosed no cause of action for damages for abuse of the process of the court, but that it did disclose a cause of action for trespass. The appellants appeal against this latter part of his ruling.

The question whether a plaint disclose a cause of action must be determined upon a perusal of the plaint alone, together with anything attached so as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true. The relevant portions of the plaint in the present case, and of the affidavit attached to it, read as follows:

"Plaint

"The plaintiffs were at all material times shopkeepers carrying on business in Bugiri and the defendants were wholesale suppliers of goods.

"2. On the 22nd day of December, 1958, the defendants falsely and maliciously and without reasonable or probable cause swore an affidavit in Civil Case No. 997 of 1958 in the district court of Busoga at Jinja a copy of which is attached hereto and marked 'CFS'.

"3. As a result of the false and malicious statements contained in para. 4. of the said affidavit the court broker was instructed to and did enter upon the plaintiff's premises with the intention of attaching the plaintiff's goods.

"4. The plaintiffs submit that the said entry was for the reasons stated above an abuse of the process of the court.

"5. The plaintiffs further submit that the said entry arising as it did by reason of the said false statement

was a trespass.

"6. By reason of the matters hereinbefore set out the plaintiffs have suffered damage."

There followed a prayer for damage, costs, and further or other relief. The relevant part of the affidavit of Jeraj Shariff of the appellant firm, referred to in para. 2 of the plaint and annexed to it, is in the following terms. The plaint referred to in it is, of course, that in the earlier suit, Civil Case No. 997 of 1958 in the district court. The deponent affirms:

> ".
>
> "3. That the defendant above-named is justly and truly indebted to me in the sum of Shs. 500/- as claimed in the plaint and that cause of action has been truly set forth in the plaint.
>
> "4. That I am informed by my accountant Mr. Vithalbhai Patel of Jinja and also upon personal enquiry and visit to the shop of the defendant situated at Bugiri, recently I have noticed that the goods lying in the shop of the defendant are disappearing rapidly. I verily and sincerely believe that the defendant is about to dispose of the whole or any part of the goods lying in the shop with intent to obstruct or delay the execution of the decree which may be passed against him.
>
> "5. By reason of the matters referred to hereinbefore I pray that the honourable court be pleaded to direct an attachment to be levied before judgment against the goods lying in the shop of the defendant just sufficient to satisfy the decree in this case including the costs of this application.
>
> "Wherefore I pray that an order be made for issue of warrant of attachment before judgment under O. 36, r. 5 (1) (*a*) of the Civil Procedure Rules, 1928, Uganda."

In holding, as he rightly did, that the plaint (read together with the affidavit attached to it) disclosed no cause of action for damages for abuse of the process of the court, the learned trial judge relied on *Gyan Prakash Mital and Another v. Kishori Lal* (1) (1942), A.I.R. All. 261. In that case the principle was applied which had been laid down in an earlier Indian case, *Satishchandra Banerji v. Lala Munilal* (2) (1932), 59 Cal. 1073. The facts in the earlier case were that the defendants, having filed in the subordinate court an action against the plaintiff for some Rs. 4,000, made an ex parte application to the subordinate judge for an order for attachment before judgment and duly obtained it. The plaintiff's shop, with its contents, was attached in execution of the order, but upon the plaintiff later paying into court the amount claimed in the action the attachment was ipso facto released. The plaintiff, without getting the order for attachment vacated or set aside ab initio, then brought a suit in the High Court against the defendants claiming damages for "loss of reputation" and "mental anxieties and troubles" suffered by reason of the attachment order which (it was pleaded) had been obtained on the strength of untrue allegations by the defendants that the plaintiff had been about to make away with his stock in trade. The facts thus bear a marked similarity to those in the present case. His claim was dismissed on a plea of limitation; but on appeal the question whether the plaint disclosed any cause of action was also considered, and Rankin, C.J., delivering the judgment of the court, held that it did not. Treating the claim on the footing that it was in the nature of a claim for damages for malicious prosecution, he said this, at p .1076 and p. 1077:

> "Now, if that cause of action is to be entertained, it does seem to me to be quite necessary that we should bear in mind the well-known principle that a court being asked to give damages is not to be put in the position of having to decide whether the determination of some other court, upon a matter properly before it, was right or wrong. In the present case, it would seem that an application to vacate that order for attachment before judgment was made; it was not prosecuted to a conclusion, no such order

> was obtained; on the contrary, under that order for attachment, certain moneys were recovered which moneys were allowed after the decree to go to the plaintiffs in the cause satisfaction of their decree. In these circumstances, I am not of opinion that the rightness or wrongness of the order for attachment before judgment can be canvassed in the suit on the question of damages for malicious prosecution. The parties having had their rights determined upon the basis that the order for attachment was a right order, it had been carried out and, in my judgment, one cannot by bringing an action for damages get another court to go behind the position as constituted in the original proceedings."

Later in the same judgment, Rankin, C.J., at p. 1078 again affirmed the principle:

> ". . . that the plaintiff cannot come and complain of an improper attachment unless the attachment is first set aside. In my judgment, it is most important to adhere to this principle; otherwise in every case of attachment before judgment, in the guise of a suit for damages the decision of one court will have to be reviewed by another . . ."

That decision, as I have said, was followed in *Gyan Prakash Mital and Another v. Kishori Lal* (1), where the principle was applied, on substantially similar facts, not to a suit for damage, but to an application made under s. 95 (1) of the Indian Civil Procedure Code for compensation on the ground that the attachment had been "applied for on insufficient grounds". Section 95 of the Indian Civil Procedure Code is reproduced without alteration (save for the substitution of "Shs. 2,000/-" for "one thousand rupees") in s. 66 of the Civil Procedure Ordinance (Cap. 6) of Uganda.

Counsel for the appellant attempted at one stage to argue that s.66 would in any event preclude the respondent from bringing any suit for damages or compensation, and that his only remedy would be an application for compensation under sub-s. (1) of that section. That, however, is clearly not so, since sub-s. (2) of the section expressly provides that "an order determining any such application", that is to say an application for compensation under sub-s. (1),

> "shall bar any suit for compensation in respect of such arrest, attachment or injunction".

This necessarily implies that if no order upon an application under sub-s. (1) has been obtained, then a suit for the same purpose will lie, the two remedies being alternative; and that this is the position under the Indian s. 95 is made clear in Mulla's Code of Civil Procedure (11th Edn.), at p. 350 and p. 351. Still less does s. 66 bar the bringing of any suit other than one for compensation, such as counsel for the respondents claims the present suit to be.

I consider the principle enunciated in *Satishchandra Banerji v. Lala Munilal* (2) and followed in *Gyan Prakash Mital and Another v. Kishori Lal* (1) to be a sound one. By analogy, where a party seeks to impeach a judgment on the ground that it was obtained by fraud, the settled practice is that he should bring an action to set it aside in the court which gave the judgment: see *Jonesco v. Beard* (3), [1930] A.C. 298, at p.300; and see the following statement of the position in Kerr on Fraud and Mistake (7th Edn.), at p. 416:

> "An innocent party cannot now prove in one court that a judgment against him in another court was obtained by fraud and ask for it to be disregarded, as it would be in his power to apply directly to the court which pronounced it to vacate it."

Counsel for the respondent, however, while conceding the soundness of the principle and the correctness of those Indian decisions, contends that the

present case falls outside their scope, in that he is neither applying for compensation under sub-s. (1), nor bringing a suit for compensation as envisaged by sub-s. (2), of the Civil Procedure Ordinance, but is bringing an action for trespass to land. His cause of action being trespass, he argues that he is not concerned with setting aside an attachment order that has in any case spent its force, but need only plead that the entry of the court broker (acting as agent for the appellants) was unlawful from the beginning for the reasons set out in the plaint. This, he argues, he has pleaded.

The answer to this contention, as I see it, is twofold. First, although neither of those Indian cases, nor any of the other decisions cited to us by counsel for the appellants, was concerned with a suit for damages for trespass, such a suit as the present falls within the principle followed in those cases. It falls squarely within the words of Rankin, C.J., in *Satischandra Banerji v. Lala Munilal* (2) which I have already quoted, in that it is one where

> "in the guise of a suit for damages the decision of one court will have to be reviewed by another."

Secondly, the essential elements to establish a cause of action in trespass have, in my view, not been pleaded. The learned trial judge, in holding that they had, dealt with the question very briefly in the following paragraph:

> "Mr. Shah has not seriously argued that the plaint does not disclose a cause of action for trespass. On the authority of Halsbury's Laws of England, second edition, Vol. 33, p.6, I have no doubt that such an action does lie".

The passage from Halsbury relied on by the learned judge sets out the well established proposition that:

> "Every unlawful entry by one person on land in the possession of another is a trespass for which an action lies, although no damage is done."

In applying this passage to the plaint in the present case, however, he was leaving unanswered the very question on which its application depended, namely whether the plaint (together with the affidavit attached to it) shows the entry to have been unlawful. In my view it does not. Paragraph 3 of the plaint certainly alleges that the broker entered upon the plaintiff's premises as a result of false and malicious statement, and para. 5 alleges that the entry was accordingly a trespass, which merely begs the question. But the heading to, and the prayer in, the affidavit annexed to the plaint, read together with para. 2 and para. 3 of the plaint itself, allege by clear implication that the entry was under a warrant of attachment before judgment, granted by the district court and issued to the broker under O. 36, r. 5, of the Civil Procedure Rules. And the plaint nowhere alleges, nor could it truthfully allege, that the warrant was, or had later been declared to have been, invalid at the time of the entry. If the plaint had simply and briefly pleaded that the defendants, through their agent, had unlawfully entered upon the plaintiff's premises, wherefore the plaintiffs claimed damages, a cause of action in trespass would have been disclosed, and it would have been for the defendants in their statement of defence to set up the warrant; though the plaintiffs, no having had the warrant set aside, would then inevitably have lost their suit. But, the warrant having been pleaded in the plaint and not having been set aside by the court which granted it, the broker's entry, as pleaded in the plaint, was a lawful one and therefore no cause of action in trespass was disclosed. And if it be urged that para. 3 and para. 5 of the plaint do by implication allege that the warrant of attachment was invalid ab initio, the answer, founded on the principle enunciated

in the two Indian cases to which I have earlier referred, is that it cannot be pleaded in a superior court, nor can that court be asked to declare, that an attachment order granted by an inferior court and not yet set aside was bad as having been improperly obtained. The proper course would have been, first to apply to the district court to set aside, ab initio, the warrant of attachment issued by it under O. 36, r. 5, as having been improperly obtained, and then, should that court grant the application, either to apply for compensation under s. 66 (1) of the Civil Procedure Ordinance or to file an action for compensation or for damages such as he has now prematurely filed.

Counsel for the appellant was unable to point to any specific provision in the Civil Procedure Ordinance or Rules under which the respondent would be able to ask the district court to set aside the warrant of attachment which it had issued. But it would seem that the procedure could be either (*a*) by way of an application to that court to exercise its inherent jurisdiction, recognised by s. 101 of the Civil Procedure Ordinance, to set aside an order granted by it to the other side ex parte, if necessary for the ends of justice or to prevent abuse of the process of the court; or (*b*) by way of an application for review, under s. 83 of that Ordinance and O. 42, r. 2, of the Civil Procedure Rules.

For these reasons I would allow the appeal with costs here and below, and would order the plaint to be rejected as disclosing no cause of action.

Sir Kenneth O'connor P: I agree. There will be an order in the terms proposed by the learned justice of appeal.

Gould JA: I also agree.

Appeal allowed. Plaint rejected as disclosing no cause of action.

For the appellants:
Patel & Shah, Jinja
J.M. Shah

For the respondent:
Baerlein & James, Kampala
A.A. Baerlein

Narendra A Patel v Suraj Ben
[1960] 1 EA 382 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	16 June 1960
Case Number:	230/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Practice – Arrest before judgment – Action for possession of property and damages – Defendant arrested – Security for appearance furnished – Application by defendant to set aside order for arrest – Whether plaintiff entitled to order for defendant's arrest under O. 36, *r.* 1 *Civil Procedure Rules – Civil Procedure Rules, O.* 36, *r.* 1 (*U.*) *– Civil Procedure Ordinance* (*Cap.* 6) *s.* 12 (*U.*).

Editor's Summary

Relying on O. 36, r. 1 of the Civil Procedure Rules the plaintiff obtained an order for the arrest of the defendant before judgment and on the same day the defendant was arrested and brought before a judge. The defendant did not show cause why she should not furnish security for her appearance but forthwith furnished the necessary security and was released. The defendant then applied to have the order for arrest set aside on the ground that the action was not one to which O. 36, r. 1 applied.

Held – the claim for possession fell within para. (*a*) of s. 12 of the Civil Procedure Ordinance and the claim for damages fell within para. (*e*) of that section; accordingly the plaintiff was entitled to have recourse to O. 36, r. 1 of the Civil Procedure Rules.

Application dismissed.

Judgment

Sir Audley McKisack CJ: This is an application by the defendant in the suit to set aside an order made by Lyon, J., for her arrest before judgment, under O. 36, r. 1 of the Civil Procedure Rules. The order was made on May 14, 1960, and, on the same day, the defendant was arrested and brought before Lyon, J. She did not show cause why she should not furnish security for her appearance, but forthwith furnished the necessary security and was released.

It is now contended that the order for arrest, which was made ex parte, was wrong in that the suit out of which these proceedings arise is not one to which O. 36, r. 1 applies. That rule empowers the court to issue a warrant for arrest if satisfied that the defendant is about to abscond (and in certain other circumstances), but only if the suit is one

> "other than a suit of the nature referred to in s. 12 of the Ordinance, paras. (*a*) to (*d*)."

Section 12 of the Civil Procedure Ordinance (Cap. 6), refers to the following suits:

> "(*a*) for the recovery of immovable property, with or without rent or profits;
>
> (*b*) for the partition of immovable property;
>
> (*c*) for the foreclosure, sale or redemption in the case of a mortgage of, or charge upon, immovable property;
>
> (*d*) for the determination of any other right to or interest in immovable property;
>
> (*e*) for compensation for wrong to immovable property;
>
> (*f*) for the recovery of movable property actually under distraint or attachment."

In the instant suit the plaintiff claims the following:

> "(i) To obtain the possession of the said plot by demolition of the said store.
>
> (ii) Shs. 5,400/- as damages for the period beginning from 1st June, 1959 to 29th February, 1960, at Shs. 600/- per month.
>
> (iii) To future damages at Shs. 600/- per month from 1st March, 1960 to the date of possession.
>
> (iv) Costs of this suit.
>
> (v) Any other relief the court may think fit."

Paragraph (i) of the claim clearly falls within the type of suit described in para (*a*) of s. 12 of the Ordinance. But the plaint, in addition to claiming possession, is claiming damages at the rate of Shs. 600/- a month, representing the rent which the plaintiff says he could have obtained for a building which he would have erected had he been able to obtain possession of the plot occupied by the defendant and to have demolished the store which he says the defendant wrongfully erected on the plot. This is, I think, a claim distinct from one for "rent or profits" referred to in para. (*a*) of s. 12, and falls under para. (*e*) of that section. If the suit were only for recovery of possession, or only for recovery of possession together with a claim for rent or mesne profits, then clearly O. 36, r. 1 would not be applicable to the suit. But this is a case where the suit falls partly under para. (*a*) and partly under para. (*e*) and, in so far as the suit relates to the latter paragraph, O. 36, r. 1 is applicable. In my view the plaintiff is entitled to have recourse to O. 36, r. 1 in respect of that part of the suit which is not excluded from the application of that rule. Consequently, I see no reason why the order by Lyon, J., should be set aside.

It is unnecessary for me, therefore, to decide whether I have in fact power to set aside an order of this kind. There is no express provision in the Civil Procedure Rules for setting aside such an order, but it is argued that s. 101 of the Civil Procedure Ordinance, which saves

> "the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court",

could properly be invoked. Nor is it necessary to consider whether the defendant has adopted the right procedure in seeking to have the order for arrest set aside, when she has in fact been released from arrest and has furnished security.

The application is dismissed with costs.

Application dismissed.

For the plaintiff:
Patel & Patel, Kampala
R. H. Patel

For the defendant:
Russel & Co., Kampala
P. V. Phadke

Zagoritis Estates Ltd v W J Tame Ltd and another
[1960] 1 EA 384 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	17 June 1960
Case Number:	105/1959
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Biron, Ag. J.

[1] Arbitration – Award – Jurisdiction – Proper law of contract – Clause applying law of arbitration in Tanganyika incorporated in contract – Arbitrators resident and sitting in Kenya – Whether award can be validly filed in Tanganyika court – Arbitration Ordinance (*Cap.* 15) (*T.*).

Editor's Summary

An agreement for sale of property in Tanganyika made between the appellant and the first respondent contained an arbitration clause, but when differences between the parties regarding the transaction arose they entered into a fresh agreement to refer the difference to arbitration. This agreement contained a clause that "The provisions of the Arbitration Ordinance, Cap. 15 of the Laws of Tanganyika so far as consistent herewith shall be deemed to be incorporated herein". Both the arbitrators appointed resided in and the arbitration took place in Kenya and the award was made at Mombasa. One difference concerned a deficiency in the length of a railway line of a value of £5,280 and whether the claim for this deficiency was barred by limitation. Counsel's opinion taken in accordance with a clause in the agreement was that

as the arbitration had taken place in Kenya, the law of limitation of Kenya applied. The arbitrators accordingly held that the claim was not time barred. At the instance of the appellant the award was on the second respondent's petition filed in the Supreme Court of Kenya whilst at the instance of the first respondent the second respondent petitioned the High Court of Tanganyika seeking to have the award filed there. The High Court of Tanganyika held that the award could be filed there whereupon the appellant appealed.

Held –

(i) the Arbitration Ordinance being procedural cl. 5 of the arbitration agreement was an express agreement between the parties that Tanganyika law and procedure were to apply and the intention was that the award should be enforced through the Tanganyika courts.

(ii) the parties having agreed to the enforcement of the award by the Tanganyika courts in accordance with the provisions of the Arbitration Ordinance of Tanganyika, were precluded from objecting to the filing of the award in the Tanganyika court.

Appeal dismissed.

Cases referred to in judgment:

(1) *W. J. Tame Ltd. v. Zagoritis Estates Ltd.*, [1960] E.A. 370 (C.A.).

(2) *N. V. Vulcaan v. A/S Mowinckels*, [1938] 2 All E.R. 152.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from an order of the High Court of Tanganyika allowing the award of an arbitrator in respect of an arbitration on certain disputes between the parties to be filed in the Tanganyika High Court under the provisions of the Tanganyika Arbitration Ordinance (Cap. 15). Another appeal *W. J. Tame Ltd. v. Zagoritis Estates Ltd*. (1), [1960] E.A. 370 (C.A.) arising out of the same matter, in which the present first respondent is the appellant and the present appellant is the respondent, and which relates to an application to set aside the award, was heard at the same time as this appeal. The argument on such second appeal is not, however, relevant to the decision of the point which arises on this appeal.

The appellant is a limited liability company incorporated in Zanzibar, and registered and having a place of business in Tanganyika. The first respondent is a limited liability company incorporated in Tanganyika and having its registered office at Tanga. The second respondent is one of the arbitrators who made the award in question, and is the petitioner on whose petition for the filing of the award the order which is now challenged was made.

The reference to arbitration with which the appeal is concerned arises out of an agreement between the appellant and the first respondent for the purchase and sale of an estate in Tanganyika known as Marungu Estate. The agreement for sale contained an arbitration clause, but, in the event, when disputes and differences arose between the parties out of the transaction, the parties entered into a fresh agreement to refer the disputes and differences to arbitration. This agreement, which was apparently executed by the appellant in Kenya and by the first respondent in Tanganyika, provided that all questions and matters in difference between the parties with regard to the various matters specified in the agreement:

> "are hereby referred to the award and final determination of E. L. Relf, P.O. Box 249, Mombasa, an arbitrator nominated by the first party [i.e. the first respondent] and O. F. N. Ellert, P.O. Box 1112, Nairobi, an arbitrator nominated by the second party [i.e. the appellant]".

Provisions, which are not relevant to this appeal, follow regarding the appointment of an umpire and the time for making an award. Clause 4 of the agreement provides inter alia that the arbitrators may take the opinion of counsel and act upon the opinion so taken. Then follows the following clause:

> "5. The provisions of the Arbitration Ordinance, Cap. 15 of the laws of Tanganyika so far as consistent herewith shall be deemed to be incorporated herein."

It is to be noted that the arbitrators named were both resident in Kenya. The proceedings on the reference in fact took place in Kenya and the award was made at Mombasa.

The cause of the controversy in the instant case arises out of the award of the arbitrators on one only of the questions specified in the arbitration agreement. This relates to an alleged deficiency in the length of a railway line handed over under the sale agreement. The arbitrators found a deficiency amounting

to £5,280 in value. Question A 8, in relation to the alleged deficiency in the railway line, was

> "8. Is the claim, if any, barred by limitation?"

The arbitrators took counsel's opinion on this point, and counsel advised that as the arbitration had taken place in Kenya the Kenya law of limitation applied and the claim was not barred. It is not disputed that if the Tanganyika law of limitation applies the claim is barred and the arbitrators so found. The arbitrators, however, accepted counsel's opinion and held the claim was not time barred.

This decision has been described as a "bolt from the blue", and it resulted in a "scramble" by the parties to get the award filed in the territory which each thought would suit their interests best. At the instance of the appellant the award was filed in the Supreme Court of Kenya at Nairobi on the petition of second respondent, the other arbitrator having left Kenya and his whereabouts being then unknown. At the instance of the first respondent the second respondent filed the petition in the instant case seeking to have the award filed in the High Court of Tanganyika. At this stage the award had already been filed in Kenya. We were informed from the bar that the jurisdiction of the Kenya Court has been challenged but that proceedings there have been stayed pending the outcome of these appeals. Owing to a misunderstanding the appellant did not appear and was not represented when the petition was heard by the High Court in Tanganyika. The learned judge of the High Court nevertheless gave the matter careful consideration and concluded that the award could be filed in Tanganyika. It is this decision that is appealed against.

A number of grounds of appeal are set out in the memorandum of appeal, but it seems to me that the matter can be determined on a very narrow basis. With great respect to the opinion of learned counsel on which the arbitrators acted, I think it is clearly established that the governing factor in an arbitration agreement is the intention of the parties. In Russell on Arbitration (16th Edn.), at p. 33 under the heading "Conflict of Laws" it is stated:

> "Where a contract is made between parties resident in different countries, or is made in one country to be performed in another, the validity and effect of an arbitration clause in the contract are to be determined (unless the contract specifically provides otherwise, as is not infrequently the case) by the 'proper law' of the contract as a whole: that is to say, whatever system of law it was intended by the parties should govern the contract. This intention, where not expressly set out in the contract itself, must be gathered from the language of the whole contract considered in the light of surrounding circumstances."

DicEy's Conflict of Laws (7th Edn.) at p. 1061 states in reference to arbitration proceedings:

> "It is well established that the parties are free to determine what law is to govern the submission."

Learned counsel in his opinion relied on *N.V. Vulcaan v. A/S Mowinckels* (2), [1938] 2 All E.R. 152, as establishing that "the lex fori will determine all matters relating to limitation"; but, with respect, I think that case is merely an example of a case in which

> "the intention, where not expressly set out in the contract itself, must be gathered from the language of the whole contract considered in the light of surrounding circumstances."

At p. 156 of the report Lord Maugham, L.C., says:

> "In this case, the appellants being a Dutch company and the respondents Norwegian shipowners, there was good reason, if not a necessity, for selecting the law which should apply to any future disputes, and the submissions of such matters to the arbitration of two persons in London and of an umpire who in case of difference was to be nominated by the directors of the Baltic Mercantile and Shipping Exchange showed clearly that English law and procedure were to be applied."

But that is not to say that the same result must have followed if the parties had expressly specified that some other law and procedure were to apply.

In the instant case it appears to me that cl. 5 of the arbitration agreement, which I have set out above, is an express agreement between the parties that Tanganyika law and procedure – the Arbitration Ordinance being procedural – are to apply. And it seems to me that it is a necessary inference that the clause involves submission to the jurisdiction of the Tanganyika Courts in the application of the provisions of the Arbitration Ordinance. I would therefore hold, as a matter of construction of the express provisions of the arbitration agreement, that the intention of the parties was that award should be enforced through the Tanganyika Courts. If I am right in this it seems to me immaterial whether or not the award was properly filed in the Supreme Court of Kenya, a matter which I am not called upon to decide. The parties having, in my view, agreed to the enforcement of the award by the Tanganyika Court in accordance with the provisions of the Tanganyika Ordinance, are, in my opinion, precluded from objecting to the filing of the award in the Tanganyika Court in accordance with that agreement.

For these reasons I think this appeal should be dismissed with costs.

Gould JA: I agree and have nothing to add.

Windham JA: I also agree.

Appeal dismissed.

For the appellant:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

For the respondent:
Donaldson & Wood, Tanga
Humphrey Slade and *R. N. Donaldson*

Chimanlal Motibhai Hira Patel v The Attorney - General

[1960] 1 EA 388 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 April 1960
Case Number:	88/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya – Mayers, J.

[1] Immigration – Removal order – Appellant claiming to be adopted son of Kenya resident – Onus of proof of adoption – Whether statement that an adopted son is a "son" constitutes material misrepresentation – Defence (*Admission of Women and Children*) *Regulations*, 1940, *Reg.* 3 *and item* (*c*) *of the Schedule thereto* (*K.*) *– Immigration* (*Control*) *Ordinance*, 1947, *s.* 5 (*K.*) *– Immigration Ordinance*, 1956, *s.* 8 *and s.* 18 (*K.*) *– Interpretation and General Provisions Ordinance*, 1956, *s.* 3 (*K.*) *– Indian Evidence Act*, 1872, *s.* 106 *as replaced by the Evidence Act* (*Amendment*) *Ordinance* (*Cap.* **12**), *s.* 3 (*K.*).

Editor's Summary

The appellant originally entered kenya as an adopted son of a resident in Kenya. He had resided in Kenya for about thirteen years when he was served with a removal order on the ground that he was a prohibited immigrant. He then sued for declaration that he was lawfully in the Colony, that the removal order was void and that he was entitled to a resident's certificate under the Immigration Ordinance, 1956. The suit was dismissed, the trial judge holding that the appellant had not proved that his entry into Kenya was lawful and that even if an adopted son could lawfully enter Kenya under the relevant regulations, the appellant had not proved his adoption. The appellant then appealed contending that (*a*) the onus of proof was on the Crown to show that the appellant was not an adopted child and (*b*) a statement contained in the application for an entry permit for the appellant that the appellant was the applicant's son was not a material misrepresentation.

Held –

(i) the statement that the appellant was a son of the applicant was a misrepresentation at the time it was made: Ex parte *Bhagubhai Bhanabhi* (1954), 27 K.L.R. 134 approved.

(ii) if ex post facto legislation, namely, the Interpretation and General Provisions Ordinance, 1956, could cure the misrepresentation it was still a misrepresentation unless the appellant was an adopted son.

(iii) under the Immigration (Control) Ordinance, 1947 and the Immigration Ordinance, 1956, as well as under s. 106 of the Indian Evidence Act, 1872 as replaced by s.3 of the Evidence Act (Amendment) Ordinance, the burden of proving that his entry was lawful rested upon the appellant as being a fact especially within his (or his own family's) knowledge; the Crown could not possibly discharge such an onus with regard to immigrants.

(iv) there was nothing in the case to shift the onus of proof from the appellant to the Crown; on the evidence the judge was right in refusing to find that the appellant was an adopted son and this was a conclusion of fact with which the appellate court would not interfere without good reason.

Appeal dismissed.

Cases referred to in judgment:

(1) *Ex parte Bhagubhai Bhanabhai* (1954), 27 K.L.R. 134.

(2) *Hirji Devchand Ramji v. Attorney – General of Kenya* (1956), 23 E.A.C.A. 20.

(3) *Rajendra Nath Holdar v. Jogendra Nath Bannerjee* (1871), 14 M.I.A. 67.

(4) *Kanchumarthi V. S. Chandra Row v. Kanchumarthi Raju* (1925), 53 M.L.J. 858.

(5) *Ramakrishna Pillai v. Tirunarayna Pillai* (1932), 55 Mad. 40.

The following judgments were read:

Judgment

Sir Kenneth O'Connor P: The appellant, who is a trader at Meru, was served on October 22, 1958, with a removal order expressed to be made on the ground that he was a prohibited immigrant. On November 18, 1958, he filed a suit in the Supreme Court of Kenya claiming a declaration that the removal order was void and of no effect, a declaration that his presence in the Colony was lawful, a declaration that he was entitled, on application, to be granted a resident's certificate under the Immigration Ordinance, 1956, and a declaration that he was entitled, on application to the Government of Kenya, to be registered as a citizen of the United Kingdom and Colonies under the provisions of the British Nationality Act, 1948. The appellant's suit was dismissed by the Supreme Court on July 17, 1959, the learned judge holding that the appellant had not proved that his entry into the Colony was lawful; and that even if an adopted son could lawfully enter under the relevant regulations, the appellant had not proved his adoption. Against that dismissal the appellant appeals to this court.

The relevant facts, which are not in dispute, are: – The appellant was born in 1936. In 1947, at the age of about eleven years, he entered the Colony of Kenya and has been residing in the colony for about thirteen years. He is now a partner in a business carried on in Kenya.

The appellant is a son of one Gokalbhai Hirabhai Patel who is, and at all material times was, resident in India. The appellant alleges that he is the adopted son of Motibhai Hirabhai Patel (hereinafter referred to as "Motibhai"), a brother of Gokalbhai Hirabhai Patel. Motibhai was at all material times resident in Kenya; but has been in India since 1956.

On March 10, 1947, Motibhai wrote a letter (exhibit E) to the Immigration Officer, Nairobi, in which he asked for an entry permit for "my son Chimanbhai s/o Motibhai Hirabhai Patel". The letter said that Motibhai wished "to call him here for study as his parents are here".

A letter was written in reply by the Immigration Officer dated April 17, 1947, to the effect that there would be no objection under the Defence (Admission of Women and Children) Regulations, 1940, to the entry into Kenya of "your son Mr. Chimanbhai" provided that he was under eighteen and complied with the provisions of the Immigration Restriction Ordinance.

It will be observed that in exhibit E Motibhai referred to the appellant as "my son" and exhibit F was granted on that basis.

In June, 1950, Motibhai applied for a certificate of permanent residence in Kenya and, in his application, stated that he had three children including the plaintiff. In evidence the appellant said that Motibhai had adopted two sons – the appellant himself and one Bhailal (Biharilal). When they were served with removal orders an advocate was consulted and advised that under Hindu law only one child could be adopted; hence Bhailal was sent back to India. The appellant says that he was adopted by Motibhai in India in 1946 and that he had been living in Kenya for about thirteen years as Motibhai's adopted son and that no one who might have had an interest to object had objected.

In 1947, when the appellant was permitted to enter Kenya, the relevant Regulation was reg. 3 of the Defence (Admission of Women and Children) Regulations, 1940. That regulation reads:

> "3. Notwithstanding the provisions of the Ordinance, but subject to the provisions of these regulations, no woman, or child who has not attained the age of eighteen years (either of whom is hereinafter referred to as a 'person') may enter the colony, whether by land, sea or air:
>
> "Provided that, if the Immigration Officer is satisfied that any person comes within any of the categories specified in the Schedule hereto and is not a prohibited immigrant within the meaning of s.5 of the Ordinance, he may permit such person to enter the Colony either unconditionally or for such period and subject to such conditions as the Governor may direct".

The relevant category in the Schedule was:

> "(*c*) The children, who have not attained the age of 18 years, of any person who is normally resident or employed in the colony."

In *Ex parte Bhagubhai Bhanabhai* (1) (1954), 27 K.L.R. 134, the Supreme Court of Kenya declined to hold that "children" in category (*c*) included adopted children. In a passage in the same case it was pointed out that what was required by reg. 3 was not that an immigrant should fall within any of the scheduled categories, but that the immigration officer should be "satisfied" that he fell within any of them; that once an immigration officer had been satisfied and an entry pursuant to his permit had been made, that entry was lawful; provided that the permit had not been induced by misrepresentation, wilful concealment of a material circumstance or fraud. It was held in *Bhagubhai's* case (1), that as the immigration officer had been satisfied that the immigrant fell within a scheduled category and as there was no evidence of wilful concealment or fraud on the part of the immigrant, he had discharged the burden of proving that his entry was lawful. The above-mentioned passage from *Bhagubhai's* case (1), was cited, apparently with approval, by this court in *Hirji Devchand Ramji v. Attorney-General of Kenya* (2) (1956), 23 E.A.C.A. 20. In *Bhagubhai's* case (1), there was no evidence of what, if any, representation had been made to the immigration officer by the immigrant. In the instant case, there was a representation by Motibhai that the appellant was his son and that he was being called to Kenya "as his parents are here".

Bhagubhai's case (1), was decided in 1954. In 1957 the Immigration Ordinance, 1956 came into operation. Section 8 of that Ordinance reads:

> "8. Any entry permit, pass, certificate or other authority, whether issued, granted or conferred under this Ordinance or under any regulations made thereunder or under any other law for the time being in force, whether or not since repealed, which is or was obtained by, or is or was issued, granted or conferred as a result or by reason of, fraud, or misrepresentation or concealment or non-disclosure, whether intentional or inadvertent, of any material fact or circumstance, shall be and be deemed always to have been null, void and of no effect."

In 1956 a new Interpretation and General Provisions Ordinance was enacted and came into force. Section 3 provides inter alia that in that Ordinance and in every other written law, other than imperial enactment, and in all public documents enacted, made or issued before or after the commencement of that Ordinance, the following words and expressions should have the meaning thereby assigned to them respectively, unless there was something in the subject or context inconsistent with such construction or interpretation:

> "'father' in the case of any person whose personal law permits adoption, includes an adoptive father;
>
>
>
> "'son', in the case of any person whose personal law permits adoption,

includes an adopted son."

Mr. Gledhill for the appellant (if I understood him correctly) puts his case as follows:

(1) The appellant "satisfied" the immigration officer. Therefore, his entry was prima facie lawful: *Bhagubhai's* case (1). It is admitted that he was not a true child of Motibhai; but (as his entry was prima facie lawful) the onus is on the Crown to show that his entry was unlawful, i.e. to show that he was not an adopted child; and that the Crown has not shown.

(2) Even if the onus is not on the Crown, there was evidence on which the judge should have found that the appellant was an adopted child of Motibhai.

(3) If, by virtue of the above-quoted definition (which is retrospective), the word "son" in a regulation included an adopted son, then "children" in item (*c*) of the Schedule to the Defence (Admission of Women and Children) Regulations would include an adopted child.

(4) Accordingly, when Motibhai wrote exhibit E asking permission for his "son" to enter Kenya, he was not guilty of any misrepresentation, or at least of any material misrepresentation, since the boy would have been eligible to enter whether as a true or as an adopted child, and s. 8 of the Immigration Ordinance, 1956, does not apply.

It will be convenient to deal with points (1) and (2) together.

(1) One reason, and probably the main reason, why the immigration officer was "satisfied" that the appellant came within a permitted category of immigrant was the letter from Motibhai stating that the appellant was his son. It is now admitted that the appellant was not Motibhai's true son. The statement that the appellant was a son was a misrepresentation at the time that it was made: *Bhagubhai's* case (1). If it could be cured by an ex post facto legislation (a point which I find it unnecessary to decide) the representation was still a misrepresentation unless the appellant was an adopted son. In my opinion, the onus of proving this fact was and remained on the appellant. Section 18 of the Immigration Ordinance, 1956 provides in sub-s. (1), among other things, that a certificate signed by any of the persons indicated shall be admissible as evidence of "(*c*) the relationship by blood, marriage or adoption" of any person mentioned in the certificate to any other person. Sub-section (2) (so far as relevant) provides that the burden of proof that any person is not, or was not at any time before the commencement of the Ordinance, a prohibited immigrant or that the entry of any person is or was at any such time lawful, shall lie on that person. This was a re-enactment and amplification of a previous provision – s. 5 (2) of the Immigration Control Ordinance which was in force in 1947 when the appellant entered the Colony and which provided that the burden of proving that any person was not a prohibited immigrant lay on that person. There is no doubt that under both these provisions the burden of proving that his entry was lawful rested upon the appellant and not upon the Crown. Apart from these provisions, that would be the position in civil proceedings under s. 106 of the Indian Evidence Act, as replaced by s. 3 of the Evidence Act (Amendment) Ordinance (Cap. 12). The burden of proving that the appellant was an adopted son of Motibhai would rest upon him as being a fact especially within his (or his own family's) knowledge. The Crown could not possibly discharge such an onus with regard to immigrants. Mr. Gledhill relied upon *Rajendra Nath Holdar v. Jogendra Nath Bannerjee* (3) (1871), 14 M.I.A. 67; and *Kanchumarthi V. S. Chandra Row v. Kanchumarthi Raju* (4) (1925), 53 M.L.J. 858, both judgments of the Privy Council. Neither of these reports is available here; but both are

referred to in *Ramakrishna Pillai v. Tirunarayna Pillai* (5) (1932), 55 Mad. 40 at p. 56 and p. 57. The facts of those cases bear no resemblance to those of the present case. *Rajendra's* case was a case of an adoption made by will and acquiesced in by the family for twenty-seven years, when a suit was brought by one of the testator's heirs claiming the estate on the ground that the adoption was invalid. Even in such circumstances their lordships held that the defendant was bound to prove his title as adopted son, though every allowance should be made for absence of evidence and every presumption which arose from long recognition of his legitimacy by members of his family should be made. In the second case the authority of a widow to make an adoption which had been made 42 years before the suit, was questioned by a reversionary heir: there had been not only a transfer of the adopted son from his natural, to his adopted, home (no question of immigration being involved), but he had been recognised after inquiry by the local authorities in proceedings in which the plaintiff had acknowledged his right. Their lordships expressed the view that the burden resting upon a litigant who disputes such a claim was indeed of the heaviest order. Clearly, in that case if any burden had rested on the defendant, it had been shifted to the plaintiff by cogent evidence in support of the adoption. In the present case not only was no evidence called on behalf of the plaintiff of any adoption ceremony, nor of what form of ceremony was necessary to effect a legal adoption in the community to which he belonged, but there was not even evidence by any member of the family that they knew of and recognised the adoption. Motibhai is now in India: no attempt was made to take his evidence on commission. Two of Motibhai's brothers are in Kenya: neither was called. The learned judge might well have presumed that their evidence would not be favourable to the appellant. There was nothing in fact to prove the appellant's adoption but his ipse dixit; and he was (as we have seen) only about eleven years of age when he claims to have been adopted. A further point of distinction between the two cases cited and the present case is that those were cases in which property was being claimed by relatives. In the present case immigration only was shown to be involved. There was, it is true, a statement by the appellant that his adoptive father had land and property in India which he would inherit and that no one had objected to his adoption. But again there was no corroboration of this. No one whose interests could be affected adversely by the alleged adoption was called to say that he did not object. If, as the Crown alleged, the "adoption" was merely a device (frequent enough among Asians as is shown by the number of cases which have come before the courts) to obtain entry into Kenya, there was no reason for the relatives to complain. In this connection it will be recalled that Motibhai had "adopted" two sons; but when served with removal orders and on being advised that under Hindu law he could only adopt one, had sent the other back to India. In such circumstances, as the learned judge observed, it would be unsafe to apply a maxim omnia praesumuntur rite ac sollenniter esse acta, particularly as it was not shown whether the appellant or the other "adopted" son had been "adopted" first. There was nothing in this case to shift the onus of proof from the appellant. On this evidence the learned judge refused to find that the appellant was an adopted son. That was a conclusion of fact with which this court should not interfere without good reason. I see no reason whatever for interfering with it: in fact I agree with the learned judge's finding.

If the learned judge's conclusion that it was not shown that the appellant was an adopted son is upheld, that is sufficient to dispose of the appeal. It is unnecessary to deal with points (3) and (4) of Mr. Gledhill's argument. I do not decide them, and I do not wish to be taken as agreeing with point (4).

I would dismiss the appeal with costs.

Gould JA: I agree and have nothing to add.

Windham JA: I also agree.

Appeal dismissed.

For the appellant:
Gledhill & Co., Nairobi
J. Gledhill

For the respondent:
The Attorney-General, Kenya
A. R. Hancox (Crown Counsel, Kenya)

Govindji Popatlal Madhavji v Nasser Alibhai and another
[1960] 1 EA 393 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	5 April 1960
Case Number:	284/1954
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Practice – Execution – Stay granted pending appeal subject to execution of bond by surety – Bond by surety to Chief Justice and puisne judges – Whether decree-holder can execute against surety without assignment by the obligees under the bond – Civil Procedure Ordinance (*Cap.* 5), *s.* 92 (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *Appendix* '*E*' (*K.*).

Editor's Summary

By a decree the defendants were, inter alia, jointly and severally liable to pay to the plaintiff Shs. 136,550/06. The defendants were granted a stay of execution pending appeal on condition, inter alia, that security be given for Shs. 200,000/-. A surety bond was duly executed by one, J.L., and after the appeal had been dismissed, the plaintiff applied for execution against the surety. As the surety bond stated that the surety was "held and firmly bound unto the Chief Justice and puisne judges of Her Majesty's Supreme Court of Kenya" it was contended for the surety that the application could only be made after assignment by the obligees under the bond, namely, the Chief Justice and puisne judges; alternatively that the obligees named were the persons who should enforce the obligation under the bond by execution proceedings against the surety and that had the form of the bond followed one of the forms in Appendix "E" to the Civil Procedure Rules, assignment would not be necessary and the plaintiff could proceed to execution.

Held –

(i) the court and the judges thereof are not juridical persons: it or they could not sue or be sued.

(ii) s. 92 of the Civil Procedure Ordinance specifically gives a decree-holder the right to execute the decree against a surety without first resorting to the step of assignment.

(iii) even if, as was submitted, the surety bond was a chose in action, the person who was entitled to the benefit of the bond was the plaintiff and not the Chief Justice or the puisne judges; the plaintiff was entitled to assign this surety bond to any person and equally to execute it.

Application granted.

Case referred to:

(1) *Raj Raghubar Singh and Another v. Jai Indra Bahadur Singh* (1919), 46 I.A. 228.

(2) *Tara Iron and Steel Co. Ltd. v. Smith* (1929), 8 Pat. 810.

Judgment

Edmonds J: By a decree granted in favour of the plaintiff on November 5, 1956, the defendants were ordered, inter alia, jointly and severally to pay to the plaintiff the sum of Shs. 136,550/06 together with interest and costs therein set out. Stay of execution pending appeal, was, however, ordered upon the condition, inter alia, that security be given in the sum of Shs. 200,000/-. A surety bond was duly executed by one Jafferali Lalji. The appeal was duly heard and was dismissed, whereupon the defendants and the surety became liable to satisfy the decree. The plaintiff has now applied for execution of the decree against the surety. The surety bond is in these terms:

> "Know all men by these presents that I Jafferali Lalji of Mombasa am held and firmly bound unto the Chief Justice and puisne judges of Her Majesty's Supreme Court of Kenya in the sum of Shs. 200,000/- (shillings two hundred thousand) to be paid to the Chief Justice and/or puisne judges or judge thereof for the time being; for which payment to be well and truly to be made I bind myself, my heirs, executors, administrators and assigns firmly by these presents.
>
> "Sealed with my seal this 18th day of February, one thousand nine hundred and fifty-seven.
>
> "Whereas by the decree made in the above suit in favour of the plaintiff Govindji Popatlal Madhavji against Nasser Alibhai and Modern Bakers Limited, the said Nasser Alibhai and Modern Bakers Limited are ordered, among other things, jointly and severally to pay the said plaintiff Shs. 136,550/06 (shillings one hundred thirty six thousand five hundred fifty and cents six) together with Shs. 15,218/78 (shillings fifteen thousand two hundred eighteen and cents seventy eight) for interest at 6 per cent. per annum thereon (from the 29th day of October, 1954, to the 6th day of September, 1956), and Shs. 14,888/05 (shillings fourteen thousand eight hundred eighty eight and cents five) the plaintiff's taxed costs of the suit and interest at 6 per cent. per annum on the total sum of Shs. 151,438/11 (being Shs. 136,550/06 plus Shs. 14,888/05) from the 6th day of September, 1956, till payment.
>
> "And whereas the said Nasser Alibhai has preferred an appeal to Her Majesty's Court of Appeal for Eastern Africa from the said decree, which said appeal is still pending.
>
> "And whereas on the application of the said Nasser Alibhai to Her Majesty's Supreme Court of Kenya in the above mentioned suit for stay of execution of the said decree pending the disposal of his said appeal, the said Supreme Court has, with the plaintiff's consent, ordered, that, as one of the terms of granting the said application for stay, due fulfilment of the said decree should be secured by the execution of the above written obligation conditioned as is hereinafter expressed.
>
> "Now the above written obligation is conditioned to be void in case the said decree of the Supreme Court of Kenya as against the said Nasser Alibhai shall be wholly set aside by Her Majesty's Court of Appeal for Eastern Africa, or (in the event of his said appeal being partly or wholly unsuccessful) he shall satisfy the decree which may be made against him in

pursuance of the judgment and order of Her Majesty's Court of Appeal for Eastern Africa in the said appeal."

It is contended for the surety that the plaintiff's application for execution is untenable on the ground that such an application can be made only after assignment by the obligees under the bond, namely, by the Chief Justice and the puisne judges of this court. I understood Mr. Doshi who appeared for the surety, to submit, alternatively, that the obligees named were the persons who should enforce the obligation under the bond by execution proceedings against the surety. On the other hand, I understood him also to argue that the only person who could execute the bond was the person entitled to the benefit thereof, namely, the plaintiff, but that he could not do so until the bond had been assigned to him by the Chief Justice and the puisne judges of the court. It was his submission that, had the form of the bond followed one of the forms given in Appendix "E" to the Rules, the assignment would not have been necessary and the plaintiff could have proceeded to execution.

I think Mr. Doshi's substantive contentions are erroneous. The court and the judges thereof are not juridical persons. It or they cannot sue or be sued. The decision of the judicial committee of the Privy Council in *Raj Raghubar Singh and Another v. Jai Indra Bahadur Singh* (1) (1919), 46 I.A. 228 makes this matter quite clear. There are other authorities to the same effect, notably *Tara Iron and Steel Co. Ltd. v. Smith* (2) (1929), 8 Pat. 801.

Section 92 of the local Civil Procedure Ordinance does not confine parties to the use of the forms given in the Schedule. This section reads as follows:

> "Where any person has become liable as surety:
>
> (*a*) for the performance of any decree or any part thereof; or
>
> (*b*) for the restitution of any property taken in execution of a decree; or
>
> (*c*) for the payment of any money, or for the fulfilment of any condition imposed on any person, under an order of the court in any suit or in any proceeding consequent thereon,
>
> the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner herein provided for the execution of decrees, and such person shall for the purposes of appeal be deemed a party within the meaning of section 34:"

Mr. Doshi concedes that the surety in this case has become liable as such. It must therefore follow that the plaintiff is entitled under s. 92 to execute the decree against the surety to the extent to which he has rendered himself personally liable. Section 92 is a specific provision giving the decree-holder the right to execute the decree against a surety without resorting in the first place to the step of assignment. Even if, as Mr. Doshi submits, the surety bond is a chose in action, the person who is entitled to the benefit of the bond is the plaintiff, and not, as Mr. Doshi suggests, the Chief Justice and the puisne judges. It would be open to the plaintiff to assign this surety bond to any person but it is equally open to him to execute upon this bond within the provisions of s. 92.

The application for execution against the surety is accordingly granted and the appropriate prohibitory orders will issue. The terms and conditions of sale are to be settled by the registrar on a day to be fixed by him. The plaintiff will have the taxed costs of this application.

Application granted.

For the plaintiff:
Patel & Thakkar, Mombasa

D. N. Khanna and *K. C. Thakkar*

For the first defendant:
Doshi & Chohan, Mombasa
D. D. Doshi

The second defendant did not appear and was not represented.

Hassam Karim & Co Limited v Africa Import and Export Central Corporation Limited

[1960] 1 EA 396 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of ruling:	12 May 1960
Case Number:	6/1958
Before:	Simmons J
Sourced by:	LawAfrica

[1] Jurisdiction – Revision – Civil action in district court – Judgment entered by magistrate for defendant by consent before trial – Consent given under mistake of fact – Order by same magistrate setting aside consent decree owing to mistake – Whether High Court has power to revise interlocutory order of magistrate – Subordinate Courts Ordinance (*Cap.* 3), *s.* 10 (*T.*) – *Indian Code of Civil Procedure*, 1908, *s.* 115, *s.* 151.

Editor's Summary

In proceedings in a district court for the price of goods sold and delivered the plaintiff company which had consented to judgment being entered for the defendant company, applied for and obtained an order setting aside the decree entered by consent on the ground that consent had been given in ignorance of certain facts. Relying on s. 115 of the Indian Code of Civil Procedure which empowers the High Court in certain circumstances to make revisional orders in any case "decided by a subordinate court" and s. 10 of the Subordinate Courts Ordinance which confers similar powers on the High Court in certain other circumstances where a subordinate court has tried a civil case, the defendant company applied for revision of the interlocutory order setting aside the consent decree. Thereupon the plaintiff company objected that the High Court could not revise an interlocutory order since this was not a case which had been tried or decided.

Held –

(i) the High Court has no power under s. 115 of the Indian Code of Civil Procedure to revise an interlocutory order. *Vithaldas Jetha v. Valibai* (1935), 1 T.L.R. (R.) 400 followed.

(ii) the High Court only has power to make an order in revision under s. 10 of the Subordinate Courts

Ordinance where the applicant has suffered grave injustice and since the plaintiff company had consented to judgment through a mistake of fact which must have been shared by the defendant company's advocate there could be no injustice in allowing the issues between the parties to be decided on their merits.

(iii) s. 151 of the Indian Code of Civil Procedure provides no more than that in so far as the court has certain powers that Code does not abrogate the powers; to find out whether the court has those powers one must look elsewhere since the powers, if any, must exist independently of s. 151.

Application dismissed.

Cases referred to in judgment:

(1) *Vithaldas Jetha v. Valibai* (1935), 1 T.L.R. (R.) 400.

(2) *Hood Ltd. v. Rajwani*, Tanganyika High Court Civil Revision No. 4 of 1957 (unreported).

(3) *Jaffar v. Gupta*, Tanganyika High Court Civil Revision No. 3 of 1958 (unreported).

(4) *Mullins v. Howell* (1879), 11 Ch. D. 763.

(5) *Raja v. Thatha* (1912), 35 Mad. 75.

(6) *U Po Htu v. Ma Than Yin* (1936), A.I.R. Rang. 389.

(7) *Arthur Faucus v. Banarshi* (1933), 1 T.L.R. (R.) 478.

(8) *Young v. Bristol Aeroplane Co. Ltd*., [1946] A.C. 163; [1946] 1 All E.R. 98.

Judgment

Simmons J: This is an application for revision of orders made in two suits in the Dar-es-Salaam district court. The orders and suits were similar in nature and it is necessary to refer to but one, and that not in detail. The plaint was a claim for the price of goods sold and delivered. After numerous adjournments the learned advocate for the plaintiff company consented to judgment for the defendant. On July 9, 1958, she applied to the magistrate in chambers for an order setting aside the consent decree on the ground that she had only consented in ignorance of certain facts, and on that ground the learned resident magistrate set aside the consent decree on August 22, 1958. It is of his order that the defendant company now asks for revision pursuant to s. 115 of the Code of Civil Procedure and s. 10 of the Subordinate Courts Ordinance (Cap. 3).

Section 115 provides that the High Court may in certain circumstances make revisional orders in "any case which has been decided" by a subordinate court. Section 10 provides that it may do so in certain other circumstances where "a subordinate court has tried a civil case". The learned advocate for the respondent took a preliminary objection that the High Court cannot revise an interlocutory order, this not being a "case which has been decided" or "tried".

So far as s. 115 in its application to Tanganyika is concerned a clear answer is to be found in *Vithaldas Jetha v. Valibai* (1) (1935), 1 T.L.R. (R.) 400, in which it was held, following an Indian decision, that such an objection was well founded. In *Hood Ltd. v. Rajwani* (2), Tanganyika High Court Civil Revision No. 4 of 1957 (unreported), Mahon, J., (as he then was) followed *Jetha v. Valibai* (1), and I have not been referred to any case in which it has been overruled by the Court of Appeal. In *Jaffar v. Gupta* (3), Tanganyika High Court Civil Revision No. 3 of 1958 (unreported), Williams, Ag. J., revised an interlocutory order but did not deal with this point in his judgment, which is therefore not an authority on the point.

It remains to be decided whether the objection is also valid against applications under s. 10 of the Subordinate Courts Ordinance. One important difference is that revision under that section is not confined, as is revision under s. 115 of the Code, to cases where no appeal lies. This execution of cases where an appeal lay was apparently the reason for holding that an application cannot be entertained in the case of interlocutory orders, because though no *immediate* appeal lies against them a remedy is supplied by s. 105, which provides that they may be made a ground of objection in the appeal against the final decree; it is not right, therefore, to say that there is *no* appeal against interlocutory orders, and they cannot be revised under s. 115 (see Woodroffe and Ameer Ali (2nd Edn.), p. 465).

Although s. 10 is not confined to non-appealable orders, so that the same objection to applications for revision under it does not lie as lies against those under s. 115, it has effect only when a subordinate court "has tried a civil case". Can it be said that in the present proceedings the district court "has tried a civil case"?

I am not going to rule whether the hearing and determination of an interlocutory application can or cannot be the trial of a civil case within the meaning of s. 10, but will assume that it can, at least in some cases. I have to decide whether there has been the trial of a case in the district court in this particular matter. Wharton (14th Edn.) quotes Coke on Littleton thus:

“Trial is to find out by due examination the truth of the point in issue or

> question between the parties, whereupon judgment may be given."

There had been no trial of a civil case up to and including the consent decree (so that there could be no revision of a consent decree) but it is not so simple to decide whether the application for rescission and its determination was such a trial. I am inclined to think that it was, and will so assume; in which case the preliminary objection would fail quoad s. 10 even though valid quoad s. 115. An examination of the application on the merits will show why it is unnecessary to decide the point definitely.

I can make no order under s. 10 unless there has been "grave injustice" to the applicant. It is plain that by the norms of natural justice there has not been anything of the kind, though there is a suspicion that on the merits there would be grave injustice if I allowed the application. The plaintiff company consented to judgment against them on their advocate's mistake of fact (which must have been shared by the advocate for the defendant company; had it not been he would have put the other advocate right) and I do not see how it could be said that on the merits there is "grave injustice" in now allowing the issues to be decided on those merits rather than on an error for which the plaintiff company was not responsible. Even if the setting aside of the consent decree involved an error – as to which I express no opinion – there would be no power to revise unless there were grave injustice, which must mean something which could not be healed by the soothing balm of an order for costs.

There is, however, another kind of grave injustice besides an offence against natural justice, as commonly understood, and that is an order which a court has no jurisdiction to make. However much one may sympathise with the plaintiff company on the merits it is necessary to examine the contention of the applicant that the magistrate had no jurisdiction to rescind the decree.

Section 20 of the Indian Contract Act provides that where

> "both parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void."

The learned authors of Woodroffe and Ameer Ali (supra) say at p. 146:

> "When a decree is passed by consent of parties, the question whether or not the compromise on which such decree is based is valid cannot be gone into on an appeal against that decree. The court, however, has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties."

Both parties were under a mistake as to a matter of fact essential to the agreement, and the agreement upon which the consent decree was based would have been void under the Contract Act. According to the textbook the magistrate therefore had jurisdiction to set aside the decree. One example of this inherent power is to be found in *Mullins v. Howell* (4) (1879), 11 Ch.D. 763, in which Sir George Jessell, M.R., said:

> "I have no doubt that the court has jurisdiction to discharge an order made on motion by consent when it is proved to have been made under a mistake, though that mistake was on one side only, the court having a sort of general control over interlocutory applications. . .
>
> "I do not think that the rules which have been laid down as the rules under which the court will enforce agreements apply to enforcing orders of the court, because the court has jurisdiction over its own orders, and there is a larger discretion as to orders, made on interlocutory applications than as to those which are final judgments."

This means that in some cases the court will discharge a consent order even though the mistake is one-sided. *Raja v. Thatha* (5) (1912), 35 Mad. 75 appears

to be contrary to Sir George Jessell's dictum; if it is, then with respect it seems to be contrary to the main body of opinion.

I have no doubt that the magistrate had jurisdiction to set aside the decree. The correct procedure to move him to do so might have been to bring a suit or (under our procedure as opposed to that of England) to apply for a review: see Woodroffe and Ameer Ali, p. 387 – "Consent decree". One of the Indian authorities cited by Mr. Sayani raises a conflict as to which is the right procedure, but that depends on the nature of the case. An application for review could be made under O. 47, r. 1, and it may be made "for any . . . sufficient reason". Rule 3 assimilates the form of application for a review to that of an appeal, which is provided for by O. 41, and by this criterion it must be admitted that the application to the magistrate was not made in the correct form: there was no memorandum of the grounds, though there was an affidavit which had the same effect, and the application was apparently in chambers when it should have been in open court. But no objection was taken to these irregularities, if such they were, and they did not occasion a grave injustice. The respondents simply objected that an application "under s. 151" was "misconceived" because that section could not be "brought into play", and then dealt with the application on the merits.

This attitude to s. 151 of the Code of Civil Procedure suggests a misconception of its nature. No application could ever be brought "under" it; it confers no power on the courts nor rights on litigants. It provides no more than that in so far as the courts may have certain inherent powers the Code does not abrogate them. To find out whether those powers actually exist one must look elsewhere than at s. 151, for they must exist independently of that section. In this case the summons was headed "Application under s. 151". This is a loose expression, however commonly used, and the real nature of s. 151 should always be borne in mind; but I know of no reason why any heading should in strictness be regarded as necessary. In any case failure to quote the correct order does not deprive the magistrate of the power conferred by that order: it is, in common with such other procedural errors as may have existed, at the worst, an error not material to the merits of the case, and not involving grave injustice.

As I have said, there is uncertainty as to whether the plaintiffs should have brought a suit to set aside the decree, or an application for review to that end, or whether they were free to do either. Where there is an allegation of fraud *U Po Htu v. Ma Than Yin* (6) (1936), A.I.R. Rang. 389, suggests that a suit should be brought, but where there is a mistake on both sides and no dispute of the facts, as here, an application for review was an unobjectionable step (and I treat the application as an application for review even though the correct procedure was not followed, for what the magistrate was asked to do was, in fact, to review his decree). The applicants themselves concede in their memorandum of application for revision that the magistrate would have had jurisdiction to review under O. 47. I am also influenced by the dictum of Hearne, J., in *Arthur Faucus v. Banarshi* (7) (1933), 1 T.L.R. (R.) 478, that a consent decree can be impeached "in a regular suit or alternatively by an application for review". Whatever may have been held in Indian cases the cursus curiae in Tanganyika would seem to be to recognize both procedures, and I think I should proceed on that footing.

Indian authorities are only persuasive, with whatever respect they are to be regarded, and once a point has been settled by an authority of this court or the courts superior to it this court will not lightly overrule that authority except perhaps as indicated in *Young v. Bristol Aeroplane Co. Ltd.* (8), [1946] A.C. 163.

To recapitulate, even if revision of an interlocutory order can be carried out under s. 10 of the Subordinate Courts Ordinance, as seems likely, there can be none in this case because there was no grave injustice and no lack of

jurisdiction on the part of the magistrate. I have dealt with the major part of the memorandum of application for revision but for completeness will refer to the paragraphs seriatim. The grounds are as follows:

(1) The learned magistrate erred in rescinding his own order made on July 9, 1958, whereby he had rejected the plaint with the consent of the respondent's advocate.

(2) The learned magistrate had no jurisdiction to make the order sought by the respondent under s. 151 or s. 96 of Indian Civil Procedure Code.

(3) The only grounds upon which review could have been granted are set out in O. 47, r. 1, but the grounds relied upon by the respondent did not fall within the purview of the said order.

(4) The learned magistrate should have held that a consent judgment could not be set aside under an application for review.

(5) Misapprehension as to facts or law on the part of the respondent does not constitute a good ground for an application for review.

The answer to paras. 1 to 3 is to agree that the magistrate had no jurisdiction under s. 96 or s. 151 and that he had jurisdiction under O. 47, but to disagree with the contention that the grounds relied upon by the respondents did not come within the purview of the order; there was a "sufficient reason" within the meaning of r. 1. Even if "sufficient reason" has to be construed ejusdem generis with the other reasons in r. 1, and I do not say that it has, the two-sided mistake here can be so construed with "the discovery of new and important matter". I have already said (in answer to para. 4) that a consent judgment can be set aside on an application for review. As to para. 5, s. 20 of the Contract Act and the authorities I have cited demonstrate that mistake of fact, at least if two-sided, can be a good ground for setting aside a consent decree. The questions under the Limitation Act do not arise.

The application is dismissed.

Application dismissed.

For the applicants:
Sayani & Co., Dar-es-Salaam
N. R. Sayani

For the respondents:
Vellani & Co., Dar-es-Salaam
R. B. Vellani

Re Dimitri Tzamtzis Deceased
[1960] 1 EA 401 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	31 May 1960
Case Number:	20/1959
Before:	Crawshaw Ag CJ

Sourced by: LawAfrica

[1] Bankruptcy – Property available for distribution – Building erected by debtor on land owned by wife – Administration in bankruptcy of estate of debtor ordered less than one year after death – Whether debtor's voluntary settlement is within expression "estate of deceased debtor" in s. 47 (9) *of Bankruptcy Ordinance* (*Cap.* 25) (*T.*) *– Bankruptcy* (*Amendment*) *Ordinance*, 1958 (*T.*) *– Bankruptcy Act*, 1883, *s.* 125 *– Bankruptcy Ordinance* (*Cap.* 25), *s.* 47 (9) (*T.*).

Editor's Summary

Letters of administration of the estate of one, T, were granted to the Administrator-General on July 28, 1958, and on June 12, 1959, the court ordered the estate to be administered in bankruptcy under s. 120 of the Bankruptcy Ordinance. On November 4, 1959, the Official Receiver, as trustee of the estate, moved the court for a declaration that a building alleged to have been erected within a year of his death by "T" with his own materials on land belonging to his wife and held under a right of occupancy was a voluntary settlement within s. 47 of the Bankruptcy Ordinance and as such was void against the Official Receiver. The motion was opposed by the widow of "T" who contended that prior to the Bankruptcy (Amendment) Ordinance, 1958 coming into force on July 11, 1958, settled property was not property of a deceased debtor within s. 120 of the Bankruptcy Ordinance.

Held – the amendments made to s. 120 of the Bankruptcy Ordinance by the Bankruptcy (Amendment) Ordinance, 1958 extended the provisions of s. 47 of the Bankruptcy Ordinance to the estates of deceased persons which are administered in bankruptcy and also extended to voluntary settlements made before the amending Ordinance came into force.

Order accordingly.

Case referred to:

(1) *In re Gould* (1887), 19 Q.B.D. 92.

Judgment

Crawshaw Ag CJ: This is a preliminary point on a motion by the Official Receiver as trustee of the estate of Dimitri Tzamtzis who died on October 15, 1955. Letters of administration were granted to the Administrator General on July 28, 1958. On June 12, 1959, an order for the estate to be administered in bankruptcy was made by the court under the provisions of s. 120 of the Bankruptcy Ordinance, Cap. 25.

The motion is for a declaration that a building on a right of occupancy held by the deceased's wife, the respondent, and alleged to have been erected within twelve months prior to the deceased's death with money and materials belonging to him, constituted and was a voluntary settlement within the meaning of s. 47, and as such is void against the Official Receiver. This section was originally s. 44, but became s. 47 when Cap. 25 was revised, subsequent to the Bankruptcy (Amendment) Ordinance, 1958, to incorporate amendments to date.

Section 120 as it stood prior to the 1958 Ordinance (it was then s. 117) was substantially similar to s. 125 of the English Bankruptcy Act, 1883, sub-s.(6) (equivalent to our then sub-s. (4)) of which reads:

> "With the modifications hereinafter mentioned, all the provisions of Part III (which includes s. 47, similar to our s. 47) of this Act, relating to the administration of the property of a bankrupt shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act."

It was held however *In re Gould* (1) (1887), 19 Q.B.D. 92 that the provisions of s. 47 were not applicable under an order of administration in bankruptcy, as the property to which that section relates is property of persons other than the bankrupt. The words in our pre-1958 Ordinance "relating to the administration of the property of bankrupt" were in brackets, and in the context would appear to be meant to be generally descriptive of the contents of Part III, in manner not uncommon in drafting, and not words of limitation. In the 1883 Act the words were within commas, not brackets, although in the 1914 Bankruptcy Act brackets were used. The *Gould* case (1), however was not decided on this sub-section read alone, but on what was considered to be the general purpose of the section as a whole. Fry, L.J., in relation to the words in sub-section (1) of s. 125, "administration according to the law of bankruptcy" said,

> "In my judgment those words apply only to the mode of administration, and not to the subject matter which is to be administered".

Referring to sub-s. (6) he said at p. 100.

> "I agree that it means that all the provisions of Part III of the Act are to apply to the case of an administration order under s. 125, but still they are to apply only 'so far as the same are applicable'. What is an 'administration order'? It is 'an order for the administration of the deceased debtor's estate', and of nothing else. So many, therefore, of the provisions of Part III as are applicable to such an administration are imported into s. 125, and no others. Stated shortly, my conclusion is, that the legislature intended to enable the Court of Bankruptcy to make an order for the administration of the estate of the deceased debtor only, and we cannot extend the section to anything else."

Although I feel doubt on this construction, as Lopes, L.J., said in the *Gould* case (1), that he did for some time, that case is still apparently, after over seventy years, accepted in England as authoritative law on the point, and I feel I must apply it; it is relied on by counsel for both parties.

Accepting therefore that prior to the 1958 amending Ordinance s. 47 did not apply to estates administered in bankruptcy, the Official Receiver supports his motion on the basis that the 1958 amendments to s. 120 apply to petitions under s. 120 (8) presented subsequent to the 1958 Ordinance, even when the voluntary settlement was made prior to that Ordinance. The 1958 Ordinance came into operation on July 11, 1958, nearly one year before the petition. If the amendments apply, then by virtue of sub-s. (9), s. 47 would apply also, for the relevant part of sub-s. (9) reads as follows: –

> ". . . the expressions 'property of the deceased debtor' and 'estate of of the deceased debtor' shall be deemed to include any property which would have been divisible amongst the creditors had a bankruptcy petition been presented against the deceased debtor immediately before his death and the proceedings had been continued as if he were alive."

Under this sub-section the "estate of the deceased debtor" would therefore extend to property coming within the provisions of s. 47, including voluntary settlements.

Sub-section (8) is not new, and before Cap. 25 was revised it was subsection (8) of the old s. 117; it has in fact been in its present form since the

Ordinance was first introduced in 1930. It reads:

> "A petition for the administration of the estate of a deceased debtor under this section may be presented by the legal personal representative of the debtor, and, where a petition is so presented by such a representative, this section shall apply subject to such modifications as may be prescribed by general rules made under sub-s. (10) of this section."

Mr. Thornton for the respondent has argued that to apply in the instant case the 1958 amendments to s. 120, including sub-s. (9), would be to give retrospective effect to the new provisions, for he says the relevant events took place before the 1958 Ordinance. In other words, the respondent was quite secure prior to that Ordinance, and by applying the amending Ordinance her rights might become adversely affected, and this would offend against the accepted principles relating to retrospective legislation. He cited to me many English authorities in which these principles were considered and applied. I should add that the amendments to s. 120 were not specifically made retrospective.

It seems to me however that sub-s. (8) must be read literally. The first part of it clearly applies to all petitions including the instant petition whether made before or after the 1958 Ordinance, and it would in my opinion be wrong to give a limited effect to the words "this section shall apply". In my view these words must inevitably mean "this section as amended from time to time shall apply".

It follows therefore that the Official Receiver succeeds on this preliminary point, and the hearing will proceed on the basis that s. 47 (1) applies to the administration of this estate.

Order accordingly.

For the Official Receiver:

W. J. Lockhart-Smith, Dar-es-Salaam

For the respondent:

Fraser Murray, Thornton & Co., Dar-es-Salaam

R.S. Thornton

Alli s/o Mzee v R

[1960] 1 EA 404 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	6 April 1960
Case Number:	594/1959
Before:	Murphy J
Sourced by:	LawAfrica

[1] Street traffic – Permitting persons to sit on roof of omnibus – Permitting public service vehicle to carry more than licensed number of passengers – Driver and conductor in charge of vehicle – Driver not

aware of excess passengers – Meaning of words "permit" and "in charge" – Traffic Ordinance, s. 34 (*e*) (*T.*) *– Traffic Rules, r.* 35(2)(*i*)(*T.*).

Editor's Summary

The driver and conductor of a bus were convicted of permitting persons to ride on the roof of a vehicle and that being in charge of a public service vehicle, they permitted more passengers than the number for which the vehicle was licensed to be carried. The driver appealed on the ground that he was not aware that the extra passengers had boarded or had climbed on the roof of the vehicle and that on the evidence it had to be assumed in the appellant's favour that he had no knowledge that the bus was overloaded.

Held –

(i) a person may properly be said to have permitted something of which he had no knowledge, provided it is shown, first, that he was in a position to forbid the act and, secondly, that he had a responsibility to forbid it.

(ii) if there is a responsibility to forbid an act, the person on whom it lies cannot escape liability unless it is shown that after taking all reasonable precautions it was impossible for him to know of the act.

(iii) applying these principles, the appellant could properly be held to have permitted the acts complained of, and, as the driver of the bus, the appellant was in charge of it notwithstanding the presence of the conductor.

Appeal dismissed.

Case referred to:

(1) *Evans v. Dell*, [1937] 1 All E.R. 349.

(2) *Alimohamed Osman v. R.* (1952), 1 T.L.R.(R.) 391.

(3) *Goodbarne v. Buck*, [1940] 1 K.B. 771.

Judgment

Murphy J: The appellant and one other, who were respectively the driver and conductor of a bus, were convicted on two counts by a magistrate at Sumbawanga. In the first count they were alleged to have permitted persons to sit on the roof of the vehicle while it was in motion and in the second count to have carried a greater number of passengers than the vehicle was licensed to carry. The first count was laid under r. 35(2)(*i*) of the Traffic Rules, the relevant part of which reads as follows:

> "(2) Any person driving or in charge of a motor vehicle or carriage used on a road –
>
>
>
> (*i*) shall not. . .permit any person to ride on the. . .roofing of the vehicle. . ."

The second count was laid under s. 34(*e*) of the Traffic Ordinance the relevant part of which reads as follows:

> "34. No owner, driver or person in charge of a public service vehicle shall:
>
>
>
> (*e*) while in charge of a public service vehicle permit to be carried a greater number of passengers . . . than that which the vehicle is licensed to carry."

(The numbers of the section and rule here quoted are as they appear in Volume III of the Revised Laws. They are wrongly quoted in the charge sheet.) It is to be noted that on both counts it was necessary to prove that the appellant "permitted" something to happen; and in the second count it was also necessary to prove that he was "in charge of" the vehicle.

The prosecution case is summarized thus in the magistrate's judgment:

> "It is not in dispute that at the material time Accused I was driver and Accused II conductor of Bus No. UF. 172; nor that this bus is licensed to carry 32 passengers.
>
> "Evidence is clear and corroborated from the two Police witnesses.
>
> "They stopped the bus and checked 9 persons on the roof and carefully counted 52 inside the bus. As a further point of detail they checked that 40 of the passengers held tickets.
>
> "I see no reason to doubt either of these witnesses."

The appellant made the following unsworn statement in his defence:

> "The number alleged could not get into the bus with all their loads. I am surprised to hear only 40 had tickets. I had stopped when police reached me, was backing. May be the extra people climbed while I was fixing the engine."

The appellant here appears to be saying that he did not know that the extra passengers had boarded the vehicle and climbed on the roof and he has repeated this with greater precision in his petition of appeal. The magistrate made no finding on the question of whether the appellant had knowledge or not and, in the absence of any positive evidence to the contrary, I think that it must be assumed in the appellant's favour that he did not have knowledge.

Could then the appellant be said to have permitted something of which he had no knowledge? There are a number of reported decisions on the meaning and effect of the word "permit" in a statute, some of which are at first sight not easy to reconcile. In *Evans v. Dell* (1), [1937] 1 All E.R. 349 it was held that the owner of a motor coach who had been charged under the Road Traffic Act, 1930, with permitting it to be used as a stage carriage had been properly acquitted since he was unaware of the use to which it was being put. This case is referred to by Abernethy, J. in *Alimohamed Osman v. R.* (2) (1952), 1 T.L.R. (R.) 391, where he quotes Swift, J. as having said that he could not see how anybody could be charged with permitting an offence to be done unless he had some knowledge that the offence was done or was about to be done. With respect, this observation of Swift, J. (with which Abernethy, J. disagreed) is not to be found in the report of *Evans v. Dell* (1), in which no judgment was delivered by Swift, J. The observation appears to have been taken from a lay report quoted in Mahaffy and Dodson's Road Traffic Acts and Orders, 1939 Supplement, at p. 7, and may have been made while hearing arguments. The reasons for the decision in *Evans v. Dell* (1), are given in the judgment of Lord Hewart, L.C.J. and that judgment leaves open the question of what would have been the position if it had been shown that the owner of the vehicle ought to have known (irrespective of whether he in fact knew or not) the purpose for which the vehicle was to be

used. This is the question which was considered by Abernethy, J. in *Alimohamed Osman v. R.* (2), where it was held that the owner of a vehicle who left it entirely to his African driver to look after the vehicle took the risk that the driver might not comply with the requirements of the traffic laws and if in these circumstances the driver drove the vehicle with defective tyres the owner had "permitted" him to do so. This decision, with which I respectfully agree, is not inconsistent with *Evans v. Dell* (1), and is in accordance with decisions in other English cases to which Abernethy, J. refers in his judgment. These cases however, all deal with the responsibility of the owner of a vehicle and I have now to consider whether they embody any principles which can be applied to the present case, in which the position is somewhat different.

One must, I think, discard the idea that this is a case of absolute liability. The use of the word "permits" indicates that there must be a mens rea, but the question to be decided is what attitude of mind constitutes a mens rea in this context. I think that this attitude of mind can best be described as an ignoring of responsibility. It seems to me that two principles emerge from the decided cases. First, the person charged must have been in a position to forbid the act which he is said to have permitted. This was decided in *Goodbarne v. Buck* (3), [1940] 1 K.B.771. Secondly, and more important, there must be a responsibility to forbid the act; and if this responsibility exists, the person upon whom it lies cannot escape liability by pleading lack of knowledge that the act was being committed, unless he can show that even by taking all reasonable precautions it was impossible for him to acquire this knowledge. This would appear to be the principle which has been applied in those cases where owners of vehicles have been held to have permitted acts done by their driver. As was said by Abernethy, J. in *Alimohamed Osman v. R.* (2), if the law were that a person could not be charged with permitting an offence unless he had some knowledge that it was done or was about to be done, it would be easy for owners of vehicles to escape their responsibilities.

The issue in the present case is the liability of a bus-driver whose bus has been overloaded without his knowledge and due to the fault of the conductor. The principles which I have mentioned can, in my view, be applied to this situation without any difficulty. Clearly it is the responsibility of a driver to see that his vehicle is in a safe condition to drive. It is not in a safe condition if it holds 20 excess passengers some of whom are travelling on the roof. In these circumstances it is not open to the driver to say that he had no knowledge of the excess passengers and is therefore not liable. I do not think that the presence of a conductor in the vehicle affected this position. The responsibility for the safety of the vehicle still rests with the driver and it would not be difficult for him to discover that the vehicle was overloaded. If he did discover this he would undoubtedly be in a position to forbid the extra passengers to be carried. I therefore hold that on both counts the appellant could properly be held to have permitted the acts complained of.

On the second count it had also to be decided whether the appellant was in charge of the vehicle. This question was not considered by the magistrate in his judgment, but I think that as a matter of common sense any driver (with the possible exception of a learner-driver) must be said to be in charge of the vehicle which he is driving. That this is so follows from what I have already said about a driver's responsibility. It is true that in this case the appellant's co-accused, that is to say the conductor, was also alleged to have been in charge, but I see nothing anomalous about this. There is no reason why more than one person should not be in charge. The conductor no doubt also has responsibilities which may bring him within the section, but it is unnecessary to consider this for the purpose of this appeal.

For these reasons I hold that the appellant was rightly convicted on both counts. He was sentenced to

pay a fine of Shs. 150/- on each count and was

disqualified from driving for a year. He had a previous conviction for allowing a passenger to travel on the roof, but this was several years ago and I think that the magistrate might have dealt with him more leniently if he had considered the possibility that the appellant did not know of the excess passengers in this case.

The appeal is dismissed. I reduce the sentence to a fine of Shs. 100/- on each count and order that the balance of Shs. 100/- be refunded to the appellant. I also reduce the period of disqualification to six (6) months.

Appeal dismissed.

The appellant did not appear and was not represented.

For the Crown:

The Attorney-General, Tanganyika

D. M. MacDonagh (Crown Counsel, Tanganyika)

R v Omari s/o Kindamba and others

[1960] 1 EA 407 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	25 May 1960
Case Number:	119/1960
Before:	Law J
Sourced by:	LawAfrica

[1] Criminal law – Forfeiture – Conviction of hunting animals in controlled area without permission – Order for forfeiture of weapons used – Whether order for forfeiture lawful – Interpretation of words "in respect of which the offence has been committed" in Fauna Conservation Ordinance (*Cap.* 302), *s.* 53(2)(*T*).

[2] Game – Unlawful hunting – Forfeiture of weapons – When forfeiture competent – Fauna Conservation Ordinance (*Cap.* 302), *s.* 53 (2) (*T.*).

Editor's Summary

Ten persons were convicted of hunting animals in a controlled area without the permission of a game warden. The magistrate, purporting to act under s. 53 (2) of the Fauna Conservation Ordinance, ordered that the guns, bows and arrows used by the accused be forfeited to the Government. When two of the accused subsequently petitioned the Government for the return of their shotguns, the validity of the order for forfeiture was referred to the court in its revisional jurisdiction.

Held –

(i) the words "in respect of which the offence had been committed" in s. 53(2) of the Fauna Conservation Ordinance, refer to the subject-matter of the offence, and not to things indirectly or incidentally connected with the commission of the offence.

(ii) the guns which were ordered to be forfeited were only involved collaterally in the commission of the offence, and therefore were not things "in respect of which" the offence was committed.

(iii) the magistrate had no power to order the forfeiture of the guns, bows and arrows under s. 53 (2) of the Ordinance because the conviction was not "in respect of" the guns, bows and arrows, but was in respect of unlawful hunting in a controlled area. *Ebrahim Ahmed Mohamed Modhaf v. R.* (1956), 23 E.A.C.A. 546 followed.

Order that the forfeiture be set aside and the arms returned to the owners thereof.

Cases referred to in judgment:

(1) *Ebrahim Ahmed Mohamed Modhaf v. R.* (1956), 23 E.A.C.A. 546.

Judgment

Law J: This case has come before the High Court in its revisional jurisdiction at the request of the Honourable the Attorney-General.

The ten accused were all convicted on their own pleas of the following offence:

> "Hunting animals in a controlled area without the written permission of the Game Warden previously sought and obtained, c/s 11(1)(*a*) and 53 of the Fauna Conservation Ordinance (Cap. 302).
>
> Particulars of Offence
>
> "The persons charged, between the 11th and 14th days of April, 1959, at Mbamba Game controlled area, in Kilosa District in the Eastern Province, did hunt and kill ten impalas, a buffalo and a wildebeest, without the written permission of the Game Warden previously sought and obtained."

To kill the animals specified above, the accused had in their possession, and no doubt used, two shotguns and two bows and arrows. The trial magistrate sentenced all ten accused to six months imprisonment and ordered "all arms to be forfeit to the Crown". All accused have served their sentence without complaint, but the two accused who are the owners of the shotguns which have been forfeited have petitioned His Excellency the Governor for the return of their guns, on the grounds that they are farmers and require the guns for the protection of their crops.

The question for consideration is whether the order for forfeiture was lawful.

By s. 53 (2) of the Fauna Conservation Ordinance:

> "When any person is convicted of an offence against this Ordinance, the court may order that any animal, meat, trophy, trap, weapon, poison, vehicle or instrument in respect of which the offence has been committed shall be forfeited to the Government."

The validity of the magistrate's order for the forfeiture of the arms used in this case depends on the interpretation of the words "in respect of which the offence has been committed". The offence in this case was hunting in a controlled area without the consent of the game warden. The forfeited shotguns were used in the course of the commission of that offence. Were these guns weapons in respect of which the offence was committed? The use of the guns was incidental or collateral to the commission of the offence, which could have been committed without the use of guns. Sub-section (2) of s. 53 is susceptible of two interpretations. Firstly, it can be argued that it was intended to enable the forfeiture of all weapons, etc., used in connection with the commission of an offence against the Ordinance. If that was the intention, it is difficult to see why the sub-section did not say so in terms. The second possible interpretation is that the sub-section only allows the forfeiture of a weapon or other thing which was the subject of an offence against the Ordinance relating to that specific weapon or thing; for instance where the offence charged related to the use of a weapon other than a suitable weapon (s. 22(3)); in such a case the offending weapon would be one in respect of which the conviction was had, and it would be liable to forfeiture. Which of these two interpretations is the correct one is now for decision, and it is the court's duty to interpret the sub-section literally without having regard to the apparent intention of the legislature.

On a literal interpretation, the words "in respect of which the offence has been committed" must, in my view, refer to the subject-matter of the offence, and not to things indirectly or incidentally connected with the commission of the offence. Similar words were considered by the Court of Appeal for Eastern

Africa in *Ebrahim Ahmed Mohamed Modhaf v. R.* (1) (1956), 23 E.A.C.A. 546, and that court interpreted the words

> "goods in respect of which such offence has been committed shall be liable to forfeiture"

which occur in certain sections of the E.A. Customs Management Act, 1952, as being restricted to goods which form the subject-matter of the charge and not as extending to goods which happen to be together with the goods forming the subject-matter of the charge. Where, in the same Act, the legislature intended to confer a general power to forfeit things used in the commission of the offence, a different wording was used. For instance, s. 157 of the Act authorises the forfeiture of the package in which goods liable to forfeiture are contained, and even the forfeiture of other goods in the same package. Section 156 authorises the forfeiture of conveyances and animals used for the movement of goods liable to forfeiture. As Briggs, J.A. pointed out, there is a contrast between "goods in respect of which an offence has been committed" and "goods seized by reason of the commission of an offence". The learned Justice of Appeal said:

> "The latter phrase, but not the former, includes goods only involved collaterally in the offence".

The former phrase applies only to goods which form the subject-matter of the offence.

In the case which is now under consideration, the guns which were ordered to be forfeited were only involved collaterally in the commission of the offence. On the authority of *Modhaf's* case (1), I must hold that the arms ordered to be forfeited in this case were not things "in respect of which" the offence was committed. They were used in the commission of the offence and thus connected with the offence but did not form the subject-matter of the offence. If the legislature intended to confer a general power to forfeit things used in the commission of any offence against the Fauna Conservation Ordinance, it has failed to achieve its object. I have come to this conclusion with regret, as the owners of guns and bows used in the mass destruction of game in the course of illegal hunting deserve to lose their weapons but I must interpret the law as I find it, and not according to the probable intention of the legislature, when that intention does not clearly appear from the words used in the statute.

It follows that in my opinion the trial magistrate had no power to order the forfeiture of the guns and bows and arrows used in the commission of the offence of unlawful hunting of which their owners were convicted, because the conviction was not "in respect of" these guns, bows and arrows, but was "in respect of" unlawful hunting in a controlled area. I accordingly order that the magistrate's order "All arms to be forfeit to the Crown" be set aside, as having been made in excess of jurisdiction, and I order that the said arms be returned to their respective owners, on application made by them in that behalf.

Order that the forfeiture be set aside and the arms returned to the owners thereof.

For the Crown:

The Attorney-General, Tanganyika

A.M. Troup (Crown Counsel, Tanganyika)

The accused did not appear and were not represented.

Govind Ukeda Patel v Dhanji Nanji

[1960] 1 EA 410 (CAM)

Division: Court of Appeal at Mombasa

Date of judgment:	15 June 1960
Case Number:	79/1959
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Kenya – Edmonds, J.

[1] Bill of exchange – Cheque – Notice of dishonour within reasonable time – Notice given two days after having knowledge of dishonour – No averment in pleadings that notice unnecessary – Whether holder can rely on such plea without amendment of pleadings – Meaning of 'refer to drawer' – Bills of Exchange Ordinance (*Cap.* 291), *s.* 49 (12), *s.* 50 (1), *s.* 50 (2) (*c*) (iv), (*K.*).

[2] Practice – Trial – Amendment of pleading – Bill of exchange – Application for leave to amend after close of evidence for both parties – Whether refusal of application justified.

Editor's Summary

The appellant unsuccessfully sued the respondent on a dishonoured cheque for Shs. 3,900/- drawn upon Barclays Bank D.C.O. Mombasa in favour of one, Bhudia, who had endorsed it to the appellant. The appellant who resided at Nairobi presented the cheque for payment through his bank in Nairobi on December 13, 1958, and was informed verbally on December 16 of the dishonour. On December 18 he received back the cheque from the bank marked "refer to drawer" and next day he sent the cheque to a friend in Mombasa with instructions to hand it to an advocate for action. The advocate wrote a letter on December 22 to the respondent informing him that the cheque had been dishonoured and requiring payment. At the trial issues were framed but at the close of the appellant's evidence, counsel for the respondent elected to call no evidence and to rely only upon one issue which was ". . . has the plaintiff given to the defendant a notice of dishonour in reasonable time". In argument, however, counsel for the appellant submitted that no notice of dishonour was necessary. It was objected that this had not been pleaded and no issue upon the question had been framed. The plaintiff's advocate then applied for and was refused leave to amend the plaint on the ground that the respondent would suffer prejudice which could not be adequately compensated by costs. On appeal, counsel for the appellant contended that the trial judge had misdirected himself in holding that notice of dishonour was not given in reasonable time and that the plaint sufficiently pleaded facts upon which it was open to counsel to submit without amendment of pleadings, that notice of dishonour was unnecessary.

Held –

(i) on the evidence it was clear that the notice of dishonour had not been given within a reasonable time and the appellant had not given any evidence to show that he had acted with due diligence or that there were any "special circumstances" justifying the delay.

(ii) the words "refer to drawer" may be used in a variety of circumstances; they may, and frequently do mean that the drawer has no funds available and has made no arrangements to meet the cheque, but that is not their only meaning and therefore not their necessary meaning; therefore,

(iii) the pleading did not amount to a plea of material facts sufficient, if substantiated, to entitle the appellant to dispense with notice of dishonour.

Appeal dismissed.

Cases referred to in judgment:

(1) *Bateman v. Joseph* (1810), 2 Camp. 461; 170 E.R. 1218.

(2) *Beveridge v. Burgis* (1812), 3 Camp. 262; 170 E.R. 1376.

(3) *Lawson v. Sherwood* (1816), 1 Stark. 314; 171 E.R. 483.

(4) *Oriental Dairy v. De Souza* (1948), 23 K.L.R. (Pt. 1) 4.

(5) *Burgh v. Legge* (1839), 5 M. & W. 418; 151 E.R. 177.

(6) *Flach v. London and South Western Bank Ltd.* (1915), 31 T.L.R. 334.

(7) *Plunkett v. Barclays Bank Ltd.*, [1936] 1 All E.R. 653.

(8) *Pyke v. Hibernian Bank*, [1950] I.R. 195.

(9) *London Joint Stock Bank v. MacMillan and Arthur*, [1918] A.C. 777.

The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Mombasa dismissing with costs the appellant's claim against the respondent on a dishonoured cheque for the sum of Shs. 3,900/-. The cheque dated December 12, 1958, was drawn by the respondent on Barclays Bank D.C.O. in favour of one Jesa Ladha Bhudia, who endorsed it to the appellant. The action was dismissed by reason of the finding of the learned trial judge that the appellant had failed to give notice of dishonour of the cheque to the respondent in reasonable time; he was of opinion that there were no special circumstances sufficient to justify the delay which occurred.

In the court below the only witness called was the appellant. There were a number of issues framed but at the close of the appellant's evidence counsel for the respondent elected to call no evidence and to rely only upon Issue No. 4 which was:

> "4. If so, has the plaintiff given to the defendant a notice of dishonour in reasonable time?"

As I have observed, this issue was decided in favour of the respondent but in the course of the argument counsel for the appellant sought to rely upon a submission that in the circumstances of the case no notice of dishonour was necessary. It was objected that this had not been pleaded and that no issue upon the question had been framed. Counsel for the appellant thereupon asked leave to amend his pleadings. The learned judge dealt fully with this matter in his judgment; he pointed out that the evidence for both parties had been concluded and that counsel for the respondent had abandoned two issues when he decided to rely upon Issue No. 4 only. He had been put to his election and had been obliged to intimate that he would not call evidence. The learned judge, having regard to the circumstances and the stage at which the application was made, felt that, if the amendment were allowed, the respondent would suffer prejudice which could not be adequately compensated for by costs, and refused the application. This exercise of his discretion, as such, has not been challenged before this court and I would say, with respect, that in my opinion the learned judge did not misdirect himself upon the matter.

Before this court two matters have been argued and they are (though not in the order in which counsel

dealt with them):

1. That the learned judge misdirected himself in holding that notice of dishonour was not given in reasonable time.
2. That the plaint sufficiently pleaded facts upon which it was open to counsel to submit without amendment of pleadings, that notice of dishonour was unnecessary.

I will first set out two provisions from the Bills of Exchange Ordinance (Cap. 291) which relate to the first of these two grounds:

Section 49 (12) reads:

> "Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:
>
> (12) the notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.
>
> In the absence of special circumstances, notice is not deemed to have been given within a reasonable time unless:
>
> (*a*) where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill;
>
> (*b*) where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter;"

Section 50 (1) is as follows:

> "Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence."

In his judgment the learned judge related the facts in the following passage:

> "The evidence adduced by the plaintiff and not in dispute as it affects the fourth issue is as follows. The cheque for Shs. 3,900/- was drawn by the defendant on Barclays Bank, Mombasa, in favour of Jesa Ladha Bhudia and endorsed by the latter to the plaintiff. The plaintiff, a resident of Nairobi, presented the cheque for payment through his bank in Nairobi on December 13, 1958. The plaintiff was informed verbally by his bank on December 16 that the cheque had been dishonoured, and on December 18 he received it back from the bank with the note thereon 'Refer to drawer'. On December 19 he sent the cheque to a friend in Mombasa with instructions to that friend to hand it over to an advocate for necessary action. On December 22 Messrs. O'Brien Kelly & Hassan, a firm of advocates in Mombasa, wrote a letter to the defendant informing him that the cheque had been dishonoured and demanding payment of the amount thereof."

It is noteworthy that in his examination in chief the appellant gave no evidence tending to show any special circumstances which might have excused his failure to comply with the terms of s. 49 (12) (*b*) of the Bills of Exchange Ordinance. Even assuming for the moment that the appellant was not called upon to act until he received the dishonoured cheque on December 18, he should prima facie have posted notice of dishonour to the respondent at the latest on the 19th. It is accepted that there is a daily post to Mombasa from Nairobi. The notice would then have reached its destination by the 20th, whereas by the method adopted, a notice dated December 22 was sent at Mombasa – there is no evidence that it was received on the 22nd or at any time but there is an admission in para. 4 of the written statement of defence that it was received on or about the 23rd.

Had the evidence concluded at the end of the appellant's examination in chief there can be no doubt that the action must have failed. In cross examination however the appellant said

> "I have never been to defendant's house in Mombasa – don't know where he lives."

He also said:

> "I received notice from Bank of dishonour on December 16 – that was date Bank informed me. I received the cheque back on December 18. December 16 was a Tuesday. I received the information at 10.00 a.m. when I went to the Bank."

He also said that he knew the respondent; that the respondent, and Jesa Ladha Bhudia the payee of the cheque and the appellant all came from the same village in India; that his niece was married to the respondent's brother and that he had been invited by Jesa Ladha Bhudia to the wedding of the daughter of the latter and the son of the respondent on December 12, 1958.

In the whole of the evidence there is only this slender foundation for a submission of "special circumstances" – that the appellant did not know where the respondent lived. It does not necessarily follow that he did not know a postal address at which the respondent could be reached. I do not think that anything turns upon whether the absence of knowledge of the respondent's address should be regarded as "special circumstances" under s. 49 (12) or

> "circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct or negligence",

within the meaning of s. 50 (1). In either case the holder of a bill is under a duty to use reasonable diligence and is not excused if he does not. Lord Ellenborough said in *Bateman v. Joseph* (1) (1810), 2 Camp. 46 –

> "When the holder of a bill does not know where the indorser is to be found, it would be very hard if he lost his remedy by not communicating immediate notice of the dishonour of the bill, and I think the law lays down no such rigid rule. The holder must not allow himself to remain in a state of passive and contented ignorance; but, if he uses reasonable diligence to discover the residence of the indorser, I conceive that notice given as soon as this is discovered is due notice of the dishonour of the bill, within the usage and custom of merchants."

And in *Beveridge v. Burgis* (2) (1812), 3 Camp. 262 –

> "Ignorance of the indorser's residence may excuse the want of due notice, but the party must show that he has used reasonable diligence to find it out. Has he done so here? How should it be expected that the requisite information should have been obtained where the bill was payable? Inquiries might have been made of the other persons whose names appeared on the bill, and application might have been made to persons of the same name with the defendant whose addresses are set down in the Directory."

If one assumes in the appellant's favour that he did not know the postal address, and that he was not required to act until December 18, and that the cheque was given to his friend to convey as the friend was to make inquiries in Mombasa for the address, it might appear that the steps actually taken were sufficiently diligent and caused no very substantial delay. But these things cannot be assumed – the burden of proving due diligence was on the appellant and it was for him to give evidence of facts which showed that he had exercised it. In his judgment in *Lawson v. Sherwood* (3) (1816), 1 Stark. 314 at 315 Lord Ellenborough said:

> "The witness says two or three days, but the third day would be too late. It lies upon you to show that notice was given in due time, and I cannot go upon probable evidence without positive proof of that fact. Nor can I infer due notice from the non-production of the letter; the only consequences is, that you may give parol evidence of it. The onus probandi lies upon the plaintiff, and since he has not proved due notice, he must be called."

In the present case the appellant was notified by his bank of the dishonour at 10 a.m. on December 16. It would have been diligent on his part if he had taken steps on that date with a view to ascertaining the address. He waited until he received the cheque on the 18th before taking action on the 19th. Counsel has argued that he had to await the return of the cheque before he knew whether notice of dishonour was requisite – e.g. it might have been marked "payment countermanded". I doubt if this is a valid argument in any event, but it was at least incumbent upon the appellant to give evidence as to whether the information given him by the bank on the 16th included the nature of the bank's notation. He did not do so. Then he made no attempt to inquire from Jesa Ladha Bhudia, the payee; it would be strange if Bhudia, whose daughter was to have married the respondent's son on the 12th December, did not know the address. Counsel for the appellant argued that it was only an assumption that Bhudia would have known – but the onus was on the appellant to take it outside the realm of assumption by giving evidence either that he had made the inquiry, or that it was for some reason impossible to do so, or that he had good reason to believe that such an inquiry would be abortive. Then there was the matter of the friend who conveyed the cheque to Mombasa. The court was not informed whether the friend knew the address personally or was to make enquiries. If he knew the address he could have taken a notice to it personally or could have given the address to the appellant, in order that a letter might be posted direct. Again the onus was on the appellant to bring evidence and he did not do so. He did not even attempt to show how the notice was in the end delivered.

In my opinion the appellant treated altogether too lightly the onus which lay upon him to establish that he acted with due diligence. He made no attempt to discharge the burden in his evidence in chief, and can rely only upon an answer to a question put to him, perhaps incautiously, in cross examination. He appears to have neglected to act as early as he might have done, and to have neglected at least one obvious avenue of inquiry; he did not attempt to show that it was not incumbent upon him or would not have availed him so to act or inquire. Whether a plaintiff has shown due diligence or otherwise in such a matter is a question of fact and the learned trial judge found that he was neither alert nor diligent. I see no reason to disagree.

The next submission on behalf of the appellant, was that it was open to him to submit at the hearing in the court below, without amendment of pleadings, that notice of dishonour was unnecessary. Counsel argued on the authority of a decision of the Supreme Court of Kenya in *Oriental Dairy v. De Souza* (4) (1948), 23 K.L.R. (Pt. 1) 4, that where an issue was clearly raised on the pleadings, even though it was not framed as an issue, it rested with the court to notice and adjudicate upon the issue. I doubt whether this authority goes so far as to cover the case of an issue which is brought up and relied upon at a stage so late as to render its entertainment impossible without substantial prejudice to the other side. I will express no firm conclusion on that point but will consider whether the issue now in question was "clearly raised in the pleadings". The only relevant part of the plaint is para. 3 –

> "3. The plaintiff's claim against the Defendant is for the sum of Shs. 3,900/- due and owing by the Defendant to the plaintiff on foot of a cheque

> No. M/AA 916784, drawn by the Defendant on Barclays Bank D.C.O on December 12, 1958 for the sum of Shs. 3,900/- in favour of one Jesa Ladha Bhudia, who endorsed it over to the plaintiff, and which cheque when presented by the plaintiff to the said bank for payment was dishonoured by the said bank with the remarks thereon 'Refer to Drawer'. The Plaintiff is the holder of the said cheque."

By virtue of s. 50(2)(*c*)(iv) of the Bills of Exchange Ordinance notice of dishonour is dispensed with as regards the drawer where the drawee is, as between himself and the drawer, under no obligation to pay the bill. Counsel's argument was that the plea that the cheque was dishonoured by the bank with the remarks thereon "refer to drawer" was equivalent to a plea that the drawer was under no obligation to pay the bill.

The usual form of claim in such cases as set out in Bullen & Leake's Precedents of Pleadings (11th Edn.) at p. 134 provides no support for counsel's argument. The words there used are:

> ". . . which was duly presented for payment and dishonoured, but A.B. had no effects of the defendant, nor was there any consideration for the payment of the said bill by the said A.B."

The case of *Burgh v. Legge* (5) (1839), 5 M. & W. 418 is quoted at p. 135 of the same volume as authority for the statement that in all cases where the plaintiff relies upon the fact that notice of dishonour has been dispensed with, the matter of excuse or dispensation is a material fact, and must be averred in the Statement of Claim.

The submission of counsel for the appellant was that the words "refer to drawer" meant that the bank had no funds to pay the cheque and that no arrangement had been made by the drawer with the bank that it should do so. Thus, he submitted, a pleading of facts had been made sufficient to satisfy s. 50 (2) (*c*) (iv) of the Bills of Exchange Ordinance – that the bank was under no obligation to pay the cheque. The words "refer to drawer" were considered by Scrutton, J. in *Flach v. London and South-Western Bank Ltd.* (6) (1915), 31 T.L.R. 334, at p. 336; the judgment reads:

> "With regard to the question of libel the words 'refer to drawer' in his opinion, in their ordinary meaning, amounted to a statement by the bank, We are not paying; go back to the drawer and ask why,' or else, 'go back to the drawer and ask him to pay'. In the view he took of the case the bank were justified in not paying under the moratorium, and he did not think it was possible to extract a libellous meaning from what had been said by the bank. Evidence had been given, however, to the effect that 'refer to drawer' meant that there was no money to pay the cheque. If that was true the meaning then on the view he had taken of the moratorium proclamation the statement was true and therefore not libellous. Taking the view that the words complained of were not capable of a libellous meaning, he must enter judgment for the defendants."

The opinion of Scrutton, J. in that case as to the meaning of "refer to drawer" was adopted by Du Parcq, J. in *Plunkett v. Barclays Bank Ltd.* (7), [1936] 1 All E.R. 653. Counsel submitted with regard to these cases that they were libel actions and the meaning of the words was being considered in relation to the question whether they could bear a defamatory meaning. That is quite true of course, but I do not think that it affects the generality of the meaning ascribed to the words by Scrutton, J., who used the phrase – "in their ordinary meaning". Counsel relied also upon the Irish case of *Pyke v. Hibernian Bank* (8), [1950] I.R. 195 in which the court was equally divided on the question whether the words "refer to drawer" were capable of bearing a

defamatory meaning. The judgments refer to the opinion expressed by Scrutton J. as to the meaning of the words and none of them dissent from it; none of the judges expressed the view that the meaning was limited to that now urged by counsel for the appellant. For instance Black, J. said at p. 208 of the report –

> "When a cheque is returned by the bank, unpaid and marked, 'R.D.', that it would not occur at once to the average business man that this was capable of meaning that the drawer had no funds and knew it, I could not for a moment agree, unless I were to affect to have lived in a balloon, and not on terra firma in association with business people. On the other hand, it seems equally plain to me that various other explanations, in no way defamatory, would be fairly open. For instance, (*a*) that it was due to the bank's mistake, as in the present case, it was, and, in any other case, might be; (*b*) that the drawer had inadvertently signed with an unusual signature; (*c*) that there was some cause, not his fault, like the moratorium in *Flach's* case or the garnishee in *Plunkett's* case; or (*d*) that the drawer, by what might well be only venial negligence, had failed to check his credit balance or permitted overdraft when writing the cheques and that he believed he had ample funds or credit."

I do not think that this case assists the appellant. The court was referred also to a passage in the speech of Lord Shaw of Dunfermline in *London Joint Stock Bank v. MacMillan and Arthur* (9), [1918] A.C. 777 at 824 as indicating circumstances in which the notation "refer to drawer" might be used. It reads:

> "If the cheque do not contain on its face any reasonable occasion for suspicion as to the wording and figuring of its contents, the banker, under the contract of mandate which exists between him and his customer, is bound to pay. He dare not, without liability at law, fail in this obligation, and the consequences to both parties of the dishonour of a duly signed and ex facie valid cheque are serious and obvious. In the second place, if there be on the face of the cheque any reasonable ground for suspecting that it has been tampered with then that in the usual case is met by the marking 'refer to drawer', and by a delay in payment until that reference clears away the doubt."

In my judgment it is clear from the authorities that the words "refer to drawer" may be used in a variety of circumstances. They may, and frequently do, mean that the drawer has no funds available and has made no arrangement to meet the cheque, but that is not their only meaning and therefore not their necessary meaning. It appears therefore that the pleading in the present case does not amount to a plea of material facts sufficient, if substantiated, to entitle the appellant to dispense with notice of dishonour. Rather it is a pleading of a fact which would have provided evidence of lack of funds if that had been pleaded. In my opinion therefore the appellant was not entitled in the court below to rely on the submission which I have been considering, without amendment of the pleadings.

Counsel for the appellant argued, that if the court took the view I have expressed, the court should order a trial of the issue so that evidence could be led to show the meaning which ought to be attached to the words "refer to drawer" in the particular circumstances. That would amount, in my opinion, to an order for the trial of an issue not pleaded. It is, in another guise, an attack upon the refusal of the learned judge in the court below, to allow the amendment. That was a matter of judicial discretion and the manner in which it was exercised has not been the subject of challenge in this court.

For these reasons I would dismiss the appeal with costs. The amount involved is small and I do not consider that there should be a certificate for two counsel.

Sir Alastair Forbes VP: I agree and have nothing to add. The appeal is dismissed with costs.

Windham JA: I also agree.

Appeal dismissed.

For the appellant:
O'Brien Kelly & Hassan, Mombasa
D. N. Khanna and *H. A. Anjarwala*

For the respondent:
Inamdar & Inamdar, Mombasa
I. T. Inamdar and *N. M. Bruhmbhutt*

African Overseas Trading Co v Bhagwanji Harjiwan
[1960] 1 EA 417 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	9 June 1960
Case Number:	7/1960
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Bill of exchange – Promissory note – Dishonour – Notice of dishonour – Whether notice necessary – Bills of Exchange Ordinance (*Cap.* 215), *s.* 3 (1), *s.* 48, *s.* 50, *s.* 52 (3), *s.* 90 (*T.*) – *Civil Procedure Code, O.* 6, *r.* 11, *O.* 7, *r.* 1, *r.* 11(*T.*).

[2] Pleading – Notice – Requirement that where notice is material pleading must aver that notice given – Whether when notice immaterial pleading must so aver – Civil Procedure Code, O .6, *r.* 11 (*T.*).

Editor's Summary

The plaintiff sued in a district court on a dishonoured promissory note. The plaint contained no averment whether notice of dishonour had been given. The magistrate held the plaint to be defective and rejected it. On appeal.

Held –

(i) in view of the terms of s. 52(3) and s. 90(2) of the Bills of Exchange Ordinance it was not necessary for notice of dishonour of the promissory note to be given.

(ii) since O. 6, r. 11 of the Civil Procedure Code only requires that when notice to any person of any

fact is material, it shall be sufficient to allege that fact, it was not necessary for the plaint to contain a negative averment that notice of dishonour was unnecessary.

Appeal allowed. Case remitted to district court for trial.

Cases referred to in judgment:

(1) *Husseinali Dharamsi Hasmani v. National Bank of India Ltd.* (1937). 4 E.A.C.A. 55.

(2) *Pearse v. Pemberthy & Others* (1812), 3 Camp. 261; 170 E.R. 1376,

(3) *Roach v. Ostler* (1827), 6 English & Empire Digest, Para. 1897.

Judgment

Mosdell J: This is an appeal from the district court, Dar-es-Salaam. The plaintiff/appellant filed in the latter court a plaint seeking to sue on a dishonoured promissory note issued on May 27, 1959, at Dar-es-Salaam by the defendant/respondent, in which the defendant/respondent ninety days after date promised to pay the plaintiff/appellant or order at the Ottoman Bank at Tabora a sum of Shs. 2,895/75 for value received.

In the plaint there was no averment as to why if notice of dishonour should have been given to the drawer, it was not given, nor if notice of dishonour were not necessary, why it was not necessary – nor if it had been given, when it had been given. At the hearing in the district court, two preliminary points were raised by the defendant/respondent. The first preliminary point concerned jurisdiction. This was decided in the plaintiff/appellant's favour, and is not a subject of this appeal. The second preliminary point concerned the omission in the plaint of any reference to notice of dishonour having been given nor why it was not necessary, if such were the case.

The learned resident magistrate held that in accordance with the decision in *Husseinali Dharamsi Hasmani v. The National Bank of India Ltd.* (1937) (1), 4 E.A.C.A. 55 (hereinafter called the "*Husseinali case*") he should reject the plaint under O. 7, r. 11 (*a*) of the Civil Procedure Code, and he accordingly did so. It is against this decision that the plaintiff/appellant has appealed.

It seems to me that there are two matters to be decided here –

(1) If notice of dishonour was not necessary should the plaintiff/appellant in the plaint have given the reason why it was not necessary.

(2) Was notice of dishonour necessary in the circumstances of the instant case.

It is clear I think from the *Husseinali* case (1) and O. 6, r. 11, O. 7, r. 1 (*e*) and O. 7, r. 11 (*a*) of the Civil Procedure Code that if notice of dishonour was necessary and it was not averred in the plaint that it had been given then the learned resident magistrate rightly rejected the plaint.

As regards question (1) supra O. 6, r. 11 of the Civil Procedure Code reads as follows:

> "Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice or the circumstances from which such notice is to be inferred are material."

Order 7, r. 1 (*e*) ibid., reads as follows:

> "The plaint shall contain the following particulars:
>
> (*e*) The facts constituting the cause of action and when it arose."

and O.7, r. 11 (*a*) reads as follows:

> "The plaint shall be rejected in the following cases:
>
> (*a*) where it does not disclose a cause of action."

Mr. Tahir-ali for the defendant/respondent submitted that even if notice of dishonour was not necessary in the circumstances here, it should have been averred in the plaint why it was not necessary. He referred to a passage in the judgment of Wilson, J., in the *Husseinali* case (1) at p. 57 in which he said:

> "In considering whether any amendment of the plaint could properly be allowed in the circumstances, it is pertinent first to observe that it is admitted that the plaint as originally filed was defective, in that it contained no averment that notice of dishonour had been given to the defendant or that such notice was unnecessary."

So far as a case where no notice of dishonour is necessary is concerned, the quoted passage is clearly obiter. In the *Husseinali* case (1), the suit concerned a bill of exchange in which notice of dishonour was necessary by virtue of s. 48 of the Bills of Exchange Ordinance, Cap. 215. The quoted passage fell far short of a statement that the plaint would be defective if it contained no averment that such notice was unnecessary in the case of a promissory note.

Order 6, r. 11 requires that when notice to any person of any fact, etc., is material, it shall be sufficient to allege such notice as a fact with certain exceptions, which are not relevant in the instant case. It would not seem to require a negative averment in such a case, i.e. when notice of a fact is not necessary. It is also unnecessary to plead matters of which the court takes judicial notice – such matters include the law of the territory including all Ordinances enacted in the territory. It would seem, therefore, that if notice of dishonour in the case of a promissory note is not necessary under the relevant law in Tanganyika, namely, the Bills of Exchange Ordinance, Cap. 215, the court can take judicial notice of that fact without it being averred in a plaint.

I hold, therefore, that if notice of dishonour was not necessary in the instant case, it was unnecessary so to aver in the plaint.

I pass now to question (2) supra, namely – was notice of dishonour necessary in the circumstances of the instant case? It is to be noted that the subject matter of the suit in the court below was a promissory note and not a bill of exchange. It is not superfluous to recall the definitions of them. A bill of exchange is defined in s. 3 (1) of Cap. 215 following s. 3 (1) of the Bills of Exchange Act, 1882 (hereinafter called the "1882 Act") as follows:

> "A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time, a sum certain in money to, or to the order of a specified person or to bearer."

A promissory note is defined in s. 84 (1) Cap. 215, following s. 84 of the 1882 Act as follows:

> "A promissory note is an unconditional promise in writing made by one person to another, signed by the maker acknowledging to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person or to bearer."

Under s. 48 of Cap. 215 which, so far as is relevant, reads as follows:

> "Subject to the provisions of this Ordinance when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each endorser and any drawer or endorser to which such notice is not given is discharged."
>
> (which follows s. 48 of the 1882 Act).

Notice of dishonour must be given to the drawer of a bill of exchange, but, submitted Mr. Patel for the plaintiff/appellant, such notice is not necessary in the case of a promissory note because the maker of a promissory note is, by virtue of s. 90 of Cap. 215 which follows s. 89 of the 1882 Act to be regarded as an acceptor of a bill of exchange. Section 90, so far as is relevant reads as follows:

> "(i) Subject to provisions in this part and except by this section provided, the provisions of this Ordinance relating to bills of exchange apply with the necessary modifications to promissory notes.
>
> "(ii) In applying those provisions the maker of a note shall be deemed to correspond with the acceptor of a bill and the first endorser of a note shall be deemed to correspond with the drawer of an accepted bill payable to drawers' order."

and, Mr. Patel submitted, as by reason of s. 52 (3) of Cap. 215, it is not necessary that notice of dishonour should be given to an acceptor of a bill hence, as a maker of a promissory note is to be regarded as an acceptor of a bill, no such notice to the defendant/respondent was necessary in the instant case.

Section 52 (3) of Cap. 215 reads as follows:

> "In order to render an acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him."

He cited the case of *Pearse v. Pemberthy & Others* (2) (1812), 3 Camp. 261; 170 E.R. 1376 (hereinafter called "*Pearse's* case") in support of this submission.

The latter is an old case decided long before the Bills of Exchange 1882 Act came into force, and I find it difficult to follow the reasoning for the decision as set forth in Vol. 170 of the English Reports, but it is cited as an authority in Chalmer's Bills Of Exchange, (12th Edn.) at p. 158 where is to be found the following:

> "Notice to charge acceptor, maker or stranger. Notice to acceptor unnecessary –
>
> By s. 52 (3) (of the 1882 Act) the acceptor of a bill of exchange or maker of a note is not in any case entitled to notice of dishonour."

Section 52 of the 1882 Act is repeated in its entirely in s. 52 of Cap. 215.

Chalmer's op. cit. further supports Mr. Patel's submission at p. 165 thereof where it is stated – "No notice or protests required." Then follows the provisions of s. 52 (3) of the 1882 Act and

> "Thus if B in Liverpool accepts a bill payable at a bank in London and it is presented there and dishonoured no notice of dishonour need be given to B. The same rule applies to the maker of a note."

As authorities are cited s. 89 (2) of the 1882 Act and *Pearse's* case (2).

Mr. Patel reinforced his argument by drawing a distinction between a bill of exchange and a promissory note, submitting that in the former, there were three persons involved, the drawer, the acceptor and the payee; whereas with a promissory note there were only two persons involved, the maker and the payee or promisee, and whereas in the case of a bill, the drawer was only conditionally liable if the acceptor did not make payment, in the case of a promissory note the maker was the person liable throughout, hence in the former case notice of dishonour to the drawer was necessary and in the latter case such notice to the maker was not, though his reasoning here so far as it is applicable to the facts in the instant case, would seem to be at variance with the reasoning given in the report of *Pearse's* case (2).

Mr. Patel further submitted that the maker of a promissory note is in the position of an acceptor as well as drawer because he makes the promissory note, and at the same time he undertakes to pay it and, therefore, as in the case of a bill where the drawer and drawee are the same person, so in the case of a promissory note by virtue of s. 52 (2) (*c*) (i) of Cap. 215, no notice of dishonour is necessary.

Section 52 (2)(*c*)(i) reads as follows:

> "Notice of dishonour is dispensed with (*c*) as regards the drawer in the following cases, namely (i) where drawer and drawee are the same person."

However, in view of the report of *Pearse's* case (2) referred to, it is doubtful whether in the circumstances of the instant case the maker of the promissory note and the drawee can be regarded as the same person. Mr. Patel's submission re s. 5 (2) of Cap. 215, as I understand it, proceeded upon the assumption that the document in the instant case was a bill of exchange and not a promissory note. In my view no such assumption is justified and the basis for this submission is non-existent.

With what did Mr. Tahir-ali counter these arguments. He has submitted that in the instant case the maker and drawee of the promissory note could not be regarded as the same person, because the promissory note was payable at a banking house. In accordance with *Pearse's* case (2), I must agree with him on this point. The Ottoman Bank at Tabora was in the position of a drawee and in that respect the promissory note was similar to a bill of exchange.

He further submitted that the provisions of Cap. 215 as to bills were applicable to promissory notes with the exceptions laid down in part 4 thereof, and that notice of dishonour was as necessary with promissory notes where a third party was involved as with bills.

By virtue of s. 90 (2) and s. 52 (3) of Cap. 215 coupled with the authority of Chalmer's op. cit. p. 158 and p. 165, *Pearse's* case (2), and *Roach v. Ostler* (3) (1827), 6 English & Empire Digest (para. 1897) in my opinion Mr. Patel is on firm ground in submitting that notice of dishonour was not necessary in the instant case.

Having already held that it was unnecessary to plead the negative averment as to notice of dishonour under O. 6, r. 11 of the Civil Procedure Code I hold that the learned resident magistrate wrongly rejected the plaint. The appeal is allowed. I direct that the plaint be accepted and the matter be tried. The plaintiff/appellant shall have his costs here and in the court below.

Appeal allowed. Case remitted to district court for trial.

For the appellant:
Dhiren & Co., Dar-es-Salaam
N. P. Patel and *C. G. Patel*

For the respondent:
Tahir & Kanabar, Dar-es-Salaam
Tahir Ali

Nanubhai Bapalal Trivedi v The Official Receiver

[1960] 1 EA 422 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	13 June 1960
Case Number:	86/1959
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – H.G. Sherrin, Senior Resident Magistrate, exercising bankruptcy jurisdiction

[1] Bankruptcy – Composition – Scheme for payment of debts in full proposed by debtor – Approval by most creditors and by Official Receiver – Scheme disapproved by court – Appeal on grounds that discretion exercised on wrong principles – Bankruptcy Ordinance (*Cap.* 30), *s.* 18 (10), *s.* 29 (3), *s.* 96 *and s.* 137 (1) (*r*) (*K.*) *– Bankruptcy Act,* 1890.

Editor's Summary

The appellant filed his own petition in bankruptcy and a receiving order was made. His liabilities were about £2,755, and his assets £147 comprising £30 cash and a balance of book debts. He proposed a composition under which the creditors should be paid their claims in full by six equal half-yearly payments, the first payment to be made six months after approval of the scheme by the court. The composition was accepted by a majority in number and more than three-fourths in value of the creditors and was approved by the Official Receiver. A senior resident magistrate, exercising the bankruptcy jurisdiction of the Supreme Court delegated under s. 96 of the Bankruptcy Ordinance, rejected the scheme on the ground that the court should not countenance the continued carrying on of business by the appellant. On appeal it was submitted that the magistrate had exercised his discretion on wrong principles.

Held –

(i) what had influenced the magistrate was that the appellant had not shown any capital with which to carry on his business such as to suggest a likelihood of success, and to permit him to conduct a business insolvent at its inception would be contrary to public policy.

(ii) the court could not say that the magistrate was wrong in refusing to sanction a scheme which was likely to result in further liabilities being incurred which the appellant would be unable to meet.

(iii) the proposed scheme did not provide reasonable security for the payment of not less than Shs. 5/- in the pound and accordingly the court was bound under s. 18 (10) of the Bankruptcy Ordinance to refuse approval of the composition scheme: *In re Paine: Ex parte Paine* [1891] W.N. 208 and *in re Sarv Daman Gautama* t/a "*G. & S. Motors*", E.A.C.A. Civil Appeal No. 21 of 1959 (unreported) followed.

Appeal dismissed.

Cases referred to in judgment:

(1) *Ex parte Campbell, In re Wallace* (1885), 15 Q.B.D. 213.

(2) *Ex parte Kearsley, In re Genese* (1887), 18 Q.B.D. 168.

(3) *In re Barlow, Ex parte Thornber*, 3 Morr. 304.

(4) *In re Paine, Ex parte Paine*, [1891] W.N. 208.

(5) *In re Sarv Daman Gautama t/a "G. & S. Motors"*, E.A.C.A. Civil Appeal No. 21 of 1959 (unreported).

Judgment

Sir Alastair Forbes VP: This is an appeal in forma pauperis by a debtor against an order dated November 20, 1958, of the senior resident magistrate, Mombasa, exercising the bankruptcy jurisdiction of the Supreme Court of Kenya delegated under s. 96 of the Bankruptcy Ordinance (Cap. 30), refusing to approve a proposal for a composition submitted by the debtor. After hearing counsel for the appellant and the Official Receiver we dismissed the appeal. We now give our reasons.

A receiving order was made on June 24, 1958, against the debtor on his own petition filed on November 25, 1957. The debtor's liabilities amounted to £2,755 odd, and his assets to £147 3s. 0d., the latter comprising £30 cash and £117 3s. 0d. book debts. The debtor is a government pensioner. He had been in business as a commission agent since 1950, at first in partnership with his sons and since 1952 on his own account. He had started business with a capital of Shs 20,000/-. According to a statement made at his public examination, he had been in financial difficulties since 1953. The proposed composition provided, inter alia, that:

> "All ordinary creditors who have claimed and proved their debts, shall be paid one hundred (100%) per centum of their proved claims by six equal half-yearly instalments the first of such instalment to be paid at the expiry of six months from the date of approval of this composition by the court and the subsequent instalments every six months after the date of the payable (sic) of the first instalment."

Payment of the composition was to be guaranteed by a son of the debtor who is employed in the Customs and Excise Department. The proposal was accepted at a meeting of creditors held on August 14, 1958, by a majority in number and more than three-fourths in value of all proved creditors. The proved creditors at that stage represented liabilities amounting to Shs. 15,425/46. The Official Receiver's report stated, inter alia:

> "That the Official Receiver is of the opinion that the terms offered by the debtor to pay 100% to all unsecured creditors within three years are reasonable and are calculated to benefit the general body of creditors.
>
> "That the Official Receiver is of the opinion that the proposal provides reasonable security for the payment of 100% to all ordinary liabilities provable against the debtor's estate."

The learned senior resident magistrate in rejecting the proposal said:

> "I am asked to approve a proposal for a composition or scheme of arrangement in which it is intended that the debtor shall continue to carry on his business and shall pay his creditors 20/- in the pound by instalments over three years. Section 137 (1) (*r*) of the Bankruptcy Ordinance makes it an offence for a person who has been adjudged bankrupt to have, within one year immediately preceding the date of the making of the receiving order, continued to trade or carry on business knowing himself to be insolvent.
>
> "It is clear that the carrying on business proposed could not become an offence if the debtor was finally adjudged bankrupt because the receiving order has already been made. There can, however, be no doubt that the legislature disapproves of persons carrying on business whilst insolvent and this disapproval has given rise to an established principle of the law of Bankruptcy.
>
> "There may be cases in which the court could properly approve a scheme which contemplates the debtor continuing to trade, but there is nothing in the proposal now before me to justify such a course. I consider it would be improper for the court to countenance the continued carrying on of business by this debtor, and I refuse approval of this scheme."

Four grounds of appeal were set out in the memorandum of appeal, but, as was stated by counsel for the appellant/debtor, the substance of the appeal was that the learned magistrate exercised his discretion on wrong principles.

As we read the learned magistrate's ruling, he was referring to s. 137 (1) (*r*) of the Bankruptcy Ordinance to stress that the legislature considered it blame-worthy for a person to continue trading when he knows that he is insolvent. We did not think he was suggesting that the debtor here would be committing an offence automatically by continuing to trade if the composition had been approved. If so, he was clearly wrong, but we did not think this is what he meant. It seemed to us that what he had in mind was that in this case the debtor, who had started with a capital of Shs. 20,000/- and now had a deficiency of some Shs. 52,000/- had not shown any capital with which to carry on business such as might suggest a likelihood of success and, to permit him to carry on the business, would be tantamount to authorising him to conduct a business insolvent at its inception; and that to do so would be contrary to public policy.

It is well settled that in considering whether a proposal for a composition should be approved the wishes of the creditors are not paramount: Halsbury's Laws of England (3rd Edn.) Vol. 2, p. 343; *Ex parte Campbell*, *In re Wallace* (1) (1885), 15 Q.B.D. 213. It is also well settled that a court of appeal will not interfere with the exercise of a discretion by the court below unless satisfied that the discretion has been exercised unjudicially or on a wrong principle – *Ex parte Campbell* (1); *ex parte Kearsley*, *In re Genese* (2) (1887), 18 Q.B.D. 168. We were not satisfied that the learned magistrate did act on a wrong principle in refusing to approve the application in the instant case. He had a duty to the public as well as to the creditors (*In re Barlow*, *Ex parte Thornber* (3), 3 Morr. 304) and we were not prepared to say he was wrong in refusing to sanction a scheme which on the face of it was quite likely to result in the debtor incurring further liabilities to other members of the public which he would be unable to meet.

We though that for this reason the appeal must be dismissed; but in any case there was another reason which we thought conclusive against acceptance of the proposed composition. It is to be noted that the proposal provides, in effect, for the payment of Shs. 3.33/- in the pound six months after approval of the composition, and a further Shs. 3.33/- twelve months after such approval, i.e. 5/- in the pound would not be paid till the expiration of twelve months from the date of approval. Sub-section (10) of s. 18 of the Bankruptcy Ordinance provides:

> "(10) If any facts are proved on proof of which the court would be required either to refuse, suspend or attach conditions to the debtor's discharge, were he adjudged bankrupt, the court shall refuse to approve the proposal, unless it provides reasonable security for the payment of not less than five shillings in the pound on all the unsecured debts provable against the debtor's estate."

In *In re Paine: Ex parte Paine* (4), [1891] W.N. 208 Lord Esher M.R., considering the corresponding provision of the English Bankruptcy Act, 1890, said that:

> ". . . the appellants were bound to shew that the proposed scheme did provide 'reasonable security for the payment of not less than 7s. 6d. in the pound'. This did not mean for payment at a distant time, such as a year hence. It meant reasonable security for payment now or within a short time."

That decision was followed and applied by this court in *In re Sarv Daman Gautama t/a "G. & S. Motors"* (5) E.A.C.A. Civil Appeal No. 21 of 1959 (unreported).

Counsel for the appellant argued that the case could not be said to fall within the terms of sub-section (10) of s. 18 since the only ground to bring it within that section which was reported by the Official Receiver was the fact that the debtor's assets did not amount to 10/- in the pound; that sub-section 3 (*a*) of s. 29 provided in effect that this fact should not be held against a debtor if he satisfied the court that the deficiency has arisen from circumstances for which he could not justly be held responsible; and that the learned magistrate had not considered this aspect of the matter.

It is true that the learned magistrate has not referred to this question in his ruling. The burden of proof is, however, on the debtor to satisfy the court, and it is to be inferred that he failed to do so. This is confirmed by the formal order drawn up on the learned magistrate's ruling which recites, inter alia, that the court is

> "satisfied that facts have been proved which would under the Bankruptcy Ordinance justify the court in refusing, qualifying or suspending the debtor's discharge".

It was further pointed out to us that though the Official Receiver's report referred only to the fact that the debtor's assets did not amount to 10/- in the pound in relation to s. 29 (3) of the Bankruptcy Ordinance, yet from other facts stated in the report it was to be inferred that that was not the only fact referred to in s. 29 (3) of the Bankruptcy Ordinance which was present in this bankruptcy; e.g. from para. 11 of the report it appears that books were only maintained by the debtor up to 1951. This may well be so, but we were satisfied that we need go no further than the deficiency in the assets to be satisfied that sub-s. (10) of s. 18 applied.

We did not think that the proposed scheme in the instant case could be said to provide for the payment of not less than Shs. 5/- in the pound "now or within a short time", and accordingly we though the court was bound under sub-s. (10) of s. 18 of the Bankruptcy Ordinance to refuse approval.

Appeal dismissed.

For the appellant:
R. M. Doshi, Mombasa
R. K. Mitra and *C. R. Doshi*

For the respondent:
The Official Receiver, Kenya
H. F. Hamel and *Pritam Singh* (Deputy Official Receivers, Kenya)

Swaleh Bin Nassiri v Salim Bin Swaleh Bin Hussein

[1960] 1 EA 426 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	31 May 1960
Case Number:	44/1959
Before:	Edmonds J

Sourced by: LawAfrica

[1] Limitation of action – Probate and administration – Claim for share of estate – Action filed twelve years after death of deceased – Whether action time barred – Limitation Ordinance (*Cap*. 11), *s.* 3 (*K.*) – *Trustees Ordinance* (*Cap*. 36), *s.* 28 (*K.*) – *Indian Probate and Administration Act*, 1881, *s.* 117 – *Real Property Limitation Act*, 1874, *s.* 8.

Editor's Summary

The plaintiff sought a declaration whether he was entitled to share in the estate of one Fatuma binti Swaleh, and if so, for certain consequential orders. Counsel for the defendant took the preliminary point that the action was time barred. Fatuma died intestate on June 1, 1946. The defendant was granted letters of administration on August 13, 1946 and on December 16, 1959 he filed his final administration account. Section 3 of the Limitation Ordinance specifies that the time for an action to be brought is ". . . within twelve years next after a present right to receive or have the same shall have accrued to some person capable of giving a discharge for or release of the same . . .". The plaintiff contended that limitation should run either from the date when the final administration account was filed or the date when a notice was published under s. 28 of the Trustees Ordinance.

Held –

(i) it was clear that the present right to receive their shares in the intestate estate of the deceased accrued to the heirs on the date of her death and as the action was not filed within twelve years of the death, it was time barred by s. 3 of the Limitation Ordinance.

(ii) section 117 of the Indian Probate and Administration Act 1881, by which the executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death, did not affect s. 3 of the Limitation Ordinance.

(iii) section 28 of the Trustees Ordinance was a permissive provision and as publication of a notice thereunder was not obligatory the failure to publish the notice was not a fact or a disability upon which an heir or legatee could rely as interrupting the running of time under the law of limitation.

Action dismissed.

Cases referred to in judgment:

(1) *In re Owen*, [1894] 3 Ch. 220.

(2) *Hornsey Local Board v. Monarch Investment Building Society* (1890), 24 Q.B.D. 1.

(3) *In re Pardoe*, *McLaughlin v. Penny*, [1906] 1 Ch. 265.

Judgment

Edmonds J: In this action the plaintiff seeks determination of the question whether he is entitled to a share in the estate of the late Fatuma binti Swaleh bin Awadhi bin Swaleh bin Elifli, and if so, certain consequential orders. Mr. Bryson for the defendant, the administrator of the deceased's estate, has taken the preliminary point that the action is barred by the law of limitation. Fatuma binti Swaleh died intestate

on June 1, 1946. The defendant, as one of the heirs, applied for and was granted letters of administration on August 31, 1946. On December 16, 1959 he filed his final administration account.

The assets of the estate consisted of two pieces of land situate in Mombasa, personal effects and a debt due to the estate of Shs. 816/19. It is agreed by counsel, who inspected the titles to the properties in the land registry for the purpose of ascertaining the facts, that the property first described in the administration account was sold by the administrator for the sum of Shs. 4,000/- and transferred to the purchaser on October 22, 1946, and that the property second described was sold for the sum of Shs. 1,200/- and transferred to the purchaser on March 20, 1957. No evidence was adduced as to when the personal effects which fetched the sum of Shs. 150/- were realised or as to when the debt due to the estate of Shs. 816/19 was paid.

It is provided by s. 3 of the Limitation Ordinance, Cap. 11 of the Laws of Kenya, inter alia, that:

> "All suits or proceedings . . . for the recovery of any legacy or share of any inheritance or intestate estate and all actions . . . against any executors, guardian, trustee, curator, administrator or agent shall and may be brought at any time within twelve years next after a present right to receive or have the same shall have accrued to some person capable of giving a discharge for or release of the same, and not after twelve years . . .".

The question whether or not this action is barred by the provisions of s. 3 depends in my view upon the interpretation and meaning of the words "after a present right to receive or have the same shall have accrued." It is contended for the plaintiff that the period of limitation should run only from one of two alternative dates, namely, either the date when the final administration account is filed, or the date when a notice in terms of the provisions of s. 28 of the Trustees Ordinance, Cap. 36 of the laws, has been published. As regards the latter contention s. 28 is a permissive provision for the protection of the administrators of an estate. The publication of such a notice as is envisaged by the Ordinance is not obligatory and the failure to publish is not a fact or a disability upon which an heir or legatee can rely as interrupting the running of time under the law of limitation.

This is not the first occasion that a court has been asked to decide the meaning of the words

> "a present right to receive or have the same shall have accrued to some person capable of giving a discharge for or release of the same."

Our local legislators have adopted these words from similar provisions as to limitation in various English Acts. It is enacted by s. 8 of the Real Property Limitation Act, 1874, that:

> "No action or suit or other proceeding shall be brought to recover. . . any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same",

and *In re Owen* (1), [1894] 3 Ch. 220, Stirling, J. following *Hornsey Loca Board v. Monarch Investment Building Society* (2) (1890), 24 Q.B.D. 1, said that the words "present right to receive" are to be read according to their ordinary meaning. In the latter case the Court of Appeal discussed at some length the meaning and effect of the words appearing in s. 8. Lord Esher, M.R. at p. 5 said:

> "It was strongly argued that the words 'present right to receive the same' in this section are equivalent to 'a present right to enforce payment of the same.' If there were some overwhelming reason why that construction should be given to the words; if that were the only construction that would render the procedure sensible, I think possibly the words might receive that construction, but I do not think it would be their ordinary meaning in the

> English language. 'A present right to receive' is not in ordinary English the same as 'a present right to enforce payment'."

Lindley, L.J. said at p. 9.

> "The expression 'present right to receive' is a little ambiguous, and, in considering what construction it is proper to put upon it, we must look a little at the object of the Act and the consequences of the rival constructions respectively. If one construction produces consequences in conformity with the scope of the enactment, and with the consequences which follow from the construction introduces a startling novelty, no lawyer would adopt the latter construction. If we read 'present right to receive' in the sense in which the Master of the Rolls has explained, and as distinguishable, as apparently it is meant to be, from 'present right to sue', everything works out harmoniously; . . . With regard to the other expression contained in the section, viz. 'capable of giving a discharge etc'., that seems to have been inserted to meet the case where a person is not legally capable of giving a discharge."

In the same case Lopes, L.J. added at p. 11:

> "The words are 'present right to receive', not 'present right to recover'. The right to receive may exist though the definite sum to be received has not yet been ascertained. There are cases where the legislature requires a notice to be given before an action can be maintained. The right of action, however, exists as soon as an actionable wrong has been committed, though it cannot be successfully enforced until the statutory requirements are complied with. Many other illustrations of the same kind might be given. Then there are the words in the section 'to some person capable of giving a discharge for or release of the same'. I think those words were inserted in order to exclude persons who are legally incapacitated such as infants or lunatics."

Kekewich, J. in *In re Pardoe*, *McLaughlin v. Penny* (3), [1906] 1 Ch. 265, took a contrary view in considering the meaning of these words as they appear in the Law of Property Amendment Act, 1860. The material provisions of s. 13 of that Act are as follows:

> "No suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same . . ."

In his judgment Kekewich, J. considered that:

> ". . . the section contemplates that the person to give the receipt shall be not only 'capable of giving a discharge for or release of the same' but shall also be a person to whom 'a present right to receive the same shall have accrued'. It seems to me that 'a present right to receive the same' means 'a right to recover by legal proceedings'. It does not merely mean this, that if the receipt be given it will hold good against all the world. It means that the person who is to give the receipt can maintain legal proceedings in order to establish the right."

Neither of the cases to which I have referred above were cited at the hearing before MR. Justice Kekewich and with all due respect to the learned judge, I accept, indeed I am bound, by the decision of the Court of Appeal. Applying the decision of that court to the circumstances in this case, it is clear that the present right to receive their shares in the intestate estate of the deceased accrued

to the heirs on the date of her death. It was suggested by counsel that the date of accrual might be postponed to the date when the assets of the estate had been realised and the executor was in a position to pay out. But that in my view is not the position. I appreciate that it is provided by s. 117 of the Probate and Administration Act of India, 1881 that an executor is not bound to pay or deliver any legacy until the expiration of one year from the testator's death, and hence it would not be open to a beneficiary to take proceedings to recover his share of an estate before the expiration of that period. However, I am satisfied that that provision does not have effect to vary the provisions of s. 3 of the Limitation Ordinance. It is a clear provision in the Limitation Ordinance that an heir, should he wish to take action to recover a share in the estate, must do so within twelve years from the date on which his right to receive the same accrued, and I am satisfied that such right accrues immediately upon the death of a testator or an intestate, and the fact that an executor may not be in a position to pay out to the heirs cannot affect their being in a position to receive and of having a right to receive as from the date of the death of the deceased. Furthermore in this case the plaintiff was under no disability to receive his share and was therefore capable of giving a discharge. The late Fatuma bin Swaleh died on June 1, 1946. The plaintiff's action was commenced on November 13, 1959 – more than twelve years after his right to receive a share in the estate had accrued. His action is therefore barred by limitation. I may add, in parenthesis, that even if the period of twelve years did not begin to run until the expiration of one year after the death of the intestate the plaintiff would still be out of time in filing this action.

The action is dismissed with costs.

Action dismissed.

For the plaintiff:
S. R. Gautama, Mombasa

For the defendant:
Bryson & Todd, Mombasa
J. E. L. Bryson

Re Mohamed Yusuf and another Trading as Mohamed Yusuf and Sons – Debtors

[1960] 1 EA 430 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	9 June 1960
Case Number:	46/1957
Before:	Rudd J
Sourced by:	LawAfrica

[1] Equitable mortgage – African lands trust – Receiving order made against debtors – Annual leases converted into 33*-year leases under Registration of Titles Ordinance after but with effect from before receiving order – Whether equitable mortgage created by deposit of title requires memorandum in statutory form – Bankruptcy Rules, r.* 265 (*K.*) *– Native Lands Trust Ordinance* (*Cap*. 100) *s.* 34 (*K.*) *– Registration of Titles Ordinance* (*Cap*. 160), (*K.*) *– Equitable Mortgages Ordinance* (*Cap.* 152), (*K.*).

Editor's Summary

The Official Receiver applied for the directions of the court under r. 265 of the Bankruptcy Rules. A receiving order had been made against the debtors. Included amongst the debtors' properties, were leases under the African Lands Trust Ordinance in respect of three plots, namely, plots Nos. 22 and 29 at Bungoma trading centre and plot No. 8 at Marech trading centre. These were one year leases renewable annually at the end of each year for a maximum of thirty-two such renewals. Under s. 34 of the African Lands Trust Ordinance no lessee of such lands is entitled to alienate the land in his lease by sale, mortgage, transfer of possession, sub-lease, bequest or otherwise without the consent in writing of the provincial commissioner. All these leases were convertible into thirty-three year leases under the Registration of Titles Ordinance. In respect of plots Nos. 8 and 29 leases were issued after the receiving order but the leases recorded that the term of thirty-three years began long before the receiving order. In respect of plot No. 22 a thirty-three year lease had not been issued though an application had been made before the receiving order. In the proceedings, Barclays Bank claimed to be secured creditors in relation to all the three plots upon the basis of a deposit of documents of title as security for an overdraft, Kenya Produce Agency Ltd. claimed to be a secured creditor in respect of plot No. 22 by virtue of a deposit of a lease as security for monies owed and one, Mrs. Miriam Binti Ali, claimed to be a secured creditor in respect of plot No. 29 by virtue of a similar deposit as security for monies due to her. Under the Equitable Mortgages Ordinance, an equitable mortgage or charge may be made by deposit of documents of title to immovable property with intent to create a security thereon subject to the Crown Lands Ordinance, the Land Titles Ordinance, the Registration of Titles Ordinance or the Registration of Documents Ordinance as the case may be. The Official Receiver therefore sought directions whether all or any of these parties were secured creditors and, if so, their rights of priority.

Held –

(i) at the time of the receiving order the title to plots was not registered under the Registration of Titles Ordinance and did not become so registered until after the date of the receiving order; if thirty-three year leases had issued under the Registration of Titles Ordinance before the date of the receiving order it might very well be that an equitable mortgage or charge created by deposit of title deeds would not be effective unless and until a memorandum in the statutory form had been duly registered under that Ordinance.

(ii) registration under the Registration of Documents Ordinance was not necessary; there was no registrable document nor was such a document required.

(iii) the equitable charge or mortgage in favour of the bank was created by the deposit of the leases as security plus possibly the consent of the Provincial Commissioner and was not created or declared by any document; the bank had a first mortgage or charge in relation to all three plots.

(iv) the Kenya Produce Agency Ltd., had an equitable charge in respect of plot No. 22 and their security ranked after that of the bank; the lease deposited with them as security did not have the consent of the Provincial Commissioner but the validity of the charge was not dependent on such consent.

(v) if the document deposited with Mrs. Miriam Binti Ali was an annually renewable lease to the debtor or a sanctioned transfer to the debtor of such a lease in respect of plot No. 29, she should be treated as a secured creditor ranking after the bank.

Order accordingly.

Judgment

Rudd J: This is an application by the Official Receiver for directions under r. 265 of the Bankruptcy Rules. A receiving order was made against the debtors on July 19, 1957. Included amongst the debtors' properties were leases under the Native Lands Trust Ordinance in respect of three plots respectively numbered as plot No. 22 and plot No. 29 at Bungoma trading centre and plot No. 8 at Marech trading centre. Each of these leases entitled the lessee to a lease for one year which, in the absence of notice to the contrary, was automatically renewable at the end of each year for another year subject to a maximum of thirty-two such renewals. It would seem that in theory a new lease would automatically issue at the end of each year but if that were so, such leases were not in practice issued promptly at the end of each year. Indeed, it would appear that the renewal leases were issued as it were in arrears.

Under s. 34 of the Native Lands Trust Ordinance it was provided in substance that no lessee of such lands should alienate the land or any part thereof comprised in his lease by sale, mortgage, transfer of possession, sub-lease, bequest or otherwise howsoever without the consent in writing of the Provincial Commissioner and it was further provided that any such sale, mortgage, transfer of possession, sub-lease, bequest or alienation effected without the consent of the Provincial Commissioner should be void.

As regards plot No. 22 at Bungoma it is clear that the debtor or one of the debtors bought the benefit of this lease from a previous owner who is not otherwise concerned in the matter now before the court. This purchase was duly sanctioned by the Provincial Commissioner and the debtors received the original lease endorsed with particulars of the transfer and the sanction of the Provincial Commissioner. Subsequently the debtor obtained a later lease in his own name.

All these leases could be converted into thirty-three year leases issued under the Registration of Titles ordinance and applications to that end had been made before the date of the receiving order. In the case of plot No. 29 at Bungoma and plot No. 8 at Marech thirty-three year leases were issued after the date of the receiving order but provided that the term of thirty-three years was to run from a date long before the receiving order.

The thirty-three year lease in respect of plot No. 22 at Bungoma does not appear to have been issued as yet.

In the proceedings before me Barclays Bank claim to be secured creditors in relation to all three plots upon the basis of a deposit of documents of title as security for an overdraft. Messrs. Kenya Produce Agency Ltd. claim to be a secured creditor in respect of plot No. 22 at Bungoma by virtue of a deposit of a lease in respect of that plot as security for monies owed by the debtor and Mrs. Miriam Binti Ali claims to be a secured creditor in respect of plot No. 29 at Bungoma by virtue of a similar deposit as security for

monies due to her from the debtors.

The Official Receiver requires the directions of the court as to whether all or any of these parties are secured creditors and if so as to their rights of priority. It has been established that documents relating to all three plots were deposited with the bank as security for the debtors' overdraft. These documents were annually renewable leases and the security was duly sanctioned by the Provincial Commissioner. In the case of plot No. 22 at Bungoma the lease from the debtors' predecessor in title endorsing the particulars of sale and sanction of the sale by the Provincial Commissioner was not deposited with the bank. Subsequently this document was deposited with the Kenya Produce Agency Ltd. as its security. In the case of plot No. 29 it appears that some document relating to this plot was deposited with Mrs. Miriam Binti Ali subsequent to the deposit of a lease with the bank but although the deposit with Mrs. Miriam Binti Ali was made on the basis that it was to be a security for money advanced by her the document in question is not before me.

Under the Equitable Mortgages Ordinance, Cap. 152, an equitable mortgage or charge may be made by the deposit of documents of title to immovable property with intent to create a security thereon subject to the provisions of the Crown Lands Ordinance or the Land Titles Ordinance or the Registration of Titles Ordinance or the Registration of Documents Ordinance as the case may be.

In my opinion none of these particular Ordinances affects the matter before me. If the thirty-three year leases had issued under the Registration of Titles Ordinance before the date of the receiving order it might very well be the case that an equitable mortgage or charge created by deposit of title deeds would not be effective unless and until a memorandum in the statutory form provided by that Ordinance had been duly registered under the Ordinance. But as regards this matter I have to consider the position as at the date of the receiving order and at that date there is nothing to indicate that any of the lands in question were subject to the Registration of Titles ordinance. The fact that subsequently leases under that Ordinance issued with effect from a time prior to the receiving order does not, in my opinion, affect the position as at the time of the receiving order. Quite clearly up to the time of the receiving order the title to the plots was not registered under the Registration of Titles Ordinance and it did not become so registered until after the date of the receiving order. It has not been suggested that the Crown Lands Ordinance or the Land Titles Ordinance has any application in the matter. It was however suggested that registration was required under the Registration of Documents Ordinance, but I am satisfied that no such registration is necessary. I do not think there was a registrable document or that such a document was required. The equitable charge or mortgage in favour of the bank was created by the deposit of the leases as security plus possibly the consent of the Provincial Commissioner and was not created or declared by any document. It follows from this that Barclays Bank as at the time of the receiving order had complied with all the formalities. They were holders of an equitable mortgage or charge in relation to all three plots. They were first in time and are, in my view, secured creditors having a first charge or mortgage in respect of each of the three plots.

As regards Kenya Produce Agency Ltd., I think that the deposit of the automatically renewable lease endorsed with the sale to the debtor and the sanction of the Provincial Commissioner was a document the deposit of which as security was capable of establishing an equitable charge. Although this charge was not sanctioned by the Provincial Commissioner I consider it quite clear that the validity of a charge is not dependent upon the sanction of the Provincial Commissioner. This charge could only be avoided if it could be held to be within the terms of s. 34 of the Native Land Trust Ordinance but that section refers to an alienation by way of sale, transfer of possession, mortgage etc. It does not require a sanction or consent for a mere charge which does not

involve any alienation. It is elementary law that one of the differences between a mortgage and a mere charge is that a mortgage involves an alienation with a right of reconveyance on payment of the money secured, whereas no such alienation is necessary or is effective in the case of a mere charge, further in my opinion a deposit of title deeds as security does not necessarily involve any alienation though it may in certain circumstances give rise to a right to a formal written mortgage conveyance.

I therefore hold that the Kenya Produce Agency Ltd., have in respect of plot No.22 Bungoma an equitable charge, that they are secured creditors and that their security ranks after that of the bank in respect of this plot.

With regard to plot No. 29 I think that if the document deposited with Mrs. Miriam Binti Ali had been produced before me it is highly probable that I should find that she is a secured creditor in respect of plot No. 29 at Bungoma ranking after the bank in the same way as Kenya Produce Agency Ltd. is in respect of plot No. 22. However in the absence of the production of that document or of any document undertaking to deposit title deeds as security I cannot find at this moment that she is a secured creditor. If the Official Receiver calls for the document deposited with Mrs. Miriam Binti Ali and finds that it is an annually renewable lease to the debtor or a sanctioned transfer to the debtor of such a lease in respect of plot No. 29 she should be treated as a secured creditor ranking after the bank.

I direct that the costs of the Official Receiver, of the bank and of Kenya Produce Agency Ltd. be paid out of the general estate. I make no order for costs in respect of Mrs. Miriam Binti Ali.

Order accordingly.

For the appellant:
The Official Receiver, Kenya
H. F. Hamel (Deputy Official Receiver)

For the respondent bank Barclays Bank D.C.O.
Kaplan & Stratton, Nairobi
C. F. Schermbrucker

For the respondent company Kenya Produce Agency Ltd.
Ishani & Ishani, Nairobi
A. Ishani

Sultani (Motor Division) Limited v J B Morgan

[1960] 1 EA 434 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	30 April 1960
Case Number:	374/1956
Before:	Lewis J

Sourced by: LawAfrica

[1] Work and labour – Repairs to motor vehicle – Quotation for repairs given – Claim in excess of quotation – Vehicle unsatisfactory after alleged repairs done – Duty to exercise reasonable care and skill.

Editor's Summary

The defendant, before going to England, took his car to the plaintiffs' garage for a general overhaul of the engine and ancillary work. The work to be done was noted on a job-card, signed supplied. For the repairs the plaintiffs claimed Shs. 2,179/-, which they claimed as the value of goods sold and delivered and work done for the defendant. The defendant disputed the whole claim, and contended that if any goods were supplied or work done, these were of no value because of the plaintiffs' incompetence. The defendant said in evidence which was hardly challenged that the plaintiffs' manager agreed to do the work and store the car whilst the defendant was in England for Shs. 800/-. He also said that the plaintiffs' manager told a friend of the defendant, who enquired about the work, that extra work would be necessary, costing about Shs. 400/- more than the first estimate. Subsequently when the defendant removed the car from the plaintiffs' garage, he found it was using as much oil as before, and on complaining to the plaintiffs, they promised to repair the car to his satisfaction, but had not done so. There was other evidence that the car was still in poor condition, smoking heavily, and certain parts needed replacing.

Held –

(i) in view of the quotations given by the plaintiffs' manager, they were not entitled to recover the amount claimed.

(ii) although the case had been presented as a claim for goods sold and work done, the transaction was a contract for hire of work and labour and the effect of the signed job-card was that the plaintiffs were to do the work required and fit necessary parts, on the footing that if there was any defect in the materials supplied, the repairers were liable; in the instant case, either the materials supplied were not of good quality, or the workmanship did not amount to the exercise of reasonable care and skill, and accordingly the defendant was not liable.

Action dismissed.

Case referred to:

(1) *G. H. M. Myers & Co. v. Brent Cross Service Co.*, [1934] 1 K.B. 46.

Judgment

Lewis J: This is a claim for goods sold and delivered and work done. The defence filed denied that any goods were supplied or work done. In the alternative, if the work was done, then it was so improperly and incompetently done that it was of no value to the defendant.

Through an oversight no issues were framed, but they can be inferred from the pleadings.

The plaintiff company carry on a garage and car repair business in Kampala and the defendant is a Government official.

It is pertinent to note that the conduct of the plaintiff business was left nearly entirely to a garage and workshop manager. P.1. was the managing director of the company.

It was not in dispute that the defendant's 1951 Citroen car was taken to the plaintiffs' garage on April 2, 1954. See job-card exhibit A. The instructions on this card are as follows:

> "Fit new pistons and liners, general overhaul engine. Fit new air filter supplied. Check front wheel bearings, fit new if necessary. Check breakleak. Check over car generally for looseness and adjustment."

Underneath these instructions, which are in pencil, is the admitted signature of the defendant. Beneath this signature there is a note that the car was to be ready for the defendant at a date to be advised, and a progress report was to be sent to the defendant in the U.K. within three months. On the back of the card are details of the hours worked on the car and the parts, oil and petrol supplied. According to this 62 1/3 hours were worked on the car and the charge was Shs. 1,132/90. Parts came to Shs. 937/43, oil to Shs. 4/70 and "oiling and greasing" Shs. 10/-. Work commenced on August 8 and finished on September 15. I notice that the last item: "Yusuf 2 hours Shs. 35/-" is undated. The invoice to the plaint claims Shs. 1,248/90 labour charges, and Shs. 931/47 for the rest.

The case really depends on whether the defendant agreed with a Mr. Boldry, the plaintiffs' manager at the time, a price of Shs. 800/- for the job. Mr. Boldry's services were dispensed with, but Mr. Sultani did not say that he had left the country, or anything of that sort. The defendant said that Boldry agreed to do the work, and store the car while he was on leave, for Shs. 800/-. To cover Boldry, whom he knew as a former P.W.D. official, defendant signed the job-card in blank. This evidence was not really challenged in cross-examination. In fact Mr. Sultani said that it could well be true. However, the statement does not stand alone. The defendant said that he sent a Mr. Lewis to see the plaintiffs about his car. Mr. Lewis gave evidence that he saw Boldry in August and was told that "he had found something and it would cost a little over the original estimate". The defendant thought that a sum of Shs. 400/- was mentioned for this extra something.

In my view this evidence disposes of the plaintiffs' claim to Shs. 2,179/87.

I must now consider whether the agreed price of Shs. 1,200/- can be recovered. The case has been fought on the ground that it was a claim for goods sold and work done. In my opinion this was wrong. This was a contract for hire of work and labour. The class is described in Halsbury's Laws of England, Vol. 1 (2nd Edn.) p. 766:

> "This class of bailment (Locatio operis faciendi) is a contract in which one of the two contracting parties undertakes to do something to a chattel, e.g. to carry it or repair it in consideration of a price to be paid to him."

If further authority is wanted for this opinion it can be found in *G. H. Myers & Co. v. Brent Cross Service Co.* (1), [1934] 1 K.B. 46, a case very similar to this one:

> "The plaintiffs entrusted a motor-car for repair to the defendants, who were garage proprietors and repairers of motor-cars. In the course of repairing the car the defendants obtained from the makers of the car, and fitted, six new connecting rods. One of these rods had a latent defect, which the defendants could not by reasonable care or skill have discovered, and it broke, causing extensive damage to the engine. The plaintiffs brought an action in the county court claiming damages from the defendants, but the county court judge gave judge gave judgment for the defendants on the ground

> that he was not prepared to hold, in the absence of direct authority, that in a contract for work done and materials supplied there was an absolute warranty that the materials supplied were fit for the purpose. The plaintiffs appealed:
>
> "*Held*, by the divisional court (Swift and du Parcq, JJ.), that the warranty implied in a contract for work done and materials supplied as to the fitness of the materials was not less than that implied in a contract for sale of goods – namely, an absolute warranty of fitness. But that warranty might be excluded if it appeared that the person giving the order did so in such a form as to show that he did rely on the contractor's skill and judgment. The case must therefore go back to the county court judge for him to determine on the evidence whether the implied warranty was in fact excluded or not."

Now the contract between the parties, save the price, is contained in exhibit A. The defendant is in effect saying: "Do this work, fit any necessary parts". He is then in no way limiting the person doing the repair work, and the person doing the repair work is, in my view, liable if there is any defect in the materials supplied, even if it was one which reasonable care could not have discovered. As was said by du Parcq, J., in *G. H. Myers & Co. v. Brent Cross Service Co.* (1), at p. 53 and p. 54:

> "The view to which I have come is that the liability of the person supplying goods in the course of doing work and labour is certainly not less than the liability of the person selling goods, and I wish to refer to a very recent decision in the Court of Appeal where words were used by Greer, L.J., which seem to me to throw some light upon the matter. . . He says this: 'The contract we have to consider is not a contract for work and materials. In such a contract – that is a contract for work and materials – it may be right to imply an undertaking that the materials will be of good quality and workmanship carried out with reasonable skill and care. . . '. It will be seen that the learned Lord Justice there in drawing a distinction between a contract for work and materials and a contract of sale seems clearly to be taking the view that in the contract for work and materials the obligations of the person supplying the materials is not less but rather greater than that of the person supplying the goods in a contract for the sale of goods; and although these words are not binding upon this court, I am of opinion that it is a true view to take, that the obligation is certainly no less."

Now for the facts. The defendant removed the car from the garage in September, 1954, and soon found it was using as much oil as before it was sent there. The defendant spoke to Mr. Sultani about this, who, said – this was not disputed – that he would have the engine stripped and the car repaired to the defendant's satisfaction. This however was never done. Mr. Johnson, Work Inspector (Mechanical) with the P.W.D., said that he examined the Citroen engine early in 1955 and found it in a very bad condition and smoking heavily. Pistons and liners needed replacing and valves re-grinding and there were other defects. In conclusion he said in effect that the condition of the engine was such that he doubted whether new pistons and liners had ever been fitted. In my view, this evidence, which I unreservedly accept, satisfied me that either the materials supplied were not of good quality or the workmanship was not carried out with reasonable care and skill. In these circumstances it would be wrong to ask the defendant to pay for them and the claim is dismissed with costs.

Action dismissed.

For the plaintiffs:
Y. V. Phadke, Kampala

For the defendant:
Hunter & Greig, Kampala
H. S. Sparrow

Popatlal Hirji v I H Lakhani & Co (EA) Ltd

[1960] 1 EA 437 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	16 June 1960
Case Number:	1029/1956
Before:	Bennett J
Sourced by:	LawAfrica

[1] Landlord and tenant – Lease for one year subject to annual option to renew – Option exercised regularly – Whether tenancy can be terminated by notice to quit – Whether yearly lease with option to renew is invalid for want of registration – Registration of Titles Ordinance, s. 108 *and s.* 110 (*U.*).

Editor's Summary

The registered proprietor of a long lease of certain shop premises had by an agreement dated March 5, 1954, sublet one of the shops to I. H. Lakhani & Co. The tenancy was to be for one year from April 1, 1954, and renewable annually at the tenant's option. The tenant firm was permitted to carry on business on the premises either in its own name or in the name of other associated concerns mentioned in cl. 2 of the agreement. The firm exercised its option of renewal annually and the shop was occupied by the Acropol Bakery and Confectionery Ltd., an associated concern. The proprietor of the lease having died, his executor assigned the lease to the plaintiff in August, 1959, subject to the existing tenancies. The rent of the shop in question was Shs. 90/- which was paid and accepted regularly until purchase of the lease by the plaintiff who refused it. Cheques for rent were made out in the name of the defendant company and until July, 1959, were forwarded under cover of letters bearing the defendant's name and signed by one of its directors. As from August, 1959, however, the covering letters were signed by a person who described himself as a partner in I. H. Lakhani & Co. On July 1, 1959, advocates acting for the plaintiff wrote to the defendant company intimating that the rent had been increased to Shs. 1,000/- per month and that unless it agreed to this rental, the tenancy would be terminated. On July 24, 1959, other advocates acting for the plaintiff sent the defendant company a notice to quite expiring at the end of August, 1959. On August 4, the advocates for the defendant company replied disputing that the validity of the letter as a valid notice to quit and pointed out that the tenancy could not be terminated in this manner. On October 26, 1959, a further advocate acting for the plaintiff wrote to the defendant company giving it notice to quit the premises "on the 30th day of November, 1959, or at the end of the month of your tenancy which will expire next after the end of one month from the date of service of this notice" and stated that the defendant company was a monthly tenant. On December 24, 1959, the suit was filed. The defendant company raised a number of defences including, inter alia, that the suit had been instituted against the wrong defendant. It was argued for the plaintiff that the defendant company was estopped from denying that it was a tenant because of representations contained in letters written by the company and its advocates, that the agreement of March 5, 1954, purported to create a term exceeding three years and was consequently void because it was not in statutory form as required by s. 108 of the Registration of Titles Ordinance and because it was not registered as required by s. 110 ibid, and that the agreement did not

entitle the tenant to a perpetual right of renewal and that the term came to an end at the end of the first or possibly the second year. It was argued for the defendant company that the plaintiff could not now rely on estoppel as it had not been pleaded.

Held –

(i) the agreement of sale between the executor and the plaintiff made it clear that the tenant was I. H. Lakhani & Co. and not the defendant company, and the plea raised in the defence that the suit was instituted against

the wrong defendant should have put the plaintiff's advocates on enquiry so as to amend the plaint by pleading estoppel; therefore, the court could not now allow the plaintiff to rely upon a ground of attack which he had not pleaded.

(ii) the court was not prepared to hold that a tenancy by estoppel had been created and it therefore followed that the suit had been instituted against the wrong defendant.

(iii) though an agreement for a lease which is annually renewable at the option of the tenant is to be construed as a lease for a term exceeding three years, such a lease even if it is not in statutory form and is unregistered is enforceable as an agreement to grant a lease in statutory form; therefore, the plaintiff was bound by the terms of the agreement.

(iv) as there was no suggestion that the option to renew was ever exercised after the relationship of landlord and tenant had ceased, the agreement was not determinable by notice to quit.

Per Curiam: "In order to succeed on a claim founded upon tenancy by estoppel, it would be necessary for the plaintiff to show not only that the defendant company was estopped from denying that it was the tenant, but it would also have to be shown that the firm of I. H. Lakhani & Co. was estopped from asserting that it had a subsisting tenancy."

Suit dismissed with costs.

Cases referred to in judgment:

(1) *Harnam Singh v. Jamal Pirbhai*, [1951] A.C. 688.

(2) *Gray v. Spyer*, [1922] 2 Ch. 22.

(3) *Vasanji Khimji v. Abdulhusein Ismail Hassan*, Uganda High Court Civil Appeal No. 92 of 1957 (unreported).

Judgment

Bennett J: In this suit the plaintiff claims from the defendant company possession of a portion of premises known as 54 Kampala Road, and mesne profits, at the rate of Shs. 1,000/- per month from the date of the termination of the tenancy until possession is given.

A number of grounds of defence have been pleaded. There is a denial that two letters purporting to be notices to quite are valid notices to quit; there is a denial that the defendant company has occupied or is in occupation of the premises in suit; there is a denial that the tenancy has ever been properly terminated; there is an allegation that the suit has been instituted against the wrong defendant. The averment in the written statement that the plaint is bad in law in that it does not recite the annual rental value of the premises has not been referred to by the defendant's counsel in the course of his argument, and I assume that it has been waived since it is a preliminary objection in point of law which should have been argued, if at all, before the trial of the suit.

The facts which have been admitted or proved to my satisfaction are these: The defendant company has seven directors all of whom are partners in a firm known as I. H. Lakhani & Co. Mr. I. H. Lakhani, who is a director of the defendant company and partner of the firm, is also a director of a company known as the Acropol Bakery and Confectionery Ltd., which is associated with the defendant company

and with the firm of I. H. Lakhani & Co.

One Marshall D'Souza was the registered proprietor of a lease for fifty-seven years and six months of 54 Kampala Road, in which there were five shops. By an agreement in writing (exhibit D.2.) dated March 5, 1954, Marshall D'Souza sublet one of the shops in the building to the firm of I. H. Lakhani & Co. (hereinafter called the firm)

> "The tenancy to be for a period of one year from the 1st day of April, 1954, and shall be renewable annually at the Tenant's option on the above terms and conditions (cl. 8 of the Agreement)."

Clause 2 of the agreement permitted the firm to carry on business on the premises either in its own name or in the name of Acropol Bakery and Confectionery Ltd., or in the name of other associated concerns therein mentioned.

Marshall D'Souza having died, his executor assigned the lease of the building to the plaintiff in August, 1959, the assignment being subject to the existing tenancies.

The firm exercised its option of renewal annually and the shop was occupied by the Acropol Bakery and Confectionery Ltd. This company, although it has ceased business due to the non-African trade boycott, is still in occupation and its furniture and fittings are still in the shop.

The rent reserved by the agreement (exhibit D.2.) was Shs. 90/- per month, and rent was paid regularly until the plaintiff purchased the lease of the building, since when the rent although tendered has been refused. Cheques for rent were made out in the name of the defendant company and, until July, 1959, were apparently forwarded under cover of letters bearing the defendant company's letter heads and signed by one of its directors in his capacity as such. As from August, 1959, however, the covering letters were signed by a person who described himself as partner in I. H. Lakhani & Co.

On July 1, 1959, Baerlein & James, who were acting as advocates for the plaintiff, wrote to the defendant company (exhibit P.4), intimating that the rent for the shop had been increased to Shs. 1,000/- per month, and that unless the defendant company agreed to this rental the plaintiff would terminate the tenancy. If there was any reply to this ultimatum it has not been put in evidence, but on July 24, 1959, Manibhai Patel & Son, another firm of advocates purporting to act on behalf of the plaintiff, sent a letter (exhibit P.5.) to the defendant company which purported to be a notice to quit expiring at the end of August, 1959.

On August 4, 1959, P.J. Wilkinson, advocate, acting on behalf of the defendant company, wrote to Manibhai Patel & Son acknowledging their letter of July 24, denying that the letter was a valid notice to quit and pointing out that the tenancy could not be terminated "in this manner" (exhibit P.7.).

On October 26, 1959, P. Khetani, advocate, acting on behalf of the plaintiff, wrote to the defendant company a letter purporting to be a notice to quite the premises.

> "on the 30th day of November, 1959, or at the end of the month of your tenancy which will expire next after the end of one month from the date of service of this notice."

This letter also averred that the defendant company was a monthly tenant.

On December 24, 1959, the suit was filed.

There cannot be the slighest doubt but that the tenancy was granted to the firm of I. H. Lakhani & Co., but on behalf of the plaintiff it is contended that the defendant company is estopped from denying that it is tenant because of representations contained in letters written by the company and by its advocates. Payment of rent by the company has also been relied upon as evidence of the defendant's tenancy although Mr. Nazareth, for the plaintiff, concedes that payment of rent is not conclusive.

Some of the letters which have been produced cannot be relied upon for the purpose of raising an estoppel since they are either addressed to someone other than the plaintiff or were written after the suit was instituted. However, I am of opinion that the letter exhibit P.7. would estop the defendant company

from denying that it was the tenant.

Mr. Wilkinson, for the defendant, has strenuously objected to the plaintiff relying upon estoppel because it has not been pleaded.

As a general rule estoppel must be pleaded for it is a material fact: See Bullen & Leake's Precedents of Pleadings, (11th Edn.), p. 801: and Phipson on Evidence, (9th Edn.), p. 704.

On the other hand the case of *Harnam Singh v. Jamal Pirbhai* (1), [1951] A.C. 688, which was cited by Mr. Nazareth, is authority for the proposition that in certain circumstances a party may be permitted to rely upon estoppel although he has not pleaded it. The reason given in that case for allowing a departure from the general rule is stated in the judgment thus, at p. 700:

> ". . . it would be unsatisfactory to allow a departure from the facts as pleaded on one side while treating the other as debarred by defect of pleading from raising an answer the substance of which was plainly in issue before the court."

In that case it would appear that both parties were in pari delicto and that this was regarded as a justification for granting some indulgence to the respondent. In the instant case no such considerations arise. Moreover, at the time of the institution of the suit the plaintiff had a document in his possession, namely, the agreement for sale between Marshall D'Souza's executor and the plaintiff (exhibit D.3.) which, had he read it, would have made it clear that the tenant of the premises in suit was I. H. Lakhani & Co. and not the defendant company.

In para. 6 of the written statement of defence it is pleaded that the suit is instituted against the wrong defendant. This should have been sufficient to put the plaintiff's advocates on enquiry, and had they made the slighest enquiry either by asking the defendant for further and better particulars of para. 6, or by looking at the document in the plaintiff's possession, they would have discovered the true position, and could have amended their plaint by pleading estoppel.

In all the circumstances I am inclined to the view that this is a case in which I ought not to permit the plaintiff to rely upon a ground of attack which he has not pleaded.

The matter is, however, largely of academic interest for these reasons. In order to succeed on a claim founded upon tenancy by estoppel, it would be necessary for the plaintiff to show not only that the defendant company was estopped from denying that it was the tenant, but it would also have to be shown that the firm of I. H. Lakhani & Co. was estopped from asserting that it had a subsisting tenancy. The firm might be so estopped if it had represented or was a party to any representation that the company was the holder of the tenancy. Per contra, the firm cannot be deprived of its tenancy merely because a third party has, without its knowledge or consent, represented itself to be the tenant. It is not open to the court in these proceedings to hold that there is an estoppel against the firm because the firm is not a party to the suit. The firm is in fact a necessary party to any claim against the company founded upon estoppel, and, in my judgment, failure to join the firm as a co-defendant must necessarily be fatal to the plaintiff's claim.

In these circumstances I am not disposed to hold that a tenancy by estoppel has been created, and it follows that the suit has been instituted against the wrong defendant.

It might, however, have unfortunate consequences for the parties if I were to dispose of the suit on this ground alone. I therefore propose to consider the other contentions advanced on behalf of the plaintiff. It is said that the agreement of March 5, 1954 (exhibit D.2.), purports to create a term exceeding three years, that it is void as a sub-lease because it is not in statutory form as required by s. 108 of the

Registration of Titles Ordinance, and because it is

not registered as required by s. 110. Reliance is placed upon s. 51 of the Ordinance which provides that no instrument until registration shall be effectual to pass any estate or interest in any land under the operation of the Ordinance.

The judgment of Warrington, L.J., in *Gray v. Spyer* (2), [1922] 2 Ch. 22, at p. 32, contains the proposition that an agreement for a lease which is annually renewable at the option of the tenant is to be construed as a lease for a term exceeding three years. It would thus seem that the agreement (exhibit D.2.) ought to have been in statutory form and to have been registered. It has, however, been held by this court in *Vasanji Khimji v. Abdulhusein Ismail Hassan* (3), Uganda High Court Civil Appeal No. 92 of 1957 (unreported), that a sub-lease for a term exceeding three years which is in non-statutory form and unregistered is enforceable as an agreement to grant a lease in the statutory form. The Registration of Titles Ordinance of Uganda is modelled upon the Australian Torrens System and in the case to which I have referred the court adopted the following passages in Kerr on Principles of the Australian Land Titles (Torrens) System, 1927 Edition, as containing a correct statement of the principles applicable in Uganda. On p. 130:

> "248. An unregistered lease in statutory form operates inter partes in like manner as an agreement for lease does under the general law.
>
> "Whilst at law the lessee is a tenant at will only, yet in equity the unregistered document is binding and effectual as between the parties to it and an action lies on the covenant for payment of rent, and the landlord's ordinary remedies, such as distress and re-entry, would be open to him."

on p. 185:

> "362. A most obvious illustration of the principle that a registered proprietor is bound by his contractual obligations is the case of a long lease in non-statutory form or of an agreement for lease. The immediate registered proprietor granting such a lease or entering into such an agreement will be compelled on the principle of *Walsh v. Lonsdale* at the suit of the tenant to execute a registrable lease in statutory form and hence the rights and liabilities of the parties must be ascertained as if a formal statutory lease had been executed and registered."

I therefore hold that the plaintiff is bound by the terms of the agreement (exhibit D.2.) however onerous and inconvenient they may be from his point of view.

The plaintiff's alternative argument is that cl. 8 of the agreement (exhibit D.2.) does not entitle the tenant to a perpetual right of renewal and that the term came to an end of the first or possibly of the second year.

The courts are loath to construe a covenant in a lease as conferring a right of perpetual renewal, but will not place a forced construction on the words used so as to negative an intention to grant such right: See Woodfall on Landlord and Tenant, (25th Edn.), p. 1096 and p. 1097, and the judgment of Scrutton, L.J., in *Gray v. Spyer* (2).

In the instant case the words of cl.8 appear to me to be plain and unambiguous. It is true that the clause does not specify within what period of time the option is exercisable, but this is not fatal to the creation of such an option. To quote from Woodfall, p. 1099:

> "If the lease contains no stated time for the exercise of the option, it continues so long as the relationship of lessor and lessee subsists."

In the instant case there is uncontradicted evidence that notice of renewal has been given annually by the tenant, and there is no suggestion that the option was ever exercised after the relationship of landlord and

tenant had ceased.

For these reasons I hold that the agreement is not determinable by notice to quit.

The suit is dismissed and the plaintiff will pay the defendant's costs.

Suit dismissed with costs.

For the plaintiff:
D. P. Khetani, Kampala
J. M. Nazareth, Q.C., and D. P. Khetani

For the defendant:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q.C., and *B. E. D'Silva*

Kartar Singh Nanak Singh Ramgharia v Naumann Gepp (East Africa) Ltd
[1960] 1 EA 442 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	1 June 1960
Case Number:	64/1956
Before:	Sir Alastair Forbes Ag P, Gould Ag VP and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Harley, J.

[1] Bankruptcy – Bankruptcy notice served upon debtor – Affidavit in reply failing to comply with rules – Affidavit treated by registrar as application to set aside bankruptcy notice but no order made extending the time specified in the notice – Application dismissed – When time begins to run for presentation of petition – Bankruptcy Ordinance (*Cap.* 30), *s.* 3 (1) (*g*) *and s.* 6 (1) (*c*) (*K.*) – *Bankruptcy Rules, r.* 100 *and r.* 101 (*K.*).

Editor's Summary

The appellant was on December 29, 1958, served with a bankruptcy notice issued on December 24, 1958, calling upon him to pay a judgment debt within seven days after service. On January 5, 1959, the appellant filed an affidavit which did not indicate that he had a counterclaim, set-off or cross-demand of any kind as required by r. 100 (2) of the Bankruptcy Rules. On January 5, 1959, the deputy registrar made a note on the file that the affidavit operated as an application to set aside the bankruptcy notice and listed it for hearing on February 3, 1959, but did not make any order extending the time specified in the notice. The Supreme Court dismissed the application on the ground that no counterclaim, set-off or cross-demand was disclosed in the affidavit. On April 22, the respondents presented a petition and the act

of bankruptcy relied upon was that the appellant's application to set aside the bankruptcy notice had been dismissed on February 3, 1959, and that he had since failed to comply with the notice. A receiving order was made on May 22, 1959, from which an appeal was brought. The substantial point taken on appeal was that the act of bankruptcy on which the petition was grounded had occurred more than three months before the presentation of the petition, contrary to s. 6(i)(*c*) of the Bankruptcy Ordinance. The respondents submitted that the effect of filing of the appellant's affidavit and the subsequent hearing was to postpone the date of the act of bankruptcy.

Held –

(i) an affidavit made in reply to a bankruptcy notice which does not allege a counterclaim, set-off or cross-demand cannot operate as an application to set aside a bankruptcy notice.

(ii) the deputy registrar was incorrect in treating the affidavit as an application and his act in so doing was without jurisdiction; accordingly, he could not be deemed to have extended the time specified in the bankruptcy notice when he set it down for hearing as an application.

(iii) if, in response to a bankruptcy notice, an affidavit is filed which does not comply with the requirements of the rules, and no stay is ordered by the registrar, then time for the presentation of a petition runs from the date fixed by the bankruptcy notice for compliance with its demand.

(iv) the petition was presented more than three months after the act of bankruptcy.

Appeal allowed.

Case referred to:

(1) *In re A Debtor Ex parte Debtor*, [1935] 1 Ch. 347.

The following judgments were read by direction of the court:

Judgment

Gould Ag VP: This is an appeal from the making of a receiving order in bankruptcy against the appellant by the Supreme Court of Kenya on May 22, 1959. A number of grounds of appeal were argued before this court but, on the view of the matter I have formed, I need discuss only one. Ground 1 in the memorandum of appeal reads:

> "1. The act of bankruptcy on which the petition was grounded had occurred beyond three months before the presentation of the petition, contrary to s. 6 (1) (*c*) of the Bankruptcy Ordinance."

If this ground is substantiated there is no question but that the appeal must be allowed as the receiving order would then have been shown to have been made without jurisdiction.

The date of various steps in the proceedings are relevant. Pursuant to a request by the advocates for the judgment creditor (later the petitioning creditor) a bankruptcy notice directed to the appellant was issued from the Supreme Court and dated December 24, 1958. It was served on the appellant on December 29, 1958, and called on him to pay the judgment debt within seven days after service, excluding the day of such service. An endorsement on the notice was in the following terms:

> "You are Specially to Note:
>
> "That the consequences of not complying with the requisitions of this notice are that you will have committed an act of bankruptcy, on which bankruptcy proceedings may be taken against you.
>
> "If, however, you have a counter-claim, set-off, or cross-demand which equals or exceeds the amount claimed by Naumann, Gepp (East Africa) Limited, in respect of the Decree and which you could not set up in the action or other proceedings in which the said Decree was obtained, you must within seven (7) days apply to the court to set aside this notice by filing with the registrar an affidavit to the above effect.
>
> (Sgd.) J. A. Couldrey.
>
> Kaplan & Stratton.
>
> *Advocates for the Judgment-Creditor.*"

On January 5, 1959, the appellant filed an affidavit in the Supreme Court in response to the notice – I deem it unnecessary to set out the contents of this

document, as it is common ground that it did not even attempt to assert that the appellant had a counter-claim, set-off or cross-demand of any kind.

On the same day, January 5, 1959, the deputy registrar made the following note:

> "Affidavit in reply to the bankruptcy notice, which operates as an application to set aside the said bankruptcy notice having been filed today by B. D. Bhatt, Esq., advocate for the debtor, I now list the same for hearing on the 3rd day of February, 1959, at 10.30 a.m. vide r. 101 of the Bankruptcy Rules Cap. 30. Hearing notices to be issued and served on the parties herein. The said affidavit to be served on Messrs. Kaplan & Stratton, Advocates, for the creditor.
>
> P. Heim.
>
> *Deputy Registar*."

The matter was set down for hearing on February 3, 1959, when the advocate for the judgment creditor took the point that the affidavit disclosed no counterclaim, set-off or cross-demand – the learned judge agreed with this submission and purported to dismiss the application with costs.

The creditor's petition is dated April 10, 1959, though the registrar's endorsement states that it was presented on April 22, 1959; this difference in dates is not material. The act of bankruptcy relied upon is set out in para. 4 of the petition:

> "That the said Kartar Singh Nanak Singh Ramgharia within three months before the date of the presentation of the petition has committed the following act of bankruptcy, namely, that his application to set aside a bankruptcy notice served on him in December, 1958, was heard on February 3, 1959, in Her Majesty's Supreme Court of Kenya at Nairobi aforesaid and was dismissed on the said date and that he has since failed to comply with the requirements of the said notice."

By virtue of s. 6 (1) (*c*) of the Bankruptcy Ordinance (Cap. 30) a creditor is not entitled to present a petition against a debtor unless the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition. Section 3 (1) (*g*) of the Ordinance enacts that a debtor commits an act of bankruptcy if he fails to comply with a bankruptcy notice, unless he satisfies the court that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the decree and which he could not set up in the action in which the decree was obtained.

In the present case the appellant failed to comply with the notice (subject to the possible effect of certain rules to be discussed in a moment) at the expiration of seven days after December 29, 1958, the date of service, that is to say January 5, 1959. If that is the date of the act of bankruptcy the petition had no proper foundation, for it was presented more than three months thereafter. The judgment creditor, however, submits that the effect of the filing of the appellant's affidavit and the subsequent hearing of the advocates for the parties pursuant thereto, was to postpone the date of the act of bankruptcy.

The matter falls to be determined with reference to the effect of r. 100 (2), r. 100 (3) and r. 101 of the Bankruptcy Rules, which read as follows:

> "100(2) There shall be also indorsed on every bankruptcy notice an intimation to the debtor that if he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt, and which he could not have set up in the action in which the judgment or order was obtained, he must within the time specified in the notice file an affidavit to that effect with the registrar.

> "(3) In the case of each notice the registrar when issuing the notice shall fix such time.
>
> "101. The filing of such affidavit shall operate as an application to set aside the bankruptcy notice, and thereupon the registrar shall fix a day for hearing the application, and not less than three days before the day so fixed shall give notice thereof both to the debtor and the creditor and their respective advocates, if known. If the application cannot be heard until after the expiration of the time specified in the notice as the day on which the act of bankruptcy will be complete, the registrar shall extend the time and no act of bankruptcy shall be deemed to have been committed under the notice until the application has been heard and determined."

The use of the words "to that effect" in r. 100 (2) shows clearly that the affidavit must allege a counterclaim, set-off or cross-demand of the nature specified, and the phrase "such affidavit" in r. 101, can only result in importing the same requirement into that rule. Consequently any affidavit which does not contain such an allegation cannot operate as an application to set the bankruptcy notice aside. The deputy registrar, however, in the present case set the matter down for hearing as an application; he did not make any order extending the time specified in the notice.

The question arises whether, as r. 101 required the deputy registrar to extend the time provided in the notice, he should be deemed to have done so when he fixed a date to hear the application. If the application were a proper one, upon an affidavit complying with r. 100 (2), that might perhaps be the reasonable and appropriate answer. But here there was no proper affidavit and the deputy registrar was wrong in treating it as an application – his act was in fact without jurisdiction. Is it in those circumstances reasonable and appropriate to hold that he should be deemed to have performed another act for which he also lacked jurisdiction?

The answer to this query appears quite plainly from the case of *In re A Debtor Ex parte Debtor* (1), [1935] 1 Ch. 347. In that case a bankruptcy notice was issued, and in accordance with it, the act of bankruptcy would normally have become complete on June 4, 1934. An affidavit was filed by the debtor on May 31, and a day was fixed for a hearing – June 21. The affidavit was rather more meritorious than the one relied upon in the present case but clearly failed to comply with the English rules corresponding to Kenya Bankruptcy Rules, r. 100 and r. 101, which are in similar terms. The registrar, when he ordered a day to be fixed, added – "No stay". The facts up to that point, are a counterpart of those in the present case, as I do not think there is any difference, so far as r. 101 is concerned, between ordering "no stay" and merely not ordering a stay. The next step in the case under discussion was the presentation of a bankruptcy petition on June 5, founded on the act of bankruptcy allegedly complete on June 4. On June 21 the "application" was heard and dismissed with costs. On June 28 a receiving order was made, and from that order the appeal under consideration was brought.

On these facts the gist of the decision of the Court of Appeal, as stated in the headnote, was:

> "*Held*, that the receiving order was properly made; that there had been no compliance by the debtor with r.140, as the affidavit on the fact of it showed that the cross demand did not equal or exceed the amount of the judgment debt, and therefore that the procedure provided by r. 141 for dealing with a bankruptcy notice did not come into operation, and that the case must be treated as if no affidavit under r. 140 had in fact been filed.
>
> "*Held*, also that the registrar, if he thought, as he appeared to have done, that the affidavit did not satisfy r. 140, ought to have marked the application

> 'Affidavit not sufficient – No case raised' and not to have taken seisin of the matter."

The court considered that the registrar was wrong in not having ordered a stay when he had fixed a day for the hearing, but there was no question of his having been deemed to have ordered a stay; the relevant rule never came into operation. It will be sufficient to set out the following passage from the judgment of Lord Hanworth, M.R., at p. 350:

> "What was done by the learned registrar was this: upon this application he marked his initials to show that it had been received on May 31 and then said 'Fix a day', and the day so fixed was this June 21; but he added 'No stay'. Now, if there was to be a hearing, if there was sufficient material to put r. 141 into operation, which from this note it would appear that the registrar thought there was by his saying 'Fix a day', then it was not right to refuse a stay, which ought to be given in accordance with the latter part of r. 141.
>
> "The application was dealt with on June 21, and no order satisfactory to the debtor was made on that date. The appellant complains that there was no stay granted, and although there was a day fixed for the hearing, inasmuch as no stay was granted, r. 141 was not complied with. That is so; but the real question is this: Did r. 141 ever come into operation? The answer is 'No', because it is only to come into operation on the filing of '*such affidavit*', namely one which complied with r. 140."

The effect of this decision, as I see it, is to lay it down that if, in response to a bankruptcy notice, an affidavit is filed which does not comply with the requirements of the rules, and no stay is ordered by the registrar (or, in the words of the rule, the registrar does not "extend the time") then time for the presentation of a petition runs from the date fixed by the bankruptcy notice for compliance with its demand. In the present instance the petition was presented upwards of three months from that date. There was no question of waiver, if such a question could be entertained, for at the hearing of the "application" the advocate for the judgment creditor immediately took the point that the affidavit did not comply with the rules. The learned judge agreed and dismissed the application with costs – he might well have struck it out as incompetent.

In my opinion then, the petition was presented too late – that is, more than three months after the act of bankruptcy. That is a point of substance and no mere technicality, and the appeal must succeed. This may at first sight appear to be something of a hardship for the judgment creditor, as there was no apparent merit in the appellant's effort to have the bankruptcy notice set aside, but there was no need whatever for the judgment creditor to have fallen into such error. Even after the "application" was disposed of on February 3, 1959, there remained just over a month during which the petition could properly have been filed. Additionally the very ground upon which the advocate for the judgment creditor successfully challenged the application should have been sufficient to apprise him of the true position.

I would allow the appeal with costs here and in the court below and would vacate the receiving order.

Sir Alastair Forbes Ag P: I agree. There will be an order as proposed by the learned Acting Vice-President.

Windham JA: I also agree.

Appeal allowed.

For the appellant:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

For the respondents:
Kaplan & Stratton, Nairobi
C. F. Schermbrucker

Amritlal Hansraj Sheth v K V Nathwani
[1960] 1 EA 447 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	27 June 1960
Case Number:	27/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Mayers, J.

[1] Detinue – Burden of proof – Bond warrants endorsed over to appellant – Return demanded by respondent and refused by appellant – Whether proof of ownership gives immediate right to possession.

Editor's Summary

The respondent had sued the appellant for damages for the wrongful detention of three bond warrants. It was common ground that the respondent was the owner of the warrants, that he had endorsed them over and delivered them to the appellant, that the appellant had accordingly acquired possession of them lawfully and that before the proceedings a demand was made for their return which was refused. At the trial both the parties gave wholly conflicting versions as to the circumstances and conditions upon which the bond warrants came to be endorsed and delivered to the appellant. The trial judge disbelieved the evidence of both the parties and found for the respondent on the ground that the appellant had not discharged the burden upon a defendant of showing that his detention of the bonds was lawful. On appeal

Held –

(i) the trial judge was justified in rejecting the evidence of both parties and therefore was right in holding that the case fell to be determined on the basis of the burden of proof.

(ii) the owner of a chattel is not entitled as such to delivery of immediate possession of it; nor does proof of ownership discharge, even prima facie, the burden of proving the right to immediate possession.

(iii) as the appellant had lawfully come into possession of the bond warrants, his possession would be presumed to continue to be lawful until proof is adduced that it has ceased to be so.

(iv) the burden of proof was on the respondent to prove an immediate right to the possession of the bond warrants which he had not discharged; such a right could not be presumed from his mere ownership of the bond warrants.

(v) in cases of detinue, where the ownership of the plaintiff is admitted and possession has lawfully been acquired by the defendant, and where the dispute is upon the immediate right to possession, the burden of proving an immediate right to possession lies on the plaintiff.

Appeal allowed.

Cases referred to in judgment:

(1) *Bray v. Palmer*, [1953] 2 All E.R. 1449.

(2) *Mohammed Mehdi Hasan Khan v. Mandir Das* (1912), 39 I.A. 184.

(3) *Salim Shaikh v. Boidonath Ghuttuck* (1868), 12 W.R. 217.

(4) *Kahler v. Midland Bank Ltd*., [1949] 2 All E.R. 621.

(5) *Sajan Singh v. Sardara Ali*, [1960] 1 All E.R. 269.

The following judgments were read:

Judgment

Windham JA: This is an appeal by the defendant in a suit instituted in the Supreme Court of Kenya, in which the plaintiff-respondent successfully sued him for damages for the wrongful detention of three bond warrants which

the respondent had endorsed over to, and deposited with, the appellant. Both parties were individuals, trading respectively under the names in which they appear as parties to the suit and to this appeal. Both on the pleadings and in evidence, the following facts were admitted by one or other of the parties. First, that the respondent was the owner of the bond warrants. Secondly, that he had endorsed them over and delivered them to the appellant. Thirdly, that the appellant had accordingly acquired possession of them lawfully. Fourthly, that before filing his suit the respondent demanded the return of the bond warrants and that the appellant refused to return them. The points in dispute, both on pleadings and on evidence, were, briefly: first, the terms and conditions upon which the respondent endorsed and handed the bond warrants over to the appellant; and secondly, depending on the answer to that question, whether or not the respondent, when he filed his suit, was entitled to their immediate possession, or in other words whether, after demand, the appellant wrongfully detained them. The particulars of the respective versions of the parties, and also the nature of the appellant's counterclaim, are sufficiently set out in the following passage from the judgment of the learned trial judge:

> "In this suit the plaintiff, who is a manufacturer's representative and an importer of cloth, seeks to recover damages for the alleged wrongful detention by the defendant of certain bond warrants which he alleges he lent to the defendant for a short time with a view to their being deposited by the defendant with his bankers by way of security for an overdraft and which, despite demand, the defendant has refused to redeliver to the plaintiff.
>
> "The defendant, by his written statement of defence, admits that he is in possession of the bond warrants but alleges that they were deposited with him by way of security for loans made by him to the plaintiff to a total value of Shs. 13,600/-, of which the plaintiff has only repaid Shs. 10,000/-. The defendant counterclaims for the outstanding balance of these loans and professes his readiness upon payment of that balance to return to the plaintiff the bond warrants.
>
> "By his reply the plaintiff, while admitting that he in fact borrowed sums totalling Shs. 13,600/- from the defendant and that of this sum Shs. 3,500/- is still outstanding, denies that the bond warrants were ever given to the defendant as security for those loans, maintaining that although virtually contemporaneous, the transactions in relation to the bond warrants and the loans were wholly independent of each other."

The judgment then proceeded to describe the nature of a bond warrant, quite correctly, in the following words:

> "Bond warrants are documents issued by bonded warehouses to persons who deposit goods with them which entitled the holder upon presentation and upon payment of the appropriate duty and storage charges, to delivery of the goods to which they relate. They are negotiable by endorsement . . ."

The respondent and the appellant gave wholly conflicting testimony as to the circumstances in which, and the conditions upon which, the bond warrants came to be endorsed and delivered by the former to the latter. The respondent called witness, and both parties produced correspondence and other documentary evidence, in support of their respective versions. The learned trial judge, after considering carefully in his judgment the credibility of each party, and the weight to be attached to the documentary evidence, arrived at the conclusion that he could not accept either of their stories as being the true version of the transaction between them. The only facts which were common ground were that the bond warrants were endorsed and delivered to the

appellant, and that during approximately the same period the appellant made money advances to the respondent, for the balance of which he counterclaimed. The learned trial judge, rejecting on the one hand the respondent's story that there was no connection at all between the two sets of transactions, and on the other the appellant's story that the bond warrants were actually deposited as security for the loans, found nevertheless, and the evidence as a whole supported his finding, that he was

> "left in no doubt that the transactions in relation to the bond warrants and the advances were directly connected with each other."

Later, he expressed himself as

> "inclined to think that they were delivered pursuant to some transaction between the parties, the real nature of which has not been disclosed to the court."

Being unable, through lack of evidence, to find what the nature of the true transaction was, he proceeded to decide the case on the basis of what he held to be the burden of proof. I will consider presently whether he placed that burden upon the right party. But for the moment it is sufficient to say that in my view he was justified, both in law and upon the conflicting evidence before him, in adopting that course, and in rejecting the stories of both parties.

As to whether he was justified in law, two cases have been cited. In *Bray v. Palmer* (1), [1953] 2 All E.R. 1449, where the parties claimed and counter-claimed for damages arising from a collision between a motor-cycle and a car, the trial judge held that either the plaintiff's or the defendant's version of the accident must be true; but because he could not decide which of them was true, he dismissed both claim and counterclaim. The Court of Appeal held that in so doing he erred, as it was his duty to make up his mind which version was more probably true and to find for the plaintiff or defendant accordingly. That case, however, is wholly distinguishable from the present one. For here the learned trial judge did not hold that either the appellant's or the respondent's story must be true; on the contrary he found that neither of them was, at least, not entirely. A decision more in point, in that it concerned a case where, as here, both parties' stories were rejected, is that of the Privy Council in *Mohammed Mehdi Hasan Khan v. Mandir Das* (2) (1912), 39 I.A. 184. That was a suit on a mortgage bond, the defence being a discharge by payment evidenced by an endorsement on the bond. Their Lordships said, at p. 189 and p. 190:

> "Their lordships cannot help considering this mode of treating a case where two distinct and conflicting sets of facts are opposed to each other as unsatisfactory. The plaintiff came into court with a definite story to account for the possession of the document by the defendant. The learned judges agree with the first court in holding that story to be false, and yet they proceed to build up a case for the plaintiff on what they call a 'possibility'. As already observed, the defendant did not rest his case merely on the legal presumption which arose from the possession of the document; he produced positive testimony which received corroboration from that presumption, and he proved facts which made his statement probable. The learned judges having disbelieved the evidence on both sides have set aside the presumption under s. 114 of the Evidence Act, which only embodies the ordinary rule of law, by a possibility based on surmises. Now, it is settled principle that suspicion, though a ground for scrutiny, cannot be made the foundation of a decision, and that is exactly what appears to have happened in this case."

The above passage is, in my view, clear authority for the course adopted by the learned trial judge in the present case. In deciding the case on the basis of the burden of proof, and in avoiding any temptation (such as that into which the judges in the court of first appeal in that case fell) to decide it upon a "possibility based on surmises", or in other words, upon any guess as to what the nature of true transaction in the present case may have been, he followed the course which their lordships of the Privy Council held ought to have been followed in the case before them.

As to whether the learned trial judge erred in rejecting the stories of both parties, counsel for each has argued that his client's story ought to have been accepted. The learned judge examined very carefully the evidence before him, and gave considered reasons for not accepting the story either party, save in respect of what was common ground. After an equally careful examination of the record I find no ground that would justify me in differing from his conclusions, either upon questions of pure credibility or in respect of his evaluation of the evidence. I find it unnecessary to scrutinise the evidence here in detail. For while Mr. Cleasby for the respondent, at the outset of his address to us, submitted an argument to show that the respondent's story need not necessarily be untrue, he later conceded that the learned judge was justified in holding, on all the evidence, that he eas not satisfied that the real agreement was either as alleged by the respondent or as alleged by the appellant; but Mr. Cleasby went on to contend that, in those circumstances, the learned judge was right in finding for the respondent. With that contention I will now deal. My conclusion on the point will make it equally unnecessary to set out in detail my reasons for having rejected the alternative contention advanced by Mr. O'Donovan for the appellant namely that the learned trial judge ought to have believed the appellant's story in its entirety.

The learned trial judge having (justifiably as I have indicated) rejected the stories of both parties, the case fell to be determined, as he rightly appreciated, upon a consideration of the burden of proof. And that brings us to the question on which, in my view, this appeal really hinges, namely the question on whom the burden of proof lay to show whether or not the respondent, when he filed his suit, was entitled to immediate possession of the bond warrants, and whether that burden had been discharged. If the respondent's version of the transaction under which the bond warrants came to be endorsed and delivered to the appellant were true, then he would, when he filed his suit, have been entitled to their immediate delivery back to him, having already demanded them. And if the appellant's version were true, the respondent would not have been so entitled, since the appellant's advances to him had not yet been wholly repaid. But, both stories having been rejected, we are left with the position on the pleadings and admitted facts.

The passage from the judgment of the learned trial judge in which, after rejecting both stories, he proceeded to consider the question of burden of proof and to resolve it in favour of the respondent, reads as follows:

> "In my view where a litigant seeks the recovery of any chattel which is admittedly his and is admittedly detained, the burden rests upon his adversary to prove that the detention of that chattel is lawful. For the reasons already advanced I am not satisfied that the preponderance of probability is that the bond warrants were given by way of security for the loans and, indeed, am inclined to think that they were delivered pursuant to some transaction between the parties, the real nature of which has not been disclosed to the court. From this it follows that the defendant has not discharged the burden upon him of showing that his detention of the bond warrants is lawful."

He then proceeded to consider the question of damages, and to award the

respondent damages in alternative sums, according as the appellant should elect to retain or to return the bond warrants or any of them, from which amount there would be deducted the Shs. 3,500/- which the respondent admittedly owed to the appellant on the counterclaim.

In my view the learned trial judge was wrong in the view which he took regarding the burden of proof, and for these reasons. When the suit was filed, as was admitted on pleadings, the appellant was in actual possession of the bond warrants, and had acquired possession of them lawfully as a bailee. The only thing which lay undisputedly in the respondent was the ownership of them. To hold that, in these circumstances, the ownership carried with it, even prima facie, a right to immediate possession, is not only to beg the question regarding the nature of the transaction between the parties, but is to advance an untenable position in law. The respondent's suit was one which, under the old forms of action, would have been in detinue-sur bailment. A plaintiff in an action in detinue, which means the wrongful retention of the possession of a chattel, must prove two things. As stated in Winfield on Tort (6th Edn.) at p. 412:

> "The plaintiff must prove, first, that he is entitled to immediate possession of the chattel and if there is any defect on his right to immediate possession he must fail. . . . Secondly, that the defendant detained it after the demand had been made for its restoration."

The owner of a chattel is not, of course, entitled as such to delivery of immediate possession of it; nor does proof of ownership discharge, even prima facie, the burden of proving the right to immediate possession. Indeed, in the present case, the bond warrants, which were legally negotiable by endorsement, had been endorsed and delivered by the respondent to the appellant, who thereby admittedly came into lawful possession of them. That being so, his possession will be presumed to continue to be lawful until proof is adduced that it has ceased to be so. As was said in *Salim Shaikh v. Boidonath Ghuttuck* (3) (1868), 12 W.R. 217, at p. 218:

> "A person in possession of property ought to be presumed to be in lawful possession until the contrary is shewn; but this is I believe, the only presumption which a judge, as a matter of law, is absolutely bound to make. For any purpose beyond this, possession is only evidence, to be taken conjointly with the other *evidence* (if any) by which it is sought to establish or impugn the title."

In the present case, no such other evidence having been accepted, there remained the presumption of lawful possession, which was unrebutted.

That the burden was on the respondent to prove an immediate right to the possession of the bond warrants, and that such right could not be presumed from his mere ownership of them, is clear from the decision of the House of Lords in *Kahler v. Midland Bank Ltd.* (4), [1949] 2 All E.R. 621, where the subject matter of the suit was securities deposited in the plaintiff's account in the defendant bank. The case was concerned with a number of other legal points not relevant to the present case; but at p. 628 Lord Normand said:

> "In the present case, therefore, it is not sufficient that the appellant has established his title to the ownership of the shares. The bailee is entitled to demand proof that he is entitled to immediate possession."

Again, in *Sajan Singh v. Sardara Ali* (5), [1960] 1 All E.R. 269, an action in detinue relating to the detention of a motor lorry, their lordships of the Privy Council indicated clearly where the burden lay. Lord Denning, delivering the judgment of the board, said at p. 272:

> "It was an action for a declaration coupled with a claim in detinue. In order to get a declaration, it was essential for the respondent to show that he was the owner of the lorry and that it was an authorised vehicle. In order to succeed in detinue, it was essential for the respondent to show that he had the right to immediate possession of the lorry at the time of commencing the action, arising out of an absolute or special property in it."

In the light of these clear expositions of the law regarding the burden of proof in cases of detinue, where ownership is admittedly in the plaintiff, and possession, lawfully acquired, is admittedly in the defendant, but where the immediate right to possession is in dispute, I would hold that the burden of proving an immediate right to possession of the bond warrants in the present case lay on the respondent, that he failed to discharge it, and that his action must fail. I would accordingly allow the appeal with costs, and set aside the judgment of the Supreme Court on the claim, while allowing the judgment for Shs. 3,500/- on the counterclaim to stand. In view of what he held to be the most unsatisfactory nature of the evidence of both parties, and their deliberate omission to disclose material facts to him, the learned trial judge decided to make no order for costs in the court below. I would not interfere with that decision. Lastly, I do not consider this to be a case warranting a certificate for the employment of two counsel, and I would not issue such a certificate.

Sir Alastair Forbes VP: I agree, and have nothing to add. There will be an order in the terms proposed by the learned Justice of Appeal.

Gould JA: I also agree.

Appeal allowed.

For the appellant:
Johar & Winayak, Nairobi
Bryan O'Donovan, Q.C., and *J.K. Winayak*

For the respondent:
Patel & Thakkar, Mombasa
R.P. Cleasby and *K.C. Thakkar*

Maina Ngotho and others v R
[1960] 1 EA 453 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	14 June 1960
Case Number:	30/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd, J.

[1] Criminal law – Trial – Irregularity – Questions and comments by trial judge in course of unsworn statement by accused – Accused's absence from a view during trial – Whether irregularities fatal to conviction – Criminal Procedure Code, s. 193, *s.* 302 *and s.* 381 (*K.*) *– Indian Evidence Act*, 1872, *s.* 165.

Editor's Summary

At the trial of the appellants for murder they chose to make unsworn statements and questions were put to two of them by the judge. During the trial when two prosecution witnesses were endeavouring to explain the type of motor car in which they had seen seven Africans on the day of the murder they were allowed to point out the type of vehicle outside the court and in the absence of the appellants. Having all been convicted they appealed against conviction and contended that the trial judge had erred in law by posing questions to the second and fourth appellants when they were making unsworn statements from the dock and by holding part of the trial in the absence of the appellants during the evidence of the two witnesses mentioned.

Held –

(i) even if, but without deciding that, the questions asked by the trial judge went beyond what was necessary to explain or clarify something obscure or ambiguous in the appellants' statements, the complaint amounted at the most to no more than an irregularity curable under s. 381 of the Criminal Procedure Code as no failure of justice had been occasioned.

(ii) even if the absence of the appellants from the view of the cars amounted to an irregularity, they were not prejudiced as the view added almost nothing to the evidence which had been given by the two witnesses which would also be curable under s. 381 ibid.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Pirmin bin Kunjanga* (1935), 2 E.A.C.A. 64.

(2) *Cosma s/o Kafwobe v. R.* (1950), 17 E.A.C.A. 123.

(3) *R. v. St. George*, 173 E.R. 921.

(4) *R. v. Martin* (1872), L.R. 1, C.C.R. 378.

(5) *Wachira and Others v. R.* (1956), 23 E.A.C.A. 562.

(6) *Poole v. R.*, [1960] E.A. 62 (C.A.).

(7) *Karamat v. R.*, [1956] A.C. 256.

(8) *Pulukuri Kotayya v. R.* (1947), 74 I.A. 65.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The eight appellants were on February 29, 1960, convicted by the Supreme Court of Kenya of the murder of John Hutson, and were sentenced to death. They have appealed to this court against conviction and sentence.

The deceased was an elderly European, aged 75 years, who was living at Kilima Estate in the Kiambu district, with his wife and granddaughter. On August 12, 1959, while sitting at dinner with his wife and granddaughter he was

attacked and severely injured by a gang of Africans who broke into the house. He was taken to hospital in Nairobi and was detained there until August 29, when he was discharged. He was re-admitted to hospital on October 3, 1959, and died on the night of October 17/18, 1959.

The eight appellants were found by the learned trial judge to have been members of the gang which attacked and injured the deceased on August 12. The learned judge found that the gang entered the deceased's house with intent to rob and assaulted the deceased in pursuance of that intent, that it was an integral part of the plan to rob that an assault should be made on the deceased and his family, and that, as weapons were carried by some members of the gang and were used, grievous harm was a probable consequence of the assault contemplated by the members of the gang. He further found on the medical evidence that the deceased's death on October 18, was due to the injuries inflicted upon him by the gang which attacked and robbed him on August 12. The learned judge accordingly convicted the eight appellants.

It may be mentioned that the assessors all expressed opinions that the appellants were not guilty. The learned judge gave cogent reasons for concluding that these opinions were deliberately perverse and of no value whatever. We see no reason to disagree with this view of the attitude taken by the assessors.

The grounds of appeal argued before this court were as follows:

"1. That the learned judge erred in fact and law when he decided that the medical evidence was sufficiently strong to establish conclusively that the deceased's death was due to injuries inflicted upon him on the 12th day of August 1959.

"2. That the learned judge erred in law by posing questions to the second appellant, Muchai Mungai, and the fourth appellant, Mbekenya Kariuki, after the latter had elected to make an unsworn statement from the dock and was in the process of doing so.

"3. That the learned judge erred in law by holding a portion of the trial – namely the identification of motor vehicles – in the absence of the appellants and during the evidence of P.W. 15 Njenga s/o Nganga and during the evidence of P.W. 18 Ibrahim Mwangi s/o Kiiru."

[The judge proceeded to consider the first ground of appeal and after reviewing the matter held that this ground must fail.] The judgment continued:

The second ground of appeal relates only to two of the appellants, namely, Muchai Mungai and Mbekenya Kariuki. All the appellants, including these two, elected at the trial to make unsworn statements. It is alleged that the learned judge improperly questioned these two appellants during the course of their statements, or made comments on the statements, and so prompted replies which may have been prejudicial to them. Counsel for the appellants conceded that a judge might ask questions during the course of the making of an unsworn statement in order to explain something obscure, but submitted that only a patent ambiguity should lead to a question and that the learned trial judge went beyond what was permissible; and he referred to *R. v. Pirmin bin Kunjanga* (1) (1935), 2 E.A.C.A. 64; and *Cosma s/o Kafwobe v. R.* (2) (1950), 17 E.A.C.A. 123.

The only provision in the Criminal Procedure Code relating to the making of unsworn statements by accused persons in trials before the Supreme Court is sub-s. (2) of s. 302. That sub-section in effect requires that an accused be given the choice of giving evidence on his own behalf, making an unsworn statement from the dock, or remaining silent. It does not specify whether or not an accused making an unsworn statement may be questioned by the trial judge. Section 165 of the Indian Evidence Act, which applies in Kenya, however, provides:

> "165. The judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:
>
> "Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:
>
> "Provided also that this section shall not authorize any judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under s. 121 to s. 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the judge ask any question which it would be improper for any other person to ask under s. 148 or s. 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

We think it follows from this section that a trial judge is entitled as a matter of law to ask questions of a prisoner making an unsworn statement. This is in accord with the decisions in the two cases referred to by counsel for the appellants The case of *Cosma s/o Kafwobe v. R.* (2), is not really relevant in the instant case as it related to the examination by an advocate of a prisoner making an unsworn statement. In *R. v. Pirmin bin Kunjanga* (1), the presiding magistrate had questioned the prisoner regarding a discrepancy between his unsworn statement and his statement at the preliminary inquiry. The court observed:

> "The interrogation of the appellant on his statement at the trial was most improper. No questions should be asked of an accused person who has not given evidence on oath unless for the purpose of explaining or clarifying something obscure or ambiguous in his unsworn statement. A discrepancy between two statements is not of itself obscure or ambiguous."

With respect we entirely agree with the limitations there indicated which ought to be observed by a trial judge in asking questions of a prisoner who has elected to make an unsworn statement. If, however, a trial judge does exceed the limits there indicated, the matter, in our view, amounts at most to no more than an irregularity which is curable under s. 381 of the Criminal Procedure Code unless it " has in fact occasioned a failure of justice." It is to be noted that the appeals in both the cases mentioned, where it was held that the prisoner had been improperly examined, in one case by counsel, in the other by the magistrate, were dismissed.

In the instant case we have no doubt whatever that the learned trial judge's questions and comments, if they could be said to exceed the limits indicated in *R. v. Pirmin bin Kunjanga* (1), in fact caused no prejudice whatever to either of the appellants concerned. In the case of Muchai Mungai one question was asked to clear up a patent ambiguity, and then, at the close of the statement, the learned judge pointed out that the appellant had refrained from comment on much of the cogent evidence against him. This was obviously a comment made in the appellant's own interest, and the answer it induced – "I know nothing about it" – can certainly not be said to have been such as to occasion a failure of justice. Similarly, in the case of Mbekenya Kariuki some questions were asked which were for the purpose of clearing up patent ambiguities in the appellant's statement. There was no question of the appellant being asked to explain discrepancies between two statements, such as was referred to in *R. v. Pirmin bin Kunjanga* (1), but contradictions were pointed out to the appellant by the learned judge which were apparent on the face of the unsworn statement

itself. In addition, on two occasions, the learned judge made comments obviously intended to clarify a misconception of other evidence to which the appellant had referred. Even if, in making these comments, the learned judge could be said to have exceeded proper limits, and we are not conviced that he did, yet undoubtedly there was no question of a failure of justice being occasioned.

In the circumstances, if there was an irregularity, we think s. 381 of the Criminal Procedure Code applies and that this ground of appeal fails.

The third ground of appeal relates to two incidents which took place in the course of the trial. The first occurred at the end of the examination-in-chief of P.W. 15, Njenga s/o Nganga. Njenga had given evidence that on August 12 he had seen seven African (unidentified), who had a small black car, acting in a suspicious manner near his house. He finished his examination-in-chief by stating "I could identify a car similar to that one". The learned trial judge then recorded:

> "By agreement of defence counsel, court counsel, assessors and witness adjourn and inspect two rows of motor vehicles outside the court in front of traffic office. There was a black Ford Prefect in each row, one number H. 6540 and the other H. 9466. The witness picked out these two cars and said that the car he saw on 12/8 might have been either of them and that it was of similar type. By agreement with defence counsel it was decided that it was not necessary for accused to be present. The accused have been told the result of the inspection."

The witness then returned to the witness box and was cross-examined by counsel for the appellants.

The second, and similar, incident occurred at the end of the examination-in-chief of P.W. 18, Ibrahim Mwangi s/o Kiiru. Ibrahim Mwangi gave evidence similar to that given by Njenga except that he went so far as to say the car was "a black car, Ford 10, old". He also said he could identify the type of car, upon which the court adjourned to the following day. On resumption the following day the learned judge recorded:

> "Note by Court: on rising of court yesterday counsel and court and assessors with 18 P.W. inspected cars parked outside court building and the traffic office. This time there were three old black Prefects there and the witness picked them out and said that the car might have been any of those three cars and that it was type of car. He could not identify the particular car."

The witness was then cross-examined.

Counsel for the appellants argued that there is a distinction in Kenya between a misdemeanour and a felony; that the offence charged here was a felony; that a trial for felony must take place in the presence of the prisoner except for good cause, e.g. if the prisoner creates a disturbance; and he referred to *R. v. St. George* (3), 173 E.R. 921. *R. v. Martin* (4) (1872), L.R. 1 C.C.R. 378; *Wachira and Others v. R.* (5) (1956), 23 E.A.C.A. 562; and *Poole v. R.* (6), [1960] E.A. 62 (C.A.). In *Poole v. R.* (6), a very similar argument was considered by a full bench of this court and counsel for the appellants conceded that he was bound by the decision in that case. That case, however, is under appeal to the Privy Council, and he desired to record his submissions based on the same arguments as were used in *Poole v. R.* (6). He further sought to distinguish the instant case from *Poole v. R.* (6), in that, in *Poole v. R.* (6), the demonstration which was in question had taken place in the absence of the prisoner by inadvertence; and that in that case the learned judge corrected the error as far as possible by a repetition in the presence of the prisoner; whereas in the present case the step taken was done deliberately with the knowledge of counsel and

the judge; and no action was taken to correct it. Learned counsel also referred to and sought to distinguish *Karamat v. R.*, (7) [1956] A.C. 256.

The instant case, for the reason indicated by counsel for the appellants, is not precisely on all fours with the *Poole case* (6). Nevertheless, so far as it is applicable we are bound by the decision in that case. In the *Poole case* (6), this court relied on s. 193 of the Criminal Procedure Code and the decisions of the Privy Council in *Pulukuri Kotayya v. R.* (8) (1947), 74 I.A. 65 and *Karamat v. R.* (7), and concluded that the presence of an accused person throughout a trial is not an absolute requirement that necessarily goes to the root of the conviction, though, in the circumstances of that case, it was held that his absence was an irregularity since there was no question of his presence having been dispensed with under s. 193 of the Criminal Procedure Code.

In the instant case the presence of the appellants at the views of the cars was undoubtedly dispensed with by the learned judge, and this was done with the consent of counsel who represented the appellants. Although it is not expressly stated that counsel consented to the second view taking place in the absence of the appellants, we think that this is to be inferred from the circumstances. Both views took place the same day in similar circumstances and we have no doubt that counsel, who are recorded as having consented to the first view in the absence of the appellants, must also have consented to the second view in the same way. Counsel for the appellants contended that under s. 193 of the Criminal Procedure Code the court should only dispense with the presence of a prisoner during a trial or part of a trial for good reason, as for instance, where the prisoner persists in creating a disturbance – *Wachira and Others v. R.* (5); and that no such good reason had existed in the instant case. In the instant case, however, the presence of the appellants was dispensed with with the consent of their counsel. This we think brings the case within the principle of *Karamat v. R.* (7), where their lordships said at p. 265:

> "It was, however, strenuously argued before this Board that as the accused was not present this is a fatal objection. A short answer to this point was made by Mr. Le Quesne, for the Crown, who pointed out that under the Criminal Procedure Ordinance it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their lordships desire to say that if an accused person declined to attend a view which the court thinks desirable in the interests of justice he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction, if one follows, though he could of course, object if any evidence were given outside the scope of the view as ordered. The appellant had the opportunity of attending and declined it."

In the instant case, even if the absence of the appellants from the views did amount to an irregularity, we have no doubt that no prejudice whatever resulted to the appellants from the procedure adopted. The view in fact added almost nothing to the evidence which had been given by the two witnesses concerned, and was not mentioned by the learned judge either in his summing-up to the assessors or in his judgment; and the two witnesses were subject to cross-examination after the view. In the circumstances, if there was an irregularity, we think it is one which is cured by s. 381 of the Criminal Procedure Code, and that this ground of appeal also must fail.

We accordingly dismiss the appeal.

Appeal dismissed.

For the appellants:

Byron Georgiadis, Nairobi

For the respondent:
The Attorney-General, Kenya
J. P. Webber (Deputy Public Prosecutor, Kenya)

R v Kantilal Chhaganlal Raval and another
[1960] 1 EA 458 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	4 April 1960
Case Number:	212/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda at Kampala – Lyon, J.)

[1] Criminal law – Theft by servant – Accused a driver-salesman – Authority to sell employer's goods after signing for them – Goods sold without permission or signing delivery book – Proceeds kept by accused – Whether offence committed – Penal Code, s. 245, *s.* 252, *s.* 258, *s.* 298 (1) (*U.*) *– Criminal Procedure Code, s.* 337 (*U.*) *– Criminal Appeal Act*, 1907, *s.* 4(1).

Editor's Summary

The first respondent who was employed by a company as a driver-salesman had authority to sell goods issued to and signed for by him for the purpose. It was alleged that he took goods belonging to the company without instructions or permission and without signing a delivery book, sold them and did not account for the proceeds of sale. He was charged with theft by a servant and the second respondent with receiving certain of the goods. At the close of the prosecution case it was submitted that the first respondent had no case to answer as he had done only what he was employed to do, namely, to sell goods for his employers, and that his failure to account for the proceeds of sale was a matter for civil action. The magistrate overruled this submission and after hearing the evidence of the respondents convicted them. The respondents appealed to the High Court which allowed the appeals and held that theft had not been proved and that there never had been a case to answer. On further appeal by the Crown

Held –

(i) the argument that the first respondent had no case to answer could only prevail if the first respondent had sold the goods in good faith for the owner and subsequently made up his mind to convert to his own use the money received.

(ii) as there was evidence that the first respondent took the goods without instructions or permission and without signing a delivery book, sold them and did not account for the proceeds, the magistrate was fully entitled to find that the first respondent took the goods animo furandi and at that time and

when he sold the goods, intended permanently to deprive the owner of them; therefore, there was a case to answer.

(iii) the High Court was wrong in law in holding that the evidence did not support the conviction of the first respondent on a charge of theft.

Appeal allowed. Convictions and sentences restored.

Cases referred to in judgment:

(1) *R. v. Abbott*, [1955] 2 Q.B. 497; [1955] 2 All E.R. 899.

(2) *R. v. Cohen & Bateman*, 2 Cr. App. R. 197.

Judgment

Gould JA: The two respondents in this second appeal were tried together in the Masindi District Court, the first respondent on a charge of theft by a servant contrary to s. 258 and s. 252 of the Penal Code, and the second respondent on a charge of receiving stolen property contrary

to s. 298 (1) of the Penal Code. The subject matter of the charge against the first respondent was five bags of sugar belonging to Masindi General Stores Ltd., and the second respondent was charged with receiving four of them, knowing or having reason to believe the same to have been feloniously obtained. Both respondents were convicted by the learned magistrate. They appealed to the High Court which allowed the appeals, quashed the convictions and set aside the sentences passed by the magistrate. The Crown now appeals against the decision of the High Court and seeks to have the convictions and sentences restored.

The evidence for the prosecution showed that the first respondent was employed by Masindi General Stores Ltd. as a driver-salesman. On the evening of Friday, May 29, 1959, he arrived at the store from Kampala with a load of Fanta and Coca-Cola in a Bedford truck. At about 11.30 p.m. the same night another driver arrived in an Austin lorry with 55 bags of sugar and 30 corrugated iron sheets. The next morning at about 8 a.m. or 8.30 a.m. Mrs. Shantilal, one of the two directors of Masindi General Stores Ltd. (her husband was the other) ordered the lorries to be unloaded. Mr. Shantilal was in Kampala at the time.

While the bags of sugar were being unloaded and placed in the store, Mrs. Shantilal went away, leaving the first respondent to supervise. After fifty bags had been taken off, the first respondent told the turn-boys not to unload the remaining five – the corrugated iron had been removed; but, on the instructions of the first respondent, some or all of it was then replaced on the truck with the five bags of sugar. The first respondent then drove the truck to the shop of one Mbalebere, at about mile three on the Masindi-Hoima road and sold one of the bags of sugar to Mbalebere. The evidence of Mbalebere and of three turn-boys who were on the truck shows that the first respondent sold one bag of sugar to Mbalebere, receiving Shs. 90/- in cash; Mbalebere said that he was to pay a balance of Shs. 34/40 later on, and that when he asked for a receipt the first respondent said he would give it to him when he paid the balance. Mbalebere was a customer of Masindi General Stores Ltd. and had previously bought goods for cash from other drivers, and been given receipts by them – this was the first time he had made a purchase from the first respondent.

The first respondent next drove the lorry to the house of one Kasigwa where the corrugated iron sheets were unloaded. These sheets had been ordered by Kasigwa and this delivery is not the subject of any complaint.

The first respondent then drove to Masindi town and stopped near the garage of the Bunyoro Bus Co. The first respondent called the second respondent from the garage and they talked. There was evidence by one of the turn-boys on the lorry that the Bunyoro Bus Co. is opposite the Masindi General Stores Ltd. The first respondent then drove back along the road leading to Mbalebere's shop but stopped near a mosque before reaching the shop. After a few minutes the second respondent arrived in a Peugeot boxbody car and on the instructions of the first respondent the remaining four bags of sugar were transferred to the Peugeot. The second respondent gave money to the first respondent. Two of the three turn-boys said that they did not see a receipt given; the third does not appear to have been asked.

No money was paid by the first respondent to Masindi General Stores Ltd. in respect of these transactions and no entry of credit sales was made in any delivery book. Mbalebere said in evidence that he had suggested that he sign for the balance of Shs. 34/40 due by him, but the first respondent said he would give him a receipt when he paid the balance. There is another aspect of the evidence (that relating to the authority of the first respondent to sell goods) with which we will deal later.

At the close of the evidence for the prosecution Mr. Hunt, who appeared in the district court for the first respondent, submitted that the first respondent

had no case to answer, on the ground that he had done only what he was employed to do, i.e. to sell goods for Masindi General Stores Ltd. The failure to account for the money, he submitted, was a matter for a civil action. No separate submission was made by the second respondent, though he must, of course, have been acquitted had the submission succeeded. The learned magistrate ruled that there was a case to answer; his reason for so doing do not appear in the record.

The respondents gave evidence and called witnesses. Each denied completely that he had carried out or participated in the transactions alleged by the prosecution. The evidence of each was disbelieved by the learned magistrate, but nothing in the defence evidence adds anything to the case for the prosecution on the question of the authority of the first respondent to sell the goods in question.

When the appeal to the High Court was heard, Mr. Wilkinson, who then appeared for the second respondent (then the second appellant) relied entirely upon a submission that the first respondent had general authority to sell goods – that if he misappropriated the proceeds of sale, that did not show that the goods were stolen – that therefore the second respondent did not receive goods proved to have been stolen. He submitted that there never had been a case to answer.

In his judgment allowing the appeal the learned judge in the High Court accepted the submission that theft had not been proved. He said:

> "The evidence shows beyond all doubt that the first appellant at times had authority to sell goods provided he accounted for the money either at the time or later.
>
> "It is important, I think, to consider the attitude of the main complainant, Mrs. Shantilal. She testified that when she had left the lorry outside the store in charge of first appellant, because her children were crying, the lorry was driven off in her absence with the five bags of sugar in it. She then continued: 'I presumed the porters had gone with the lorry. Kantilal returned after about half an hour. I did not speak to him.' She had already noted that there were only fifty bags in her godown. She continued: 'When my husband returned the following day, which was a Sunday, I reported to my husband.'
>
> "In any event, when the first appellant drove off with the five bags of sugar, that could not amount to asportation, because he was acting within the scope of his authority. In my opinion there was neither theft nor fraudulent conversion of the bags of sugar when he delivered them to Mbalebere and the second appellant. I am not concerned with the question whether any other offence was committed.
>
> "On the whole case I have come to the conclusion that had the learned magistrate expressly directed himself on Mr. Hunt's submission in the lower court, he may well have come to the conclusion that theft by the first appellant was not proved. On the facts as submitted by Mr. Wilkinson I am of that opinion, for the reasons I have given."

The grounds set out in the memorandum of appeal to this court are as follows:

> "1. The learned judge erred in law in considering whether there was evidence before the trial court on which the respondents should have been called upon to enter upon their defence after the trial court had held that there was such evidence and the respondents had entered upon their defence.
>
> "2. The learned judge erred in law in failing to consider the evidence:

(*a*) of the first respondent that he had not delivered one bag of sugar to Mbalebere (P4) and four bags of sugar to the second respondent; and

(*b*) of the second respondent that he did not buy sugar.

"3. The learned judge erred in law, in failing to consider the evidence of Shantilal Hirji Nathwani (P7) as to the procedure that was followed when a driver-salesman took goods with him for sale before holding that there was no case for the respondent to answer at the close of the prosecution case."

Counsel for the respondents took a preliminary objection to grounds 2 and 3, which, he submitted, were not matters of law. By virtue of s. 337 of the Criminal Procedure Code either party to an appeal from a subordinate court may appeal to this court against the decision of the High Court on a matter of law, but not on a matter of fact or mixed fact and law. We reserved our finding on this objection and permitted argument to proceed subject to our ruling. Having now considered the whole case, we do not find it necessary to come to any decision as to ground 2 as we are not of opinion that the denial of the respondents that they had any part in the alleged transactions augments in any way the evidence for the prosecution on the subject of the authority of the first respondent to sell the goods in question. He was described by Mr. Shantilal as a driver-salesman and his denial that he sold the goods does not relieve the prosecution from the duty of proving that he stole them and did not sell them within his authority. Paragraph 3 of the memorandum, however, does appear to raise a question of law. The purport of the judgment of the learned judge is that the first respondent (and consequently the second respondent) had no case to answer in the lower court, and that the learned magistrate was wrong when he ruled that they had. If, in coming to his decision on the matter, the learned judge failed to take into consideration relevant evidence, he was clearly wrong in law. It comes to this, that if there was evidence upon the record which justified the learned magistrate in his ruling that there was a case to answer at the close of the prosecution case, the learned judge was wrong in law when he held the contrary. Lord Goddard, C.J., in *R. v. Abbott* (1), [1955] 2 Q.B. 497, said at p. 505:

"Here we have a question whether or not there was a right decision in point of law by the judge. In our opinion the judge ought to have said at the end of the case for the prosecution that there was no evidence against the appellant Abbott, and therefore he was wrong in law in giving the decision he did."

In those circumstances the Court of Criminal Appeal followed a judgment of Channell, J., in *R. v. Cohen and Bateman* (2), 2 Cr. App. R. 197 on the construction of s.4(1) of the Criminal Appeal Act, 1907, in which he said at p. 207 –

" . . if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso."

In the present case the learned magistrate decided that there was a case to answer and it will be expedient first to examine the evidence recorded with a view to ascertaining whether his finding was justified. There was clear evidence that the first respondent sold the five bags of sugar, one to Mbalebere and four to the second respondent, and did not account to Masindi General Stores Ltd. for the proceeds of sale. As to the first respondent's general authority to sell goods, there is a passage in the evidence of Mbalebere which is relevant. He said:

> "When I want goods sometimes I give an order at the shop and the goods are delivered to my shop. At other times the drivers on their way to other customers ask me if I want anything. On such occasions the drivers deliver the goods and I give cash. I am given a receipt. If I cannot afford to buy cash I sign in the book."

The witness was speaking generally of the drivers employed by Masindi General Stores Ltd. and his words would no doubt apply to the first respondent; it is clear therefore that drivers were in a position to sell goods which had not been specifically ordered by customers. Mrs. Shantilal, in cross-examination, said that the first respondent had sold one or two cases of Coca-Cola when he was bringing it from Kampala, and had accounted for the proceeds. Apparently there was no objection taken to his so doing, though these goods had not arrived at the store. Mr. Shantilal, in describing the normal practice, said:

> "When driver-salesmen go on safari they take certain goods and sign for them in this book which I produce (Ex. No. 4). They sell goods to shopkeepers in the district, mostly for cash, very little credit is given. If a man pays cash a 'cash sale' is issued. When credit is given signature is obtained in the delivery book. At the end of each safari the driver-salesman gives me an account and I tally the goods."

He said also:

> "The salesmen when they return from safari give an account of the goods sold. Sometimes there is a shortage. If it is more than a shilling or two I deduct from their salary."

Mrs. Shantilal also testified to this practice when she said:

> "We are general traders for Masindi and district. We send lorries round. I do not know if we have hawker's licences.
>
> "When drivers go out they sign delivery notes and when they return I check against these."

It would appear to be clear on this evidence that drivers had authority to sell goods which they had signed for and taken out on their lorries. It seems also that they might sell goods which they were transporting to the store from one of the store's suppliers; we do not think, however, that any great significance is to be attached to this as the store would no doubt know the quantity the lorry was intended to bring and the driver would, in the ordinary course of business, have some form of delivery note from the supplier. There would thus be a check upon what had been sold.

The actions of the first respondent were in our opinion well outside any authority disclosed by the evidence. The fact that a driver has authority to sell goods checked and issued to him for the purpose, in no way confers upon him authority to remove goods from his master's premises, unknown to the latter and without receipt. The fact that a servant may have limited or even general authority to sell his master's goods does not make it any the less theft (as defined in s. 245 of the Penal Code) if he takes or fraudulently converts them to his own use. Take, for example, the case of a shop assistant who, within his authority, sells groceries over the counter all day; if at the end of the day he takes home a pound of sugar with the intention of selling it and keeping the proceeds, he is guilty of theft of the sugar – not of the proceeds of sale.

In the present case the fact that the first respondent took the sugar without instructions or permission and without signing a delivery book, sold it and did not account for the proceeds, is evidence upon which, in our opinion, the learned magistrate was fully entitled to find that the first respondent took the goods from the store animo furandi and at that time and when he sold the goods,

intended permanently to deprive the owner of them. Only if the first respondent had sold the goods in good faith on behalf of Masindi General Stores Ltd. and subsequently made up his mind to convert the money received to his own use, could the argument advanced on his behalf prevail. As we have indicated, there was evidence on the record that that was not the case and we are satisfied that there was a case to answer. The evidence for the defence having been disbelieved and therefore doing nothing to diminish the strength of the evidence for the prosecution, the learned magistrate was fully entitled to find the charges proved beyond reasonable doubt. No separate submission of no case to answer was made by or on behalf of the second respondent and his case has been treated by counsel during both appeals as standing or falling with that of the first respondent. We would observe nevertheless, that at the close of the evidence for the prosecution before the learned magistrate there was ample evidence that he had received the four bags of sugar, and, in the circumstances in which he had received it, sufficient prima facie evidence of knowledge that they had been stolen. It will be recalled that the conversation between the first and second respondents referred to in the evidence took place outside the Bunyoro Bus Company which was opposite the premises of Masindi General Stores Ltd. The transfer of the goods and payment of money, however, obviously by pre-arrangement, took place at some distance from the store and it is difficult to assign any valid reason for this procedure if it was not to escape observation.

The learned judge in the High Court suggested that the magistrate had not applied his mind "expressly" to the question of the authority of the first respondent. It is true that the learned magistrate did not record his reasons for ruling that there was a case to answer and did not advert to the question of authority in his judgment, but with respect, we think that the learned magistrate, having just listened to an argument by Mr. Hunt in which the question of authority was the main theme, could hardly have failed to direct his mind to it. In any event we are satisfied that he made no error in law in deciding that there was a case to answer.

For these reasons we are of opinion that the learned judge in the High Court was wrong in law when he held that the evidence did not support the conviction of the first respondent on the charge of theft. The appeal is therefore allowed and the convictions of the two respondents upon the respective charges, and the sentences passed thereon by the learned magistrate, are restored.

Appeal allowed. Convictions and sentences restored.

For the appellant:
The Attorney-General, Uganda
J. J. Dickie

For the respondents:
Wilkinson & Hunt, Kampala
R. E. Hunt

Obare s/o Abare v R
[1960] 1 EA 464 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	19 April 1960
Case Number:	26/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Wicks, J.

[1] Criminal law – Practice – Reading of depositions by judge before trial – Whether proper.

[2] Criminal law – Murder – Inadmissible confession – Judge aware of inadmissible confession – Whether judge uninfluenced by inadmissible confession when weighing evidence – Indian Evidence Act, 1872, *s.* 28 *as amended by the Evidence* (*Amendment*) *Ordinance*, 1959 (*K.*).

Editor's Summary

The appellant was convicted of murder and sentenced to death. On appeal the main ground relied on by counsel for the appellant was that the trial judge was aware that the appellant had confessed to the murder and that though he ruled that the confession was inadmissible in evidence, his mind must have been influenced by it in his assessment of the effect of the evidence which, apart from the confession, was entirely circumstantial.

Held –

(i) the normal practice in East Africa whereby the judge to whom a case had been assigned reads the depositions before the commencement of the trial has been expressly approved: *Seif s/o Selemani v. R.* (1953), 20 E.A.C.A. 235; and there was no reason to differ from that view.

(ii) there was nothing to suggest that the trial judge allowed himself to be improperly influenced by the appellant's confession after he had excluded it from the evidence.

(iii) although the trial judge's direction as to the circumstantial evidence was not adequate, his mind was clearly directed to the inherent weakness to which such evidence may be subject and the words he used did not amount to a material non-direction; the evidence was clearly incompatible with the innocence of the appellant and could only reasonably be explained on the hypothesis of his guilt.

Appeal dismissed.

Cases referred to in judgment:

(1) *Seif s/o Selemani v. R.* (1953), 20 E.A.C.A. 235.

(2) *Kariuki Kamau and Others v. R.* (1954), 21 E.A.C.A. 203.

(3) *Kipkering arap Koske and Another v. R.* (1949), 16 E.A.C.A. 135.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant appealed to this court against his conviction of murder and sentence of death by the Supreme Court of Kenya sitting at Kericho. After hearing counsel for the appellant we dismissed the appeal, and now give our reasons.

The principal ground of appeal relied on by counsel for the appellant was that the learned trial judge was aware of the fact that the appellant had made a confession to the murder and that though he ruled that the confession was inadmissible in evidence, yet his mind must have been influenced by it in his assessment of the effect of the evidence which, apart from the confession,

was entirely circumstantial. The relevant passages in the memorandum of appeal are as follows:

> "1(*a*) The learned trial judge having heard during the case and even in the evidence (by hearsay evidence) of the fact that the accused had confessed to killing the deceased should, when deciding that the confession was inadmissible, have terminated the trial and asked for another trial judge to hear the case de novo as would have been done in the case of a European prisoner being tried by a jury.
>
> "(*b*) No human being, not even one of Her Majesty's Supreme Court Judges, knowing of the existence of a confession by an accused person can fail to be influenced to some extent by such knowledge and irreparable damage was done to the accused's defence when the trial judge came to know of the confession.
>
> "(*c*) Admittedly defence counsel was largely responsible for informing the trial judge and admittedly the trial judge had probably already seen this confession amongst the depositions and exhibits but it has always been this counsel's contention that trial judges should not look at any deposition or any exhibit unless and until it is properly put in and admitted by him as evidence at the court of trial.
>
> "(*d*) The learned trial judge did not even recite in his judgment, as he might have done, that he had succeeded in putting it out of his mind and it will be contended that in truth a fact of this magnitude could never be entirely dismissed from the mind of any judge.
>
> "(*e*) It is indeed significant in this connection that of the three assessors who were none of them told about the existence of any confession, all three concluded that the accused should be acquitted.
>
> "(*f*) There should of course have been a trial within a trial first and the import of the statement in question should not have been brought to the knowledge of the trial judge unless and until he had decided in the light of all the surrounding circumstances to admit it."

The confession in question was one made to a magistrate. It was not mentioned by Crown counsel in his opening, and it would seem that when the magistrate was about to be called counsel for the defence, Mr. Jones, must have intimated that there was a matter to be argued which should be heard in the absence of the assessors. The relevant part of the record reads as follows:

> "Assessors leave the court, and are kept in a reserved room.
>
> "Jones: An admission was made the day after the accused was charged. He had already made a cautioned statement, it is a point blank denial of knowing anything of the matter. On the next day Inspector Rhodes says accused wished to see a magistrate, and inspector Rhodes himself took accused to see Mr. Thompson, who had remanded accused the previous day and the accused made a confession. In suggesting there is anything wrong in Inspector Rhodes' attitude, I do regard the fact that both these gentlemen, already being interested in the case, the court should take great care and examine closely all the circumstances relating to the confession. No suggestion that Mr. Rhodes or Mr. Thompson have not acted properly. I have no instructions from my client that the confession was improperly taken, that is that threats were made or he was beaten and so on. Accused's statement is a bald one which is not corroborated. Ask that court give statement closest scrutiny before considering admitting it into evidence."

Inspector Rhodes, the investigating officer, then gave evidence, in the absence of the assessors, to the effect that on September 10, 1959, he charged and cautioned the appellant, who had been under arrest since the previous day; that the appellant made a statement in reply to the charge and caution which was a denial of the offence; that later in the day the appellant appeared before a magistrate, Mr. Thompson, and was remanded in custody for a week; that on the following day he (Inspector Rhodes) questioned the appellant in his office in an attempt to elicit further information; that the appellant repeated what he had said when charged, and said he had no complaints and there was no one whom he wished contacted on his behalf; that a constable was instructed to return the appellant to the cells; that four or five minutes later the constable returned and informed Inspector Rhodes that the appellant had admitted killing the woman; that Inspector Rhodes then had the appellant brought before him again, and the appellant admitted that his admission to the constable was correct; that Inspector Rhodes then asked the appellant if he would like to make a statement before a magistrate, intimating that the appellant was under no compulsion to do so; that the appellant said he did wish to make a statement, and that he was thereupon taken before Mr. Thompson at Mr. Thompson's house and there made the statement in question. In reply to a question from the court Inspector Rhodes agreed that when he questioned the appellant he was already in possession of evidence on which he considered the appellant would be convicted. The record then reads:

> "Court to Mr. Twelftree" (i.e. Crown Counsel): "Is it not the law that where the police have charged a man with an offence, and the police are already in possession of evidence on which they are prepared to proceed to trial, it is improper to question the man further?
>
> "Twelftree: That is so. There are cases here and in England to that effect.
>
> "Court: And any statement made after that questioning is inadmissible unless there is proof that the accused is not still influenced by the questioning?
>
> "Twelftree: I agree, and the statement is not voluntary. There was no break between the wrongful questioning and the making of the statement to the magistrate on which it could be said the effect of his questioning had gone and the statement was made independently of it.
>
> "Ruling: Any statement made under the circumstances as appear in this case is inadmissible.
>
> "Jones: And I ask that the statement should not be admitted into evidence.
>
> "Court: Then if the defence do not want the statement in that will be the result."

The question of the admissibility of the confession was not before us, and we offer no comment upon its exclusion except to say that the learned judge appears to have applied the law in relation to the facts very strictly in favour of the appellant.

Counsel for the appellant contended that the learned trial judge must have been aware of the nature of the confession from reading the depositions; and he relied on a passage in the judgment as an indication on the face of the record that the learned judge had read the depositions. The passage in question reads as follows:

> "The corporal's evidence given at committal proceedings was, 'I instructed constable Kiprotich to search the surroundings of the house and shortly afterwards he came to me with a bag of maize which he stated he had found near the house'."

This, however, clearly refers to a passage in the witness' evidence where a part of his deposition which conflicted with his evidence at the trial was put to him, and he agreed that at the preliminary inquiry he had said what was recorded in the deposition. It is no indication that the learned judge had read the whole of the depositions, and there is nothing else on the record to indicate that this was the case.

Nevertheless, we think it probable that the learned judge did read the depositions. We are aware that the normal practice in East Africa is for the judge to whom a case has been assigned to read the depositions before the commencement of the trial. Such a practice has been expressly approved by this court. In *Seif s/o Selemani v. R.* (1) (1953), 20 E.A.C.A. 235 at p. 236 the court said:

> "In a jury trial the judge will often know matters which are rightly kept from the jury. For instance he may often have to rule on the admissibility of evidence, the nature of which must be communicated to him although it will be withheld from the jury until the judge has ruled that it is admissible. If he is sitting without a jury he must perform a double function as judge of law and judge of fact and this he is able to do on account of his professional training and experience which enables him to exclude from his mind anything which is not evidence in the case. We note from the record that Mr. Real who appeared for the appellant at his trial asked the judge to put the case before another judge if he thought he might be prejudiced. The learned trial judge gave the correct and only possible answer, namely that although he knew that there was more than one information against the appellant in existence, and had glanced at the depositions this would in no way prejudice his hearing of the case. If any other conclusion was possible the administration of justice in these territories would be gravely affected. Except to a limited extent in Kenya the system of trial by jury does not obtain, and the trial judge, although aided by assessors, has by law the responsibility placed on him of being a judge of fact as well as of law. We are aware that many judges observe the practice of reading the depositions before trial, and the practice is in every sense a proper one. Indeed if this was not generally done the chances that accused persons would suffer is by no means remote. Except in capital cases it is the exception rather than the rule that the accused is represented by counsel, and even in capital cases, the counsel assigned will often be young and inexperienced persons. It would often therefore be very much in the interests of the person charged, that the judge should have knowledge of the nature of the case alleged against him, and should be able to test the credibility of the witnesses by his aquaintance with what they have said on a previous occasion. It is this knowledge that enables a judge to keep proper control of the trial, and to ensure that no point which may tell in the accused's favour is overlooked."

We see no reason to differ from the view taken by the court in that case. No doubt, if it appeared that a trial judge had allowed himself to be influenced by some matter which appeared in the depositions but which had not emerged in evidence at the trial, for instance, if he based some part of his judgment on evidence given at the preliminary inquiry and not repeated at the trial, that would be a good ground for setting aside the conviction. That, however, is not the case here. We think that if by reason of reading the depositions a trial judge comes to know of matter which cannot be brought out in evidence at the trial, he must be trusted to exclude such matter from his mind in considering the case made out against the accused at the trial. (See also *Kariuki Kamau and Others v. R.* (2) (1954), 21 E.A.C.A. 203).

Similar reasoning applies with equal force where a trial judge in the course of a trial becomes aware of matter which is inadmissible in evidence. It must often happen in a case where the admissibility of a statement is disputed that the trial judge in the course of the "trial within a trial" becomes aware of the contents of the statement. Indeed it may often be necessary for him to read the statement in order to decide whether it is admissible or not, e.g. in a case where it is disputed whether a statement made to a junior police officer is a confession and so excluded by s. 28 of the Indian Evidence Act as amended by the Evidence (Amendment) Ordinance, 1959. Where a statement is excluded after a trial within a trial we have no doubt that a trial judge is to be trusted to exclude it from his mind when he considers the evidence against the accused. We see nothing whatever in the instant case to suggest that the learned trial judge allowed himself to be improperly influenced by the appellant's confession after he had excluded it from evidence.

The remaining grounds of appeal were as follows:

> "2. The learned trial judge in his judgment never mentioned any motive and although motive is not essential the absence of it should always be considered and commented upon and especially so where all of the evidence was of the most circumstantial kind.
>
> "3. The doctor gave no approximate time of death and it is submitted that a body lying out in the open in Africa for eighteen hours would not be 'fresh' as stated by the doctor in his evidence and this fact, which would confound the evidence of P.W. 4 and P.W. 5, was never considered.
>
> "4. The judgment of the learned trial judge was against the weight of the evidence and the learned trial judge erred notwithstanding his deductions, and expressed reasons in going contrary as he did to the view of all three of the assessors."

We were unable to see any substance in these grounds of appeal. As regards motive, this was not the type of case which suggested a premeditated motive, and there was little evidence to indicate the immediate cause of the attack on the deceased. It is possible to imagine possible motives, including robbery, the sack of maize carried by the deceased being later found near the appellant's hut. In view of the circumstances there was little to be gained from speculation as to the reason for the assault which caused the death of the deceased, and we did not think that the learned judge's failure to mention it was of any significance.

As to ground 3, the evidence suggested strongly that the deceased met her death during the afternoon of September 8, since she never arrived at her destination at the maize mill. Counsel conceded that the district was a fairly cold district and there was evidence that rain had been falling, which would tend to keep the atmosphere cool. We saw no necessary inconsistency between the medical evidence and that of P.W. 4 and P.W. 5.

Under the last ground of appeal counsel for the appellant argued various points in the chain of circumstantial evidence. He contended that the boy, Nyamambi, had not identified the date; that that witness did not see the appellant and the deceased enter the tea store where the murder was alleged to have taken place; that the tractor driver, Brangata, who passed the tea store, did not identify the deceased as the woman he saw there in company with the appellant; and that the learned judge misdirected himself in saying:

> "However, it is not disputed that the track led from the accused's hut and doubled back to it, that the bag of maize was found at the point where the track doubled back, that the point was about five paces from the accused's hut, and that it was found in grass about two feet high."

The learned trial judge considered the evidence very carefully and properly directed himself in regard to the need for caution in considering the evidence of a juvenile. He gave cogent reasons for not relying on the opinions of the assessors. We saw no reason to differ from his acceptance of Nyamambi's evidence that he saw the appellant and the deceased going to the tea store to shelter from the rain. It is true that Nyamambi's identification of the date when he saw the appellant and the deceased was not very clear, but we think the learned judge was justified in his inference from Nyamambi's evidence in cross-examination, and Inspector Rhodes' evidence of when he saw Nyamambi, that Nyamambi's evidence must have related to incidents on September 8. The learned judge fully appreciated that the tractor driver, Brangata, did not identify the woman whom he saw in the tea store with the appellant, but nevertheless, after a proper direction, accepted Nyamambi's evidence that it was the deceased whom he had seen going to the tea store. Again, we saw no reason to differ. As regards the finding of the bag of maize, there was some confusion in the evidence of corporal M'Rasia as to whether he or constable Kiprotich had picked it up. The learned judge carefully considered this evidence. No doubt in saying that the details as to where the bag of maize was found were not disputed, the learned judge had in mind that the appellant was present at the search and did not either give evidence or make a statement challenging the police evidence. That fact, taken in conjunction with the fact that it was not suggested to corporal M'Rasia in cross-examination that his evidence as to the place where the bag of maize was found was wrong, was, we think, sufficient justification for the remark.

The learned judge, we think, erred as to one matter which was not argued on the appeal. He did not specifically direct himself that the circumstantial evidence, to justify the inference of guilt, must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt – *Kipkering arap Koske and Another v. R.* (3) (1949), 16 E.A.C.A. 135. His direction as to circumstantial evidence was as follows:

> "I instructed the assessors that circumstantial evidence is admissible and is not unusual in criminal cases and that where, as in this case, there are no eye-witnesses of the death and such testimony is not available, they are entitled to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. That if they admit such evidence, they should do so cautiously they should examine it closely if only because evidence of that kind may be fabricated to throw suspicion on another. Also that before drawing an inference of the accused's guilt from circumstantial evidence they must be sure that there are no other co-existing circumstances that would weaken or destroy the inference. On the other hand circumstantial evidence is often the best evidence as it is evidence of surrounding circumstances which by undesigned coincidence, is capable of proving a proposition with great accuracy, whereas eye-witnesses may have lied and succeeded in concealing that they did so from the court."

Later, after reviewing the facts and the inferences which he drew from them, he said:

> "This being so, and being satisfied that there were no other co-existing circumstances that weaken or destroy the inference to be drawn from this chain of circumstances I find that . . . the verdict is guilty of murder as charged."

Although we thought that this was not an adequate direction as to circumstantial evidence, the learned judge's mind was clearly directed to the inherent weaknesses to which such evidence may be subject, and we did not think that the words he used amounted to a material non-direction in the instant case. The evidence

accepted by the learned judge was to the effect that on the afternoon of September 8, the deceased was on her way to a maize mill carrying a sack of maize; that she was seen on the road with the appellant walking behind her, and both were seen going towards a party built tea store to shelter from a rain-storm; that shortly afterwards during the rain-storm the appellant was seen in the tea store with a woman whom the witness did not recognise; that the deceased never arrived at the maize mill, which was only a matter of a few hundred yards away from the tea store; that there were drag marks leading from the tea store to the spot where the body of the deceased was found; and that the sack of maize carried by the deceased was found concealed in high grass close to the appellant's hut. We thought that this evidence was clearly incompatible with the innocence of the appellant and could only reasonably be explained on the hypothesis of his guilt. We were satisfied that if the learned judge had fully directed himself on the question of circumstantial evidence, he must have reached the same conclusion.

For these reasons we dismissed the appeal.

Appeal dismissed.

For the appellant:
Mervyn Morgan & Co., Nairobi
M. J. E. Morgan

For the respondent:
The Attorney-General, Kenya
F. de F. Stratton (Crown Counsel, Kenya)

Musa Luinda v R
[1960] 1 EA 470 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	25 April 1960
Case Number:	181/1959
Before:	Sir Kenneth O'Connor P, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Uganda – Sir Audley McKisack, D.J.

[1] Criminal law – Evidence – Admissibility of confession by co-accused against other co-accused – Accused charged with receiving stolen property on two different dates – Both offences arising out of a single transaction – Meaning of "the same offence" – Penal Code, s. 298 (1) (*U.*) *– Evidence Ordinance* (*Cap.* 9), *s.* 28 (*U.*) *– Indian Evidence Act* 1772, *s.* 30.

Editor's Summary

One, Kagoro, and others including the appellant were jointly tried by a magistrate for receiving stolen property on September 27 and 28, 1958, respectively. At the trial two unequivocal confessions by Kagoro of receiving stolen property were admitted against the appellant and he was convicted. He then appealed to the High Court but his appeal was dismissed on the ground that Kagoro's confessions were properly taken into consideration as against the appellant. He appealed again contending that under s. 28 of the Evidence Ordinance such confessions are only admissible against an accused person if he and the person making the confessions are "being tried jointly for the same offence". It was submitted that the charges preferred against the appellant and Kagoro were of receiving different amounts on different dates and in different places, though the sum alleged to have been received by the appellant was a portion of that received by Kagoro.

Held –

(i) that the appellant and Kagoro, though charged with offences of the same kind, were not tried jointly for "the same offence", and therefore the confessions of Kagoro were wrongly admitted as against the appellant.

(ii) though there was a good deal of evidence against the appellant apart from the confessions, it could not be said that the judgment of the magistrate would necessarily have been the same had he excluded the confessions from consideration; therefore, the court could not say that the evidence accepted against the appellant occasioned no miscarriage of justice.

Appeal allowed.

Cases referred to in judgment:

(1) *In Re Periyaswami Moopan* (1931), 54 Mad. 75.

(2) *Kundan s/o Tillumal v. R.* (1948), A.I.R. Sind. 65.

(3) *Badi v. R.* (1884), 7 Mad. 579.

(4) *Bishnu Banwar v. R.*, 1 Cal. W.N. 35.

(5) *R. v. Nur Mahomed* (1884), 8 Bom. 223.

Judgment

Gould JA: The appellant was convicted by the district court of Ankole at Mbarara, of the offence of receiving stolen property contrary to s. 298(1) of the Uganda Penal Code. The property alleged in the "Particulars of Offence" to have been received by him was

> "about seven bundles of East African currency notes in Shs 100/- and in Shs. 20/- belonging to Barclay's Bank D.C.O.".

The same charge sheet contained a count, also for receiving stolen property, against Vicensio Frelio Kagoro, the property concerned in this charge being

> "a handbag containing East African currency notes of Shs. 100/- and Shs. 20/- and a bundle of East African currency notes of Shs. 100/-, belonging to Barclays Bank D.C.O.".

The charge against Kagoro alleged that the offence took place on or about September 27, 1958, at Mbarara, in the district of Ankole; that against the appellant was laid on or about September 28, 1958, at Kiswomba village, Gombolola Mut. XI, Buddu, in the district of Masaka. The same charge sheet contained a count against one Charles Watson Silvestry Kigundu for stealing a mail bag containing Shs. 360,000/- belonging to Barclay's Bank D.C.O. and counts against four other men for receiving stolen goods. One of the seven pleaded guilty and the other six were tried jointly before the learned resident magistrate; we are now concerned only with the appellant and Kagoro who were convicted upon the respective counts of receiving stolen property detailed above. Kagoro did not appeal against his conviction by the learned magistrate and the appellant's appeal to the High Court was dismissed. He has now brought a second appeal to this court.

Only a brief outline of the facts is necessary. On September 26, 1958, a mail bag containing Shs. 360,000/- was stolen at Mbarara. According to the evidence of two accomplices, Wafula and Moyi, who gave evidence for the prosecution, Kagoro received a substantial part of the stolen money on the evening of September 27. He placed it in a canvas handbag. Late the same evening Kagoro hired the car of one Jaffarali Kara and was driven by him to a dance hall about two miles from Masaka, at which they arrived in the early hours of September 28. Kagoro was carrying a small bag. At the dance hall Kagoro hired a

taxi driven by Ederisa Kasule and was driven some thirty miles to a place where, after inquiry, they found the house of the appellant. They had been accompanied on the journey by Akia Dungu, Kasule's brother. Kasule and Dungu both gave evidence – they were not accomplices, though Dungu is apparently of bad character. The prosecution relied on their evidence as establishing (*a*) that

Kagoro carried a bag (*b*) that after entering the appellant's house Kagoro called him outside and that Kagoro took the bag out with him (*c*) that while the two men were outside the witnesses heard part of a conversation between them in which Kagoro adjured the appellant to "be firm", (*d*) that when the two men returned, the bag appeared to be less full than it had been and (*e*) that the witnesses then drove Kagoro to another destination for which service he paid a further sum of Shs. 50/- which he took from the handbag.

Kagoro made two statements which were admitted in evidence as exhibits R. and S. The learned magistrate referred to them in his judgment in the following passage:

> "In addition, Kagoro has made (among others) two statements exhibits R. and S., confessing to deep personal complicity in the disposal of the stolen money, and also implicating Kigundu and Luinda. The first he says he made because he was beaten. The second he says he never made at all. One is retracted, the other repudiated. I can see no merit in the defence argument that because one is retracted and the two are more or less the same, both must be retracted. In fact, though they are broadly to the same effect, they are by no means identical. As against himself, the repudiated confession would be ground for conviction even were no other evidence to hand, though in fact there is of course a mass of other evidence against him. It is also under s. 28 of the Evidence Ordinance admissible against Kigundu in phase 2 and Luinda in phase 4. I have already, in the trials within trials, given my reasons for holding that the contentions that he made the one under duress and did not make the other at all are untrue."

We do not deem it necessary to set out the contents of exhibits R. and S., as it is sufficient to state that they amount to unequivocal confessions of the receipt by Kagoro of a bundle of notes and a bag containing notes in circumstances which admit of no other conclusion but that he knew or had reason to believe that they were stolen. They also contain the assertation that he gave to the appellant, in the circumstances indicated in the evidence of the witnesses Kasule and Dungu, "about seven bundles of notes of Shs. 20/- and Shs. 100/-". It is obvious that it is with reference to this passage that the amount alleged in the charge to have been received was fixed, for there is no other evidence on that point. Kagoro did not, in either statement, say that he told the appellant that the money had been stolen and the state of the appellant's knowledge of the source of the money remained a matter of inference from the circumstances.

Before this court it was argued for the appellant that Kagoro's confessions were inadmissible as against him and should have been excluded from consideration. In the appeal to the High Court this question was decided adversely to the appellant. The learned chief justice was dealing there with two appeals, that of Kigundu, who was charged with theft, as well as that of the appellant. So far as it is relevant to the question now under consideration his judgment reads:

> "As I have said, the magistrate relied on Kagoro's statement implicating Kigundu, in addition to relying on the evidence of the other two accomplices. He took this statement into account against Kigundu under s. 28 of the Evidence Ordinance, which is as follows:
>
> '28. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the court may take into consideration such confession as against such other person as well as against the person who makes such confession.'
>
> Here the magistrate was in error, because Kagoro and Kigundu were not

being tried jointly 'for the same offence'. Kigundu was being tried for theft, whereas Kagoro was being tried for receiving. This is not sufficient to satisfy s. 28; see the Indian Evidence Act by Chitaley & Rao (1956 Edn.) Vol. 2, note No. 5 on s. 30. Consequently the statement by Kagoro cannot be taken into account as against Kigundu.

.

"The case of the appellant Luinda is different. Here the accomplice evidence was corroborated by evidence of two men (P. 15 and P. 16) who were engaged to take Kagoro at 4 a.m. to Luinda's house. Kagoro was seen to be carrying a bag which was full when he took it into Luinda's house, and to be partially empty when he came out. And he was heard to be advising Luinda to 'be firm'. There was also evidence that, when Luinda was questioned, he said he had not seen Kagoro for nine years. And there was the statement by Kagoro implicating Luinda which could properly be taken into consideration against Luinda under s. 28 of the Evidence Ordinance, since Kagoro and Luinda were being jointly tried for the same offence, i.e. receiving stolen notes. Consequently, there was adequate corroboration of the accomplice evidence and, on the evidence as a whole, I consider that the magistrate was right in convicting Luinda."

Section 28 of the Evidence Ordinance, which is reproduced in the foregoing passage of the judgment of the learned Chief Justice, is in the same terms as s. 30 of the Indian Evidence Act. That section embodies a departure from the general rule of English law which is that the confession of an accused person is evidence against himself only and cannot be admitted or used as evidence against others. It is generally accepted that the justification for the enactment of s. 30 of the Indian Evidence Act is that the fact of full self-implication by an accused person serves as some sort of guarantee for the truth of the accusation, contained in the confession, against the other. Nevertheless, the obvious weakness of that guarantee has resulted in the courts in India, and in East Africa, construing the section very strictly. In *In re Periyaswami Moopan* (1) (1931), 54 Mad. 75 at 77-8 Reilly, J. said:

"But even for that limited purpose the confession must be of the kind intended by the legislature when enacting s. 30. What kind of confession is intended? The words of the section are 'when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved'. In my opinion 'confession' in that collocation of words cannot reasonably be interpreted to mean a confession of any offence in the world, nor even of any minor offence included in the offence for which the accused persons are being tried, nor of any offence connected with that offence, nor of any other offence which may be disclosed by the evidence, but only of the very offence for which they are being tried, 'offence' always including under the explanation to the section abetments and attempts. That appears to me to be the plain meaning of the words. To interpret the word 'confession' in the section in any wider sense is to accuse the legislature of using loose language in a matter of great importance. In my opinion we must read the word 'confession' as if it were followed immediately by the words 'of that offence'; and that appears to me to be the plain meaning of the section as read by a reasonable man. And indeed, if that were not the meaning, why should the use of the confession be confined to cases where the accused persons are being tried for the same offence? But, keeping our attention for the moment on the words themselves, if we speak of persons being tried for the same offence and in the same sentence speak of one of them making a confession, how can we mean by 'confession' a confession of any other

> offence unless we are most careless in the use of language? To my mind the words of s. 30 of the Evidence Act leave no doubt that the confession mentioned is a confession of the offence for which the accused persons are being tried."

In the judgment of the court in *Kundan s/o Tillumal v. R.* (2) (1948), A.I.R. Sind. 65 at 66 is the following:

> "There appears to be consensus of judicial opinion that where two persons are jointly tried, one for an offence under s. 457, Penal Code and the other for an offence under s. 411, Penal Code, a confession made by one accused person cannot be taken into consideration against the other who has been implicated in the confession. The words 'same offence', we think, must mean identical offence, and not offence of the same kind. For instance, s. 234, Criminal P.C. refers to offences of the same kind, and offences of the same kind are defined in sub-s. (2) of s. 234, Criminal Penal Code as offences punishable with the same amount of punishment under the same section of the Indian Penal Code or any special or local law. We think that the words 'same offence' in s. 30, Evidence Act have not the same meaning as the words 'offences of the same kind' in s. 234, Criminal Penal Code."

This passage indicates very definitely that it is not sufficient for the offences to be of the same kind, and the use of the word "identical" shows a strict construction of the word "same". In *Badi v. R.* (3) (1884), 7 Mad. 579 it was held that murder and abetment of murder were not the "same" offence – this was before, by an amending Act of 1891, an explanation was added to s. 30 of the Act to the effect that "offence" as used therein included abetment and attempt. It has also been held, where three persons were tried for theft jointly with a fourth who was charged with receiving stolen property, that the confessions of the three could not be admitted as against the fourth – *Bishnu Banwar v. R.* (4), 1 Cal. W.N. 35.

Having these considerations in mind it is necessary for us to decide whether, in the present case, Kagoro and the appellant were jointly tried for the same offence. The answer to be derived from consideration of the wording of s. 28 of the Evidence Ordinance, appears to us clearly to be in the negative. Kagoro was charged with receiving a handbag containing East African currency notes of Shs 100/- and Shs. 20/- on September 27, 1958, at Mbarara in the district of Ankole, while the appellant was charged with receiving about seven bundles of East African currency notes of the same denominations on September 28, 1958, at Kiswomba village in the Masaka district. How could offences committed by different persons on different dates in different places fall within the words "the same offence"? The only links between the two offences were that Kagoro, in addition to his own offence of receiving, abetted the appellant in his subsequent offence, and that the subject matter of the appellant's offence was no doubt a portion of the money received by Kagoro on the previous day. Neither of these considerations, in our opinion, affects the position. Kagoro was not charged with abetting the appellant, and the fact that the same property is the subject matter of two successive offences cannot be said to result in those offences becoming a single offence. No doubt the two offences charged in the present case were offences of the same kind, but, as has been seen, that is not enough.

Counsel for the Crown submitted in argument that Kagoro's confessions were rightly admitted as against the appellant on the authority of the case of *R. v. Nur Mahomed* (5) (1884), 8 Bom. 223, and it is necessary to consider this case in some detail. Unfortunately the exact wording of the charge or charges is not given in the report. The headnote reads:

> "Evidence of the possession and attempted disposal of coins of unusual kind is relevant on a charge of uttering such coins soon afterwards when the *factum* of uttering is denied.
>
> "A. and B. were tried together, under s. 239 of the Indian Penal Code (XLV of 1860), on a charge of delivering to another counterfeit coins, knowing the same to be counterfeit at the time they became possessed of them. A. confessed that he had got the coins from B. and had passed them to several persons at his request.
>
> "Held that the confession of A. was relevant against B. When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice."

It would seem from the headnote that A. and B. were jointly charged with delivering counterfeit coins to a specific person. The same appears from the opening passage of the judgment of the court delivered by West, J. (p. 224):

> "The appellant Nur Mahomed valad Abdul, commonly called Numa Seth (accused No. 2 before the court of session), has been convicted along with Mahomed valad Imam (accused No. 1 before the court of session) by the session judge at Poona, under s. 239 of the Indian Penal Code, of having fraudulently delivered to another, counterfeit coin, knowing, at the time that he became possessed of it, that it was counterfeit, and has been sentenced to suffer rigorous imprisonment for two years."

The court then went on to discuss the evidence of four women who had testified to having seen the accused deliver silver coins to Mahomed Imam, and came to the conclusion that it could not be relied upon. The judgment then referred to two further witnesses in the following words (p. 225):

> "There is, however, the further evidence of the two Marwaris, Luma Sapaji and Moti Gulal. The former deposes to the purchase of some tents by the appellant and Mahomed Imam, and the offer by the appellant to pay for them in Halle Sikka rupees. The latter deposes to a negotiation with him for the sale of some rupees of that coinage."

Having discussed this evidence their lordships continued (at p. 226 and p. 227):

> "As to the confession of Mahomed Imam (who says he passed the rupees given him by the appellant), which has been objected to as inadmissible, we think that when two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice. The object sought by the rule of law is a safeguard for sincerity and for information, and this safeguard equally subsists in the case supposed as where the confession implicates both in an identical act. But while this is so, and while it justifies the admission of the confession in this case, the particular circumstances in which the confession was made, equally with the character of the confession itself, deprive it of any material weight. Mahomed Imam was caught, so to speak, red-handed; and his confession tends to reduce his guilt to that of a subordinate agent of the appellant as principal. Such a confession wants in a great measure the intended guarantee of truth. It is self-serving according to the ideas of him who makes it, and cannot be relied on."

Whether the confession might have been excluded altogether on the grounds contained in the last three sentences of that passage is not in point here, where we are concerned only with the meaning of the expression "the same offence". It is impossible to gather from the judgment with any confidence the identity of the person to whom the counterfeit coins were alleged, in the charge or charges, to have been delivered. The text does not appear to suggest that it was either Luma Sapaji or Moti Gulal. It may have been Bhagwandas who is mentioned only in the following two passages (at p. 226):

> "It is possible – and we think not improbable – that Mahomed Imam may have gone to the appellant, represented to him that he had got *Halle Sikka* rupees from his earnings by theatrical performances at Hyderabad, and begged the appellant to aid him to change them for Government coins, and the appellant may have gone innocently with him. That there was nothing in the appearance of the rupees to excite the suspicion of an unprofessional man like the appellant, is shown by the fact that the shroff Bhagwandas accepted them as genuine over and over again. It is, therefore, quite probable that the appellant should take them as genuine."

At p. 227:

> "Bhagwandas does not depose to Mahomed Imam's telling him that he had received the rupees from the appellant."

We think that the important words in the court's reference to the confession of Mahomed Imam above set out are

> ". . . when two persons are accused of an offence of the same definition arising out of a single transaction. . . ".

The subsequent reference to

> "acts separable from those ascribed to his accomplice, and capable, therefore, of constituting a separate offence from that of the accomplice"

is not intended, in our view, to suggest that the appellant had been charged with delivering counterfeit coins to Mahomed Imam and that Mahomed Imam had been charged with delivering them to someone else. That does not appear to be consistent either with the general tenor of the judgment or the words "an offence. . . arising out of a single transaction". The emphasis, in the passage under consideration, appears to us to be on the nature and content of the confession and the way in which the person making it inculpates himself; the existence of a joint charge arising out of a single transaction is a pre-requisite. Their lordships could not have intended by their reference to "a single transaction" to include a transaction to which neither, or only one, of two accused persons were parties. A theft by A. is a single transaction and if B. and C. subsequently, at different places and on different dates, receive portions of the stolen property their offences could, in one sense, be said to arise out of that transaction. That, we are confident, was not what was intended to be asserted by the court in *R. v. Nur Mahomed* (5), and there is at least one decision which definitely indicates the contrary. Unfortunately the report of that case is unavailable here and we have only a reference to it in The Evidence Act by Chitaley and Rao Vol. 2, Note 5, Point 8. The reference given is (1886) 1886 Pun Re (Cr.) No. 9 p. 17 (p.17). The note in Chitaley and Rao is, that where different property, the proceeds of the same theft is received by two different persons those persons are not jointly tried for the same offence. Each has committed a distinct offence in respect of the property received by him, though both are punishable under one section; s. 411 of the Penal Code. This decision, which is an illustration of the construction of the word "same" as "identical" adopted in *Kundan v. R.* (2) appears to us to be in accord with the way in which s. 30

of the Indian Evidence Act has been construed generally by the courts. The two receivers might never have seen or heard of each other and there was no single transaction in which they were mutually concerned. How then could they be guilty of the same offence within the strict, or the ordinary, meaning of the words? We think that the same reasoning applies here. There was no single transaction to which Kagoro and the appellant were parties and out of which the charges arose upon which they were jointly charged. It has already been pointed out that Kagoro was not charged in respect of his participation in the receipt by the appellant of the seven bundles of currency notes. The receiving by Kagoro and that by the appellant took place on different dates and at different places and those circumstances are neither negative nor counterbalanced by the fact that part of the property involved on each occasion was the same. We think, therefore, that the decision in *R. v. Nur Mahomed* (5), cannot bear the weight which counsel for the prosecution sought to place upon it, and that therefore the confessions of Kagoro were wrongly admitted as against the appellant.

Though there was a good deal of evidence against the appellant apart from the confessions, we cannot say that the judgment of the learned magistrate would necessarily have been the same had he excluded them from consideration. The confessions provided evidence that money was actually passed by Kagoro to the appellant, a fact for the establishment of which the prosecution would otherwise have had to rely upon purely circumstantial evidence of a far from conclusive nature. We cannot therefore say that the confessions which were received and considered as evidence against the appellant occasioned no miscarriage of justice.

The appeal is therefore allowed, the conviction and sentence set aside, and the appellant is ordered to be released forthwith. It is unnecessary for us, in the circumstances, to consider a number of other grounds of appeal which were argued by counsel for the appellant.

Appeal allowed.

For the appellant:
Kiwanuka & Co, Kampala
B. K. M. Kiwanuka

For the respondent:
The Attorney-General, Uganda
J. J. Dickie (Crown Counsel, Uganda)

Municipal Council of Dar-Es-Salaam v The Commissioner for Transport
[1960] 1 EA 478 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	26 March 1960
Case Number:	13/1958
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] Rates – Exemption – Land owned by Commissioner for Transport – Land used exclusively as sports fields by children of employees of Commissioner – Whether entitled to exemption from rates – Local Government (*Rating*) *Ordinance* (*Cap.* 317), *s.* 3 (*c*) *and* (*g*) (*T.*).

Editor's Summary

The valuation court at Dar-es-Salaam had exempted from rates a portion of a piece of land belonging to the Commissioner for Transport which was used exclusively as sports fields by children of the employees of the Commissioner on the ground that it came within the exception of s. 3 (*g*) of the Local Government (Rating) Ordinance as "land used exclusively for the purposes of a public recreation ground". The Municipal Council appealed on the grounds inter alia that (i) the land had not been declared a public recreation ground nor was it managed or controlled as such and (ii) the public had no right to the land for recreation or other purposes. The Commissioner cross-appealed and contended that the portion in question was entitled to exemption not only under s. 3 (*g*) but also under s. 3 (*c*) of the Ordinance as "land used exclusively for the purposes of outdoor sport or recreation".

Held –

(i) for entitlement to exemption under s. 3 (*g*) of the Local Government (Rating) Ordinance the land must be dedicated as a public recreation ground and for exemption under s. 3 (*c*) the piece of land should be reasonably well defined as a distinct entity and should be appropriated exclusively to the use in respect of which exemption is sought.

(ii) the land for which exemption was claimed was not reasonably identifiable as a distinct entity nor had such land been appropriated exclusively for the purpose of outdoor sports or recreation; accordingly the land was not entitled to exemption either under s. 3 (*c*) or 3 (*g*) of the Ordinance.

Appeal allowed.

Case referred to:

(1) *Dar-es-Salaam Municipal Council v. Prince Aly Khan*, [1959] E.A. 422 (T.).

Judgment

Biron Ag J: This is an appeal from a decision of the valuation court of the Municipality of Dar-es-Salaam upholding an objection by the Commissioner for Transport, the respondent in this instant appeal. Land, on which is situate a number of houses occupied by the Asian staff of the Commissioner, was valued for the purposes of the quinquennial valuation for the 1958 Valuation Roll, at Shs. 258,700/-. The area of this land as given in the formal notice of objection, is 12.936 acres. The Commissioner objected to the valuation on the grounds that, and I quote from the formal notice of objection:

> "Of the area of 12.936 acres an area of 2.067 acres has been allocated for use as sports fields and should be exempted."

On such ground the Commissioner submitted that a figure of Shs. 198,000/- should be substituted for the figure at which the land was valued.

On the matter coming before the then magistrate holding the valuation court, Mr. Nicholson, he held, and I quote his decision in full as it is a short one:

> "I do not think it can be said that this land is used exclusively for the purposes of outdoor sport or recreation under exception (*c*) to 'rateable property' in s. 3 of the Ordinance. Nevertheless this area has been kept aside as a recreation area while housing developed all around it many years ago. It has, from my inspection of the site, not been properly developed and laid out as playing fields but it is obviously the sort of place where children from the nearby residences would play. In these circumstances I consider that the area comes under the heading of a 'public recreation ground' in terms of exception (*g*) to rateable property and I accordingly exempt it, as used exclusively for the purposes of a public recreation ground, from rateability."

The relevant paragraphs quoted by the learned magistrate are paragraphs (*c*) and (*g*) of the definition of "rateable property" in s. 3 of the Local Government (Rating) Ordinance (Cap. 317), hereinafter referred to as the Ordinance, which respectively reads as follows:

> "3. In this Ordinance unless the context otherwise requires – 'rateable property' means all land in a municipality, and all improvements on, in or under any such land, save as is hereinafter excepted, that is to say –
>
> (*c*) land used exclusively for the purpose of outdoor sport or recreation and not for the purposes of gain:
>
> (*g*) land used exclusively for the purposes of any public road, public park, or public recreation ground."

The Municipal Council of Dar-es-Salaam appealed from this decision of the valuation court on the grounds as set out in the memorandum of appeal, that:

> "(*a*) The said portion of land is under the control of the Commissioner for Transport;
>
> (*b*) the said portion of land has not been declared a public recreation ground nor is it managed or controlled as such;
>
> (*c*) the public has no right to use the said portion of land for recreation or other purposes."

The appeal first came before Mr. Justice Simmons, when Mr. Hamlyn appeared for the appellant Municipality and Mr. Le Champion for the respondent Commissioner. Mr. Le Champion sought to uphold the decision of the valuation court on the grounds that the land was entitled to exemption under para. (*c*) of the section and not as found by that court under para. (*g*). Both counsel agreed before this court that the evidence on which the decision of the valuation court was based was "very brief and unsatisfactory". In an interlocutory judgment, Simmons, J. allowed additional evidence to be adduced by both parties and directed the valuation court to take such evidence and remit it to this court. In the same judgment Simmons, J. stated:

> "But I add this warning: unless an appropriate cross-objection is, by leave, filed pursuant to O. 41, r. 22, it is extremely doubtful whether the objector will be allowed to argue or succeed on exception (*c*) in this appeal."

Leave to file such a cross-objection or cross-appeal was applied for and granted

by this court and the respondent Commissioner has filed a notice of appeal to the effect that he will contend that the decision of the valuation court:

> "Ought to be varied to the extent and in the manner and on the grounds hereinafter set out, namely:
>
> "The land in question, in addition to coming under the heading of 'public recreation ground' in terms of exception (*g*) to the definition of rateable property contained in s. 3 of the Local Government (Rating) Ordinance (Cap. 317), came within the definition of exception (*c*) to the said definition of rateable property in that it was used exclusively for the purposes of outdoor sport or recreation and not for the purposes of gain."

In pursuance of the order of Simmons, J. further evidence was taken before Mr. Otto, sitting as magistrate of the valuation court. This evidence is now before this court. At this instant hearing Mr. Livingstone who appeared for the respondent Commissioner, abandoned any claim for exemption under sub-paragraph (*g*) and based his claim for exemption solely on sub-paragraph (*c*).

Both in front of Mr. Nicholson it was stated, and in front of Mr. Otto it was given in evidence, that the children of the Asian employees who occupied the houses on the land, played and have organized sports on the specific area of land for which exemption is sought. As already noted, the area for which exemption was sought was originally 2.067 acres. On this particular land there are cesspits and drainage installations. At the taking of the additional evidence a further plan was produced by the respondent Commissioner excluding from the land shown on the plan as "area used exclusively as a playing field" an area marked as

> "area used both as a playing field and as a site for drainage installation (.51 acres)"

and a further area of .06 acres, leaving the area marked as "area used exclusively as a playing field" at 1.497 acres, as was shown on the said plan marked Exhibit A. Mr. Livingstone stated that it is for this lesser area that he is now claiming exemption and not for the larger area as previously claimed.

At the taking of this additional evidence, evidence was given by Mr. Saur Singh Panesar, a draughtsman employed by the railways who stated that he had lived on this estate since 1943, to the effect that the children of the employees of the Railways Administration used this area for playing games; that there are pitches provided for cricket and posts for volleyball etc. There are also apparently organized games and

> "the parents subscribe Shs. 5/- for materials, collect regular subscriptions every month for sports requirements."

The issue before this court is now limited to the smaller area of 1.497 acres for which exemption is claimed and is also further narrowed in that the exemption is sought under paragraph (*c*), that the land is

> "land used exclusively for the purposes of outdoor sport or recreation and not for the purposes of gain".

Although the claim for exemption under paragraph (*g*) has been expressly abandoned by Mr. Livingstone, I consider it necessary to make a formal finding in respect of the entitlement to exemption under this paragraph in view of the finding of the valuation court that the land was entitled to such exemption under this particular paragraph. In his evidence Mr. Saur Singh Panesar is recorded as saying, and I quote "Sometimes African children come in afternoon, but leave when Asians come", and again,

> "Would not like others to come and play there; consider it is for the use of people living in railway quarters".

Without going into the legal niceties it is abundantly clear from the facts that not only has the land in question not been dedicated as

> "land used exclusively for the purposes of any public road, public park or public recreation ground",

but the user is confined in the main to the children of the railways employees living on the site and the general public are not really encouraged to come and use the land. I therefore formally rule that the land in question is not entitled to exemption under sub-paragraph (*g*) of s. 3 of the Ordinance.

On the evidence now available I find as a fact that the land in question is at present being used as what may be termed a playground and that there is a de facto user of the land for outdoor sport or recreation. Although no specific evidence has been led on this, it can I think be reasonably inferred from the evidence that the land is not being used "for the purposes of gain". As this particular area, and I ought to add even at this stage, not well specified area, is not at present being used for any other purpose, I am quite prepared to hold that it is being used "exclusively for the purposes of outdoor sport and recreation". Mr. Hamlyn, for the appellant Municipality, has submitted that the relevant date of the user for the purposes of the valuation is 1st April, 1957. The valuation was for the 1958 Valuation Roll, which, by General Notice No. 2769 of 1958, came into operation on October 6, 1958, but by sub-s. (2) of s. 10 of the Ordinance the Roll came into force with effect from January 1, 1958, and by s. 3,

> " 'the time of valuation' means a date nine months before the commencement of the year for which the Valuation Roll is to come into force",

that is April 1, 1957. Although strictly speaking this was not given in evidence, it would appear that the whole of the land or the estate, was valued as one entity for the 1953 Valuation Roll when, incidentally, no objection was made to the valuation. At that time much of this land was bog and marsh, and even before the 1953 valuation it was being steadily reclaimed and filled in. Although the evidence of this, which has been challenged by Mr. Hamlyn, may not be considered very strong, I am quite prepared to hold that on the material date, that is April 1, 1957, the land was, as it still is,

> "used exclusively for the purposes of outdoor sport or recreation and not for the purposes of gain".

It is now necessary to consider the position in law. Mr. Hamlyn has submitted that as according to the respondent Commissioner this land has been reclaimed and developed, by s. 35 of the Town and Country Planning Ordinance (Cap. 378) consent to such development should have been obtained from the Town Planning Board and no such consent has in fact been obtained. Section 35 reads;

> "Notwithstanding any other law to the contrary, no person shall develop any land within a planning area without planning consent or otherwise than in accordance with planning consent and any conditions specified therein".

By s. 2 of the same Ordinance:

> " 'development' means the carrying out of any building operation, engineering operation or mining operation in, on, under or over any land, the sub-division or laying out of land, or the making of any change in the use of land."

Also by r. 65 (1) of the Township Rules applied to the Dar-es-Salaam Municipality by the Municipalities Ordinance:

> "No person shall –
>
> (*a*) lay out, construct, repair, widen or extend any street, road, lane, passage or footway;
>
> (*b*) lay out or construct any drain, sewer, electric or water-main;
>
> (*c*) divide any land into plots; or
>
> (*d*) erect on any land any hedge, fence or wall or other boundary marks, except with the permission and in accordance with the directions of the Authority."

Mr. Livingstone submits that the High Commission has always been held to be an emanation of the Crown and he was –

> "rather doubtful of the extent to which, if at all, local planning law applies. I have not developed this argument fully, I am merely putting it in and saying I am rather doubtful as to the extent to which any planning laws do apply. I know the Commissioner for Transport does submit plans and gets approval as a matter of course, but I would not say he was bound to do it and that merely gives weight to my contention that this use does not have to be approved."

However, from the statement of Mr. Loxton, who appeared for the Commissioner at the first hearing of the objection by the valuation court, it would appear that consent or permission is required, as he is recorded as saying –

> ". . . but 2.067 acres is being used as playing fields by children. Housing in existence around it already. This is in accord with our Architects and Planning Depts. ideas and ought to have been approved by the local authority but I do not know if this has been approved."

Mr. Livingstone further submits that even if consent or approval is necessary, the absence of such consent or approval would not disentitle the land to exemption, as the criterion is the actual user of the land and the position is not affected by the absence of consent or approval to such user. I very much doubt the soundness of this argument, but I do not feel called upon to rule on what may be termed this collateral issue.

A number of authorities have been cited, but I do not find any of them to the point, or of any very great assistance; each case must be decided on its own facts. By s. 3 of the Ordinance:

> " 'land' includes any easement existing for the benefit of such land but excludes improvements on, in or under such land."

That really is not of very great assistance in determining what is meant by "land" in para. (*c*) of the same section, "land used exclusively for the purposes of outdoor sport or recreation". But I would postulate two minimum requirements for land, i.e. a piece or parcel or plot of land to be entitled to exemption must –

> (1) be reasonably well defined as a distinct entity; and
>
> (2) have been appropriated to the use in respect of which exemption is sought.

In this case neither the large area for which exemption was originally sought, nor the lesser area for which exemption is now claimed, is at all defined and recognizable as a distinct entity. It is merely a part of the parcel of land which has been valued and rated as a whole. Maps have been produced showing

these particular areas, but their lines of demarcation are purely arbitrary and, I may add, imaginary. In fact, as expressly stated in evidence by Mr. P. S. Padway, who described himself as a surveyor in the employment of the Commissioner, the land in question has not even been surveyed. I find it impossible to hold that exemption can be claimed for an unspecified and indistinguishable as a distinct entity, area of land. With regard to the second proposition, it is, I think, pertinent to refer to a passage from the interlocutory judgment of Simmons, J. already referred to, which was quoted with approval by Crawshaw, J. in *The Municipal Council of Dar-es-Salaam v. Prince Aly Khan* (1), [1959] E.A. 422 (T.).

> "Whether a given piece of land is used as a recreation ground is a question of fact in each case, but I do not think that no matter what piece of waste or unused land which happens de facto to be used for the resort and recreation of adults or as a playground for children is for that reason alone a 'public recreation ground'. Certainly, it is necessary that the ground should in fact be 'used' as such; but there must also be an express or inferrable right in the public to use the land, which means something more than the mere absence of fencing which would leave a user in doubt whether he was trespassing or not."

The learned judge was dealing with the position under para. (*g*) as to whether the land constituted a public recreation ground. In this instant case, although there need not be an express dedication as may be required for public use, there must be at lowest, I consider as already indicated, an appropriation for the use of the land for outdoor sport or recreation. It is not sufficient for an owner merely to allow such user and take no steps to prevent it. In this case there is no evidence at all that the Commissioner has appropriated the land to such use. It is abundantly clear that the land is being so used merely, or at least on little more than, sufferance and that such sufferance could be terminated at any time at will. Mr. Livingstone has invited me to assume that because the Commissioner has cut the grass and passively acquiesced to the use of the land for sport and recreation the land has been appropriated to such purpose. In his very lucid argument he said:

> "He (the Commissioner) does maintain the land to the extent that he cuts the grass. He has taken no objection to the murram pitch being there. I cannot go beyond that. I do know what has been happening, but on the evidence he has done no more that cut the grass to allow the murram pitch to be laid there and to allow volleyball posts to be put in there, and allowed people to play soccer and cricket there. I can only deduce from the facts that if people do go to the extent of laying down murram pitches, which must cost quite a little bit, and go to the extent of getting proper sports facilities and use proper footballs there and not tennis balls, and collect subscriptions, the people themselves must have been satisfied that they would be able to use this land for some little time as a sports field. I can only put that as an assumption your lordship might well take on the facts."

The people may well be satisfied with this state of affairs but I do not consider that it is open to the court to make any such assumption.

In the case already referred to Crawshaw, J. said:

> "In the instant case the respondent so far as is known has done no act in relation to the land which recognizes its use as a road, although he may silently have acquiesced in the passage of cars over it; there is of course nothing to prevent him putting it to some entirely different use at any time."

And he allowed the appeal from the decision of the valuation court which held that the land in question was entitled to exemption from rates under para. (*g*)

as “land used exclusively for the purposes of any public road”. Likewise in this instant case all the respondent Commissioner has done to the land for which exemption is sought is silently to have acquiesced in its use for outdoor sports and recreation and

> “there is of course nothing to prevent him putting it to some entirely different use at any time.”

As the land for which exemption is claimed is not reasonably identifiable as a distinct entity, nor has such land been appropriated exclusively for the purpose of outdoor sports or recreation, I find that this land is not entitled to exemption from rating as contended by the respondent Commissioner. The appeal is accordingly allowed with costs to the appellant Municipality both in this court and in the court below. The decision of the valuation court is set aside and it is ordered that the original valuation of Shs. 258,700/- for the whole site be restored to the valuation roll.

Appeal allowed.

For the appellant:
O. T. Hamlyn, Dar-es-Salaam

For the respondent:
The Legal Secretary, East Africa High Commission
H. B. Livingstone (Senior Assistant Legal Secretary, East Africa High Commission)

The Attorney-General v David Marakaru
[1960] 1 EA 484 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	21 April 1960
Case Number:	109/1960
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] Practice – Appeal – Conclusion drawn from facts – Whether reasonableness of conclusion is a question of law or fact – Respondent charged with theft – One box substituted for another when in custody of respondent – Circumstantial evidence leading irresistibly to a conclusion of guilt – Penal Code, s. 274 (*c*) *and s.* 275 (*K.*).

Editor’s Summary

The respondent was charged with theft of goods in transit contrary to s. 274 (*c*) of the Penal Code, and in the alternative of theft by persons in the public service, contrary to s. 275 ibid. On August 28, 1959, the cashier from the District Commissioner’s Office, Mombasa, accompanied by the District Revenue

Officer, and a tribal policeman, took to Mombasa railway station a wooden specie box containing Shs. 80,000/- in cash, being the month's wages for the staff at the District Commissioner's Office at Wundanyi. The Revenue Officer and the tribal policeman remained at the railway booking office with the box whilst the cashier went to the railway police station and fetched the respondent in whose custody the wooden specie box containing Shs. 80,000/- was then left. Subsequently he and the booking clerk transported to the train and delivered to the guard a wooden specie box which was later identified as one made by a carpenter for the respondent. From Mombasa the box went by rail to Voi railway station under police escort and was then taken to Wundanyi where it was found to contain bundles of newspapers. The trial magistrate accepted the evidence of the cashier and the revenue officer that a specie box containing a sum of Shs. 80,000/- was taken to the Mombasa railway station and left in the custody of the respondent and the prosecution case was that the accused

switched the boxes at the booking office. The booking clerk stated that the respondent had no opportunity of doing so but the magistrate did not accept his evidence. The magistrate in acquitting the respondent held that the circumstantial evidence adduced by the prosecution could not in the circumstances lead irresistibly to the conclusion that the respondent committed or took an incriminating part in the commission of the offence and that, however unsatisfactory the evidence of the booking clerk was, it could not be rejected in favour of a mere theory unsupported by any evidence.

Held –

(i) a decision is erroneous in law if it is one to which no court could reasonably come.

(ii) once the magistrate found that the booking clerk was mistaken in thinking that the respondent had no opportunity to exchange the boxes, there could be only one conclusion from the facts and that was that the respondent either himself exchanged the boxes or aided and abetted their exchange.

(iii) the conclusion drawn by the magistrate from the facts which he found was not reasonable.

Case remitted to the trial magistrate with a direction to convict on the first count and thereafter to deal with the respondent according to law.

Case referred to:

(1) *R. v. Dishon Odinga and Others*, [1959] E.A. 12 (K.).

(2) *Bracegirdle v. Oxley*, [1947] 1 All E.R. 126.

(3) *Edwards* (*Inspector of Taxes*) *v. Bairstow and another* [1955], 3 All E.R. 48.

(4) *R. v. Senktuka* (1946), 13 E.A.C.A. 89.

(5) *R. v. Tharacithio* (1946), 13 E.A.C.A. 119.

(6) *R. v. Kipkering arap Koske and Another* (1949), 16 E.A.C.A. 135.

Judgment

Sir Ronald Sinclair CJ, read the following judgment of the court: This is an appeal by the Attorney-General by way of case stated against decision of the resident magistrate, Mombasa, acquitting the respondent on the following charges:

"Count 1:

Statement of Offence.

Theft of goods in transit, contrary to s. 274 (*c*) of the Penal Code.

Particulars of Offence.

1. David Marakaru s/o Karigitho.
2. Jacob Matheka s/o Daud Mbinda.
3. Stephen Chege s/o Kitongu and
4. Munyasia s/o Siengo.

On or about the 28th day of August, 1959 at Mombasa in the Coast Province, stole Shs. 80,000/- the property

of Her Majesty from the railway station, Mombasa whilst the said Shs. 80,000 was in transit from Mombasa to Wundanyi.

In the alternative:

"Count 2:

Statement of Offence.

Theft by persons in the public service, contrary to s. 275 of the Penal Code.

Particulars of Offence.

1. David Marakaru s/o Karigitho.
2. Jacob Matheka s/o Mbinda.
3. Stephen Chege s/o Kitongu,
4. Mungasia s/o Siengo.

On August 28, 1959, at Mombasa in the Coast Province, being persons employed in the public service, namely the Kenya Police Force, stole Shs. 80,000/-, the property of Her Majesty."

The facts found by the learned trial magistrate are not set out in the case, as they should have been, and for the facts it is necessary to refer to the judgment which is annexed to the case. The magistrate is referred to the judgment of this court in *R. v. Dishon Odinga and Others* (1), [1959] E.A. 12 (K.), for the manner in which a case should be stated.

The relevant facts found by the trial magistrate are set out in the following passage from his judgment:

"It has been the practice for the District Commissioner's Office, Mombasa, once a month, apart from the odd exception, to send cash, in the region of Shs. 80,000/- to the District Commissioner's Office, Wundanyi, for payment of wages; and for the last three years the Mombasa District Commissioner's cashier (P/W 11) has followed a set procedure which involved delivering at Mombasa railway station a specie box containing the money and arranging for it to be conveyed by train to Voi railway station from where it was collected and taken to the District Commissioner's Office, Wundanyi. This procedure was well known to the accused whose duties were to detail train escorts and to keep records. He had for over a year dealt with the matter of escorting the box containing the money on to the train at Mombasa railway station and was thoroughly conversant with the routine adopted and the type of box used.

"In August of this year, a carpenter (P/W 3) at Majengo, Mombasa, made for the accused a wooden specie box positively identified as exhibit 1.

"On August 28, the cashier from the District Commissioner's Office, Mombasa, accompanied by the District Revenue Officer, (P/W 13) and a tribal policeman, took to Mombasa railway station a wooden specie box containing the sum of Shs. 80,000/- in cash, being the month's wages for Wundanyi. The District Revenue Officer and the tribal policeman remained in the railway booking office with the specie box whilst the cashier, who had telephoned the accused the day before to arrange an escort, went to the railway police station to fetch the accused. The accused accompanied the cashier to the booking office and the wooden specie box containing the sum of Shs. 80,000/- was left in his custody. The accused, accompanied by the railway booking clerk (P/W 15), then transported a wooden specie box to the train and delivered it into the custody of the guard (P/W 20), which box was positively identified as exhibit 1. This box was then escorted by Police Inspector Wakafi (P/W 6) to Voi railway station and was subsequently taken to the District Commissioner's office, Wundanyi, where it was opened and found to contain bundles of newspapers.

"Accepting as true evidence of the cashier, the revenue officer and the train guard, the genuine specie box containing Shs. 80,000/- was taken to the booking office at Mombasa railway station where it vanished and exhibit 1 belonging to the accused, appeared in its place. It is perfectly obvious that somebody switched the boxes in the booking office – not earlier, on the evidence of the cashier and the revenue officer; and not later, on the evidence of the booking clerk (P/W 15), and from the fact that a

parcel stamp ticket which was affixed in the booking office was affixed to exhibit 1.

"The prosecution case is that it was the accused who switched the boxes at the booking office – but there is no evidence that it was the accused who did so. Indeed, on the evidence of the booking clerk (P/W 15), the accused had no opportunity to do so. The prosecution invite me to place no reliance on the evidence of the booking clerk (P/W 15) – and indeed, I consider his evidence most unreliable but there is no other evidence upon which I can rely in regard to this particular aspect of the matter.

"On the evidence of the cashier and District Revenue Officer it was definitely the genuine specie box containing the money which was left by them in the booking office in the custody of the accused. On the evidence of the booking clerk (P/W 15) this same box was by his side being guarded by the tribal policeman when the accused entered the booking office and he then ordered the accused to take it to the train guard and personally accompanied the accused with the box to the guard's van of the train and obtained a receipt for it from the train guard. But there is no doubt that the box delivered to the train guard was exhibit 1 and not the genuine specie box.

"The booking clerk purported to identify in court exhibit 1 as the box which had been brought to the booking office by the cashier, District Revenue Officer and tribal policeman, and another booking clerk (D/W 2) thought that it was exhibit 1 which he had weighed at the booking office while the cashier was fetching the accused. If this were so, the boxes must have been switched before the accused entered the booking office – which on the evidence of the cashier and District Revenue Officer could not have been and was not the case. P/W 15's identification was based solely on two railway labels attached to exhibit 1, one of which was the parcel stamp ticket, and he was patently mistaken, as was D/W 2. The genuine specie box containing the money weighed 30 1/2 lbs. and this was the weight entered on the consignment note and subsequently copied therefrom on to a parcel stamp ticket. This parcel stamp ticket was subsequently affixed, by accident or by design, to exhibit 1 – there being no positive evidence as to who affixed it. As exhibit 1 weighed only 17 lbs. it clearly could not have been and was not the specie box weighed by D/W 2.

"However, the fact that P/W 15 and D/W 2 were obviously mistaken in their identification of exhibit 1 does not take the prosecution case any further forward – as on the evidence of P/W 15 the subsequent substitution of exhibit 1 for the genuine specie box could only have been accomplished by witchcraft. According to him, he was with the accused all the time until the box was delivered to the train guard and he 'paid particular attention to the box'.

"There is no evidence that P/W 15 was not with the accused all the time and, however mistaken he may have been – indeed, must have been – the court cannot substitute conjecture for evidence. No matter how unsatisfactory his evidence is, it cannot be rejected in favour of a mere theory unsupported by any evidence whatsoever."

The magistrate went on to find that the circumstantial evidence which was adduced by the prosecution could not in the circumstances be said to lead irresistibly to the conclusion that the respondent committed or took an incriminating part in the commission of the offence with which he was charged. He therefore acquitted the respondent.

The questions on which the opinion of the court is sought are:

"(i) Was the magistrate correct, when applying his mind to the question

before him, in reaching the conclusion that the prosecution had failed to prove the charge, and was not the only conclusion to be drawn from the facts that the accused was guilty.

(ii) Was the conclusion drawn by the learned trial magistrate, namely, that the accused was not guilty of the offence of theft, one which could not reasonably be drawn from the facts by the learned trial magistrate.

(iii) Was the learned trial magistrate correct in holding that the circumstantial evidence must lead him irresistibly to the conclusion that the accused committed or took an incriminating part in the commission of the offence with which he was charged."

This court can, of course, interfere with the decision of the learned magistrate only if is erroneous in point of law. Mr. Webber, the Deputy Public Prosecutor, who appeared for the Attorney-General contended that the conclusion of the learned magistrate was one to which he could not reasonably come and, therefore, that his decision was erroneous in point of law.

We agree that a decision is erroneous in law if it is one to which no court could reasonably come. In *Bracegirdle v. Oxley* (2), [1947] 1 All E.R. 126, it was held that if justices come to a conclusion to which no reasonable bench of magistrates could come, the High Court can interfere because the position is then the same as if the justices had come to a decision of fact which there was no evidence to support. In that case Denning, J., as he then was, said at p. 130:

> "The question whether a determination by a tribunal is a determination in point of fact or in point of law frequently occurs. On such a question there is one distinction that must always be kept in mind, namely, the distinction between primary facts and conclusions from those facts. Primary facts are facts which are observed by the witnesses and proved by testimony; conclusions from those facts are inferences deduced by a process of reasoning from them. The determination of primary facts is always a question of fact. It is essentially a matter for the tribunal who sees the witnesses to assess their credibility and to decide the primary facts which depend on them. The conclusions from those facts are sometimes conclusions of fact and sometimes conclusions of law. In a case under the Road Traffic Act, 1930, s. 11, the question whether a speeed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts, and that is the case here. The conclusion drawn by these justices from the primary facts, was not one that could reasonably be drawn from them."

We were also referred to *Edwards* (*Inspector of Taxes*) *v. Bairstow and Another* (3), [1955] 3 All E.R. 48 the headnote of which reads:

> ". . . although an appellate court may allow an appeal from the commissioner's determination only if it is erroneous in law, yet, where a Case Stated shows on the face of it no misconception of law, if it should appear to the appellate court that no person, if properly instructed in the law and acting judicially, could have reached that particular determination, the court may proceed on the assumption that a misconception of law has been responsible for the determination."

We shall deal first with the third question submitted for the opinion of the court. In our opinion the learned magistrate was quite correct in holding that in order to justify conviction the circumstantial evidence must lead him irresistibly to the conclusion that the respondent committed or took part in the commission of the offence with which he was charged. That principle has

been laid down time and time again by the Court of Appeal: see, for instance, *R. v. Senkatuka* (4) (1946), 13 E.A.C.A. 89 and *R. v. Tharacithio* (5) (1946), 13 E.A.C.A. 119. It is only another way of saying, as was held in *R. v. Kipkering arap Koske and Another* (6) (1949), 16 E.A.C.A. 135, that in order to justify, on circumstantial evidence, the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypotheses than that of his guilt.

The remaining two questions will be considered together. Summarising the facts, the genuine specie box containing Shs. 80,000/- in cash was taken to Mombasa railway station by the District Revenue Officer and a tribal policeman. The District Revenue Officer and the tribal policeman remained in the railway booking office with the specie box, while the cashier brought the respondent from the railway police station. At the booking office the genuine specie box containing the Shs. 80,000/- was left in the respondent's custody. The respondent then transported the false specie box which was later found to contain newspapers, to the train and delivered it to the guard. The boxes had been switched in the booking office. The false specie box had been made for the respondent earlier that month by a carpenter.

According to the booking clerk he was with the respondent all the time until the box was delivered to the train guard and, therefore, the respondent had no opportunity to switch the boxes. The magistrate found that the booking clerk must have been mistaken, but held that, however unsatisfactory his evidence was, it could not be rejected in favour of a mere theory unsupported by any evidence whatever.

The learned magistrate was quite wrong in holding that the suggestion that the respondent was a party to the substitution of the false specie box (exhibit 1) for the genuine specie box was a mere theory unsupported by any evidence whatever. It is clear from his findings of fact that during the short time the genuine specie box was in the respondent's custody in the booking office it was exchanged for the false specie box which the respondent had previously had made for him. Once the magistrate found that the booking clerk was mistaken in thinking that the respondent had no opportunity to exchange the boxes, there could be only one conclusion from the facts and that is that the respondent either himself exchanged the boxes or aided and abetted their exchange. To apply another test, the inclpatory facts are incompatible with the innocence of the respondent and incapable of explanation upon any other reasonable hypothesis than that of his guilt. In our opinion, the conclusion drawn by the learned trial magistrate from the facts which he found was not one that could reasonably be drawn from them.

The case is accordingly remitted to the trial magistrate with an intimation that both the offences charged have been proved and, as the offences were charged in the alternative, a direction to convict on the first count and thereafter to deal with the respondent according to law.

Case remitted to the trial magistrate with a direction to convict on the first count and thereafter to deal with the respondent according to law.

For the appellant:
The Attorney-General, Kenya
J. P. Webber (Deputy public Prosecutor, Kenya)

For the respondent:
Bali Sharma & Co., Nairobi
Bali Sharma

Southern Highlands Tobacco Union Limited v David Mcqueen

[1960] 1 EA 490 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	16 June 1960
Case Number:	22/1960
Before:	Sir Alastair Forbes VP, Gould and Windham JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Spry, J.

[1] Damages – Breach of contract for personal services – Principles on which assessment of damages should be made.

[2] Damages – Mitigation – Whether duty to mitigate entails outlay of expenditure.

[3] Income Tax – Award of damages – Damages for breach of service contract – Whether damages liable to income tax – Meaning of "compensation" – East African Income Tax (Management) Act, 1958, *s.* 3 *and s.* 5 *– Income Tax Act,* 1918, *Schedule E, r.* 1.

Editor's Summary

By an agreement dated January 31, 1958, the appellant company re-engaged the respondent as general manager at a salary of £2,000 per annum for four years from July 1, 1959. Under the agreement the respondent who was already in the service of the appellant company could not be dismissed before the expiration of the agreed term. On June 24, 1959, the appellant company gave the respondent written notice that his services would not be required after June 30, 1959. The respondent thereupon sued for wrongful dismissal and claimed £11,802, of which £8,000 represented four years' salary. The trial judge found in his favour and awarded him £10,412 as damages. On appeal against the quantum of damages the appellant company contended that the trial judge ought to have made allowance for the likelihood that the respondent would have earned something during the four years in respect of which he claimed damages for loss of prospective salary, that a sum representing an estimate of those earnings ought to have been deducted from the £8,000, that the respondent had made insufficient efforts to mitigate his damages, and that the trial judge ought to have deducted a sum representing approximately the income tax which the respondent would have to pay on his salary of £8,000 if he had received it.

Held –

(i) the trial judge was correct in refusing to make any deduction for prospective earnings in view of the respondent's age and the attempts he had made to obtain other employment without success.

(ii) while a plaintiff is required to mitigate damages so far as he can, he is not required to involve himself in expenditure to do so; therefore, it could not be argued that the respondent ought to have set up in private practice as an accountant to mitigate his damages.

(iii) the trial judge was right in holding that the burden of proving that the respondent could have obtained suitable other employment lay on the appellant company.

(iv) the trial judge was right in holding that the damages for wrongful dismissal were liable to income tax under s. 5 (2) (*c*) of the East African Income Tax (Management) Act, 1958, and that accordingly no deduction should have been made by him to represent the tax which the respondent would have paid on the four years' salary.

Appeal dismissed.

Cases referred to in judgment:

(1) *British Transport Commission v. Gourley*, [1955] 3 All E.R. 796.

(2) *Acklam v. Sentinel Insurance Co. Ltd.*, The Times, December 18, 1959.

(3) *Jewelowki v. Propp*, [1944] 1 All E.R. 483.

(4) *Roper v. Johnson* (1873), L.R. 8 C.P. 167.

(5) *Bwavo Mpologoma Growers Co-operative Union Ltd. v. Gasston and Barbour and Others*, [1959] E.A. 307 (C.A.).

(6) *Du Cros v. Ryall* (1935), 19 T.C. 444.

(7) *Henley v. Murray*, [1950] 1 All E.R. 908.

The following judgments were read by direction of the court:

Judgment

Windham JA: The appellant company, whose registered offices are at Iringa, in Tanganyika territory, employed the respondent as their general manager from the year 1950, at a salary of £2,000 per annum, under two successive agreements. Under a third agreement, a written one dated January 31, 1958, the breach of which lead to the institution of these proceedings, the appellants re-engaged the respondent as their general manager at the same salary for a period of four years with effect from July 1, 1959. The agreement contained no clause entitling the appellants to dismiss him before the end of that four year period, and the learned trial judge's finding that no implied term to that effect should be read into the agreement has not been challenged on appeal. On June 24, 1959, as a result of friction between the respondent and other officials of the appellant company, the appellants wrote a letter to the respondent, dated June 24, 1959, giving him notice that his services would not be required after June 30, 1959. The respondent had no option but to leave their service on that date, and in the following month he filed a suit in the High Court, Dar-es-Salaam, for damages for wrongful dismissal in breach of the written agreement. The main item in his claim for damages was £8,000, representing salary at £2,000 per annum for the four year period covered by the agreement, from July 1, 1959, to June 30, 1963. To this were added further items, in respect of housing allowances and leave pay and passages claimed to be due under the agreement, making a total of £11,802.

The case was heard in December, 1959, the learned trial judge found in the respondent's favour, and, disallowing only one small item in connection with the leave pay claimed, he awarded the respondent damages in the sum of £10,412.

Much of the evidence and of the judgment was taken up with the issue whether the conduct of the respondent afforded legal justification for the appellants in dismissing him. The learned trial judge, after giving the question careful consideration, held that it did not; and against that finding there has been no appeal. This court is therefore not concerned with the events that led up to the dismissal. The appeal is only against the quantum of damages, the learned judge's assessment of the figure awarded being attacked on two grounds. First, it is contended that he ought to have made allowances for the likelihood that the respondent would earn something during the four years in respect of which he claimed damages

for loss of prospective salary, and ought to have deducted from the £8,000 awarded under that head a sum representing a rough estimate of what those earnings would be. Linked with this is a contention that the respondent made insufficient efforts to mitigate his damages. Secondly, it is contended that the learned judge ought to have deducted a sum representing approximately the income tax which the respondent would have had to pay on his £8,000 salary if he had received it, following the decision of the House of Lords in *British Transport Commission v. Gourley* (1), [1955] 3 All E.R. 796.

To both these matters the learned trial judge gave his considered attention in his judgment.

The passage from the judgment which deals with the question whether the respondent had sufficiently endeavoured to minimize his loss by seeking employment elsewhere, or whether any sum should be deducted from the £8,000 as representing what he would probably earn in other employment during the ensuing four years, reads as follows:

> "The principles on which damages are assessed are clear and simple but their application is not so easy. A person wrongfully dismissed is entitled to be compensated fully for the financial loss he suffers as a result of his dismissal, subject to the qualification that it is his duty to do what he can to mitigate his loss. The amount of the loss is not necessarily the sum of the emoluments which the plaintiff would have received (it may be more or less) but that sum will generally form the basis of the calculation. Where the plaintiff has obtained other employment before the action begins, his actual emoluments in his new employment can be taken into account but where he has not obtained other employment, the court has to assess the likelihood of employment being obtainable and the remuneration which the plaintiff may be expected to earn. It is the duty of the plaintiff to seek and to accept employment but he is not required to seek or to accept employment of an unsuitable nature.
>
> "In the present case, the plaintiff has not yet obtained fresh employment, although he has made attempts. Letters have been produced in confirmation of these attempts, and it is significant that the chairman of East African Tobacco Company Limited wrote: '. . . I have been very impressed with your ability. However, I am afraid that, owing to your age there is nothing we can offer you at the present time and I am afraid I cannot even hold out any great hopes for the future.'
>
> "For the Union, it was argued that the plaintiff is a man of capability and experience, particularly experience as an accountant and company secretary. Mr. Houry submitted that men with such experience are in great demand; he said he could find the plaintiff a job at 'this very moment', possibly at a higher salary than he has been receiving. I must, I think, regard this as rhetorical, since there is no evidence on the record to support it.
>
> "The plaintiff is fifty-eight years of age. At that age, it is not easy for a man to find employment, however healthy and able he may be. It is, of course, possible that the plaintiff may be offered well-paid employment tomorrow but he may not, and if he does not find employment soon, his chances will progressively diminish. The difficulty is that the number of posts for which the plaintiff is suitable and which he would regard as suitable employment is comparatively small; his position is entirely different from that of, for example, a young clerk who can seek employment in a wide field. Furthermore, while it is settled law (*Addis v. Gramophone Co. Ltd.* (1909) A.C. 488) that the plaintiff cannot be awarded damages for any loss he may sustain 'from the fact that his having been dismissed of itself makes it more difficult for him to obtain fresh employment', I think I can and must, in considering mitigation, take into account that, whatever the outcome of these proceedings, the dismissal of the plaintiff and the fact that he has brought these proceedings will tend to prejudice his chances of early employment (*Acklam v. Sentinel Insurance Co. Ltd.* The Times, December 18, 1959).
>
> "It must also be borne in mind that if the plaintiff obtains employment anywhere except in Iringa, where he has a house and where his wife has a business, he will almost certainly suffer loss or incur expenditure which ought to be set off against his earnings in that employment.

> "Mr. Houry argued that proceedings such as these should not be used as a means of making a profit: I agree, but on the other hand it is proper that the plaintiff should be indemnified to the full extent of his loss. The benefit of the doubt, if I may use that expression, should, I think, go to the plaintiff, since it was the wrongful act of the Union that gave rise to these proceedings.
>
> "I think it would be a wrong approach to attempt to assess the chances of the plaintiff finding employment and to scale down the measure of damages accordingly or to assume that he is bound to find some employment and make an arbitrary deduction. Before I can make any deduction, I must be satisfied that the probability is that the plaintiff, acting diligently and in good faith, can find suitable employment. I do not feel I can say that in the present case. It is well established that the burden of proof in these cases is on the defendant (*Roper v. Johnson* (1873) L.R. 8 C.P. 167) and in my opinion the Union has failed to discharge that burden.
>
> "It has also been suggested that the plaintiff, who has experience (but no professional qualifications) as an accountant, might set up in practice as such or, in the alternative, that he might grow tobacco on the farm he owns. As regards the first, I think that to go into practice even on the smallest scale would involve some outlay of capital, and a person entitled to damages is not required to lay out money in mitigation. As regards the second, the plaintiff said in evidence that he has let his farm on lease: he was not asked the term of the lease or whether it could be determined. Apart from these details, however, either of these enterprises would be, to some extent at least, hazardous and it would be quite impossible for this court, with no evidence before it, to estimate what profit, if any, might result. I cannot, therefore, give any weight to either of these suggestions in mitigation of damages."

The above passage sets out in an unexceptionable manner, to my mind, the principles that ought to be acted upon in assessing damages for wrongful dismissal, and applies them to the facts of the case. Learned counsel for the appellants, however, has submitted it to criticism.

First, he points out that the learned trial judge, while he relied, as we have seen, on a passage from the judgment in *Acklam v. Sentinel Insurance Co. Ltd.* (2) The Times, December 18, 1959, which favoured the respondent, wherein a relevant factor in assessing prospective earning capacity was declared to be the fact that

> "employers were not usually eager to employ a man who had brought an action against his former employer",

he failed to take into consideration, and to place on the other side of the scale, a further factor which was stated to be relevant in another passage from that same judgment, namely the possibility that, before the expiry of the period for which damages in lieu of lost salary were being claimed, the plaintiff

> "might have been run over by a bus and might have left the defendants' employ of his own accord."

The facts in *Acklam's case* (2), however, were very different from those now before us. In that case the plaintiff, who was wrongfully dismissed from employment in London, was described as a brilliant insurance salesman who obviously had an earning capacity; and he was claiming damages for eleven years prospective loss of salary, at the end of which period he would be sixty-five. Clearly the possibility of his death within eleven years, whether by being run over (a more serious risk in London than in Tanganyika) or from any other cause, was actuarially a far less negligible one than that of the

present respondent's death within four years; while the likelihood of so brilliant a salesman being tempted or able to desert his employers for more profitable employment in London or elsewhere was likewise far greater than that of the present respondent being able to do so in East Africa. In the present case both possibilities were, in my view, so unlikely as not to merit consideration by the learned trial judge, whose attention does not, in any case, appear to have been directed to them by the appellants.

Secondly, it is contended that, although the learned trial judge accepted the respondent's uncontradicted evidence that during the last few months he had been seeking other employment in vain, he ought to have taken into account the probability, or even the possibility, that during the remaining 3 1/2 years the respondent would obtain at least some employment, or set up as an accountant on his own. The answer to this contention, to my mind, is two-fold. To begin with, the whole matter was carefully considered by the learned trial judge, who in my opinion gave adequate reasons for holding that the likelihood of the respondent obtaining employment, having in view his age and his hitherto unsuccessful efforts to find it, was not such that he could properly allow for it in reducing the damages to be awarded. It was suggested for the appellants that the respondent, who was an unqualified accountant, could have set up as an accountant on his own, notwithstanding that this would have entailed an outlay of money on his part which was by no means certain of being wholly or even partly recouped by resultant earnings over the next 3 1/2 years. As to this, the learned trial judge's observation that "a person entitled to damages is not required to lay out money in mitigation" is a correct statement of the law. In *Jewelowski v. Propp* (3), [1944] 1 All E.R. 483, where a plaintiff was claiming damages for fraudulent misrepresentation, the principle was stated thus:

> "It is the plaintiff's duty, says counsel for the defendant, to minimise his damages, and counsel argued and said quite properly that in a case of wrongful dismissal the injured person cannot sit down and twiddle his thumbs and claim damages from the person who has wrongfully dismissed him. He must seek employment elsewhere, and, if he obtains it elsewhere, he must reduce the damages claimed from the person who has to pay, and the duty of a person to minimise his damages is a proposition which is well known and cannot be controverted. But, says counsel for the plaintiff, that does not mean a person has to expend money . . . It seems to me . . . that the argument of counsel for the plaintiff is right, namely, that a person cannot be called upon, when he has a claim for damages for fraudulent misrepresentation, to expend money in order to minimise those damages. It seems to me that such a rule would be going very far beyond the rule that a plaintiff has got to minimise his damages."

Secondly, as the learned trial judge rightly held, the burden of proving that suitable other employment was available to the respondent lay on the appellant. As Brett, J., observed in *Roper v. Johnson* (4) (1873), L.R. 8 C.P. 167 at p. 181 and p. 182, it is for the plaintiff to prove the damages to which he is prima facie entitled,

> "leaving it to the defendant to show circumstances which would entitle him to a mitigation."

This the appellants manifestly failed to do. They called no evidence at all to show that alternative employment was available, or was likely to be available, to the respondent. The respondent's own evidence showed that he had taken all reasonable steps to mitigate his damages by seeking other employment. That was the most that he was required to do, and the appellants did nothing to shake that evidence.

I would accordingly hold that the grounds of appeal concerned with prospective earnings elsewhere and with mitigation of damages must fail; and I turn to the remaining ground of appeal, in which it is urged that the figure awarded as damages ought to have been reduced in view of the incidence of income tax, following the rule in *British Transport Commission v. Gourley* (1).

That rule was explained and applied by this court recently in *Bwavu Mpologoma Growers' Co-operative Union Ltd. v. Gasston and Barbour and Others* (5), [1959] E.A. 307 (C.A.) at p. 315 and p. 316. Briefly, the learned trial judge, under the rule, ought to have deducted from the damages awarded in lieu of the lost emoluments the amount of income tax to which they would have been subject, unless those damages themselves would be liable to income tax. The learned judge held that the damages would be taxable, and accordingly declined to make the deduction. The question before us is whether he was right in holding the damages to be taxable. In so holding, he relied on s. 5 of the East African Income Tax (Management) Act, 1958, which applies in Tanganyika Territory. The particular provision of the section on which he relied is not stated in the judgment, but it is clear that it must be para. (*c*) of sub-s. (2). Under s. 3 (1) (*a*) of the Act, tax is chargeable in respect of "gains or profits" from "any employment or services rendered". By s. 5 (2) (*c*) such "gains or profits" are defined to include:

> "(*c*) any amount received as compensation for the termination of any contract of employment or service, whether or not provision is made in such contract for the payment of such compensation:"

There follow three provisos which are irrelevant.

The sole question before us is whether the word "compensation" in the above paragraph can be held to include damages; for damages cannot in any case be taxable until actually recovered by and paid to a plaintiff, and, once recovered, they will undoubtedly have been "received" by him within the meaning of the paragraph, notwithstanding a submission advanced for the appellants to the contrary. Two English cases have been cited to us for the appellants where it was held that, under the English Income Tax Act, 1918, damages awarded for wrongful dismissal are not taxable as income, whether under Sch. E, r. 1, of the Act or any other provision of it, on the ground that such damages are not income but are capital gains. Those two decisions are *Du Cros v. Ryall* (6) (1935), 19 T.C. 444, and *Henley v. Murray* (7), [1950] 1 All E.R. 908. In the former case the action was compromised, and the defendant company paid a sum to the plaintiff as "agreed damages". These were held to be not taxable, in that the sum was capital and not income. The later case was concerned with agreed compensation paid to the plaintiff without action brought, upon the abrogation of his contract of employment, as representing the prospective salary that he would have drawn under that contract. This too was declared to be capital and not income. In both cases it was clearly laid down, indeed in *Henley v. Murray* (7) it was conceded, that damages for wrongful dismissal, whether they be at an agreed figure or at one assessed by the court, are a capital sum, and as such not taxable under the English Act. If those decisions were authorities governing cases falling under the East African Income Tax (Management) Act, 1958, the position would be unarguable. But they are not. For the English Act contains no provision corresponding even approximately to para. (*c*) of s. 5 (2) of the East African Act. We are therefore thrown back upon the question whether, in construing that paragraph, the word "compensation" ought to be construed as including damages.

One contention advanced on the appellants' behalf may be disposed of at the outset. It is urged that, since the meaning of the word "compensation"

admits of some doubt, para. (*c*) should be construed so as not to include as "income" something which, but for it, would clearly (on the authority of the English decisions) be capital. The answer to this, as I see it, is, first, that the legislature is quite free to enact that anything which, but for its provisions, would be capital, shall be deemed to be taxable as income; and secondly, that para. (*c*) does beyond argument provide that something which, on the English authorities, would be capital, shall be so taxable, namely compensation (not being damages) for the termination of a contract of employment, whether or not provision is made in the contract for the payment of such compensation. It was just such compensation, as we have seen, which was declared in *Henley v. Murray* (7) to be capital. Therefore para. (*c*) has already on the face of it provided that something which would otherwise be untaxable as capital shall be deemed to be taxable as income. To hold that its provisions extend a little further in this direction than is conceded by the appellants would not, therefore, bring about a result that we cannot assume the legislature to have contemplated. We are accordingly free to construe the word "compensation" without any such initial bias, and to decide whether upon the ordinary meaning of the word it would include damages. And if damages are a form of compensation, that is to say if "compensation" is the wider term, embracing (among other things) damages then it is not necessary that the words "or damages" should appear in para. (*c*) after the word "compensation" in order that damages should be covered by the paragraph.

Construing "compensation" with these things in mind, it appears to me that the word does include damages. That damages are in their essence compensation for loss or injury is a legal common-place; and this is also the ordinary meaning of the word. "Damages" are defined in the Shorter Oxford English Dictionary as "the sum claimed or awarded in compensation for loss or injury sustained". Both in Byrne's Law Dictionary and in Jowitt's Dictionary of English Law the word is defined, following (it would seem) a passage in Coke Upon Littleton, as

> "money adjudged to be paid by one person to another as compensation for a loss sustained by the latter in consequence of an injury committed by the former".

And in Arnold on Damages and Compensation (2nd Edn.) they are defined as

> "the pecuniary compensation or satisfaction which a plaintiff can recover by process of law, in respect of injury sustained through the act or default of a defendant. . .".

Nor is there anything in the context of para. (*c*) of s. 5 (2) to rebut the presumption that "compensation" is intended to include what by accepted and legal definition it does include, namely the kind of compensation known as damages. Rather the contrary. For the paragraph, on the face of it, would clearly cover compensation agreed between parties, out of court, to be paid upon the unwarranted termination of a contract of employment, such as was paid in *Henley v. Murray* (7). And the paragraph expressly covers such a payment even where the contract makes no provision for compensation. If an action for the compensation were instituted, the only difference would be that the compensation would then be called "damages". If such damages were agreed during the hearing, and the case settled out of court, there would be nothing inherently different in the nature of what was paid, from the payment in the first imagined case, namely payment without any suit having been filed. Nor, to take the examples one stage further, would there be any inherent difference between the second imagined case, where what was paid would be called "agreed damages", and a case where the suit was tried to its conclusion and the sum was awarded by the court.

In short, the word "compensation" includes on the face of it "damages" which are a particular kind of compensation. There is nothing to justify a presumption that the legislature intended to give the word a narrower meaning, and thereby to draw a vital distinction, as regards taxability, between any of the three categories of cases that I have postulated. I would accordingly hold, in agreement with the learned trial judge, that the damages for wrongful dismissal awarded by him in the present case would be liable to taxation under s. 5 (2) (*c*) of the East African Income Tax (Management) Act, 1958, and that accordingly no deduction should have been made by him to represent the tax which the respondent would have paid on the four years salary for the loss of which those damages were awarded.

For these reasons I would dismiss this appeal with costs.

Sir Alastair Forbes VP: I agree and have nothing to add. The appeal is dismissed with costs.

Gould JA: I also agree.

Appeal dismissed.

For the appellants:
George N. Houry & Co., Dar-es-Salaam
K. A. Master, Q.C., and *J. B. Patel*

For the respondent:
Fraser Murray Thornton & Co., Dar-es-Salaam
W. D. Fraser Murray

Alibhai Karmal Kara v The Administrator-General
[1960] 1 EA 497 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	16 April 1960
Case Number:	123/1959
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] Limitation of action – Debt – Claim against deceased's estate – Revival of debt – Acknowledgment – Whether twelve years period of limitation in art. 132 *of Indian Limitation Act,* 1908 *applies to personal relief or only to relief against property mortgaged – Whether an entry of a time-barred debt in an estate duty affidavit constitutes a promise to pay so as to revive debt – Whether an unaccepted offer by administratrix to transfer plot of land in settlement of debt constitutes a promise to pay – Indian Contract Act,* 1872, *s.* 25 (3) *– Indian Limitation Act,* 1908, *s.* 19, *art.* 132.

Editor's Summary

At his death on March 18, 1954, the deceased owed the plaintiff Shs. 28,200/- made up of a number of loans of money to the deceased by the plaintiff and supported by promissory notes executed contemporaneously with the loans. On September 28, 1957, when administration of the deceased's estate had been taken over by the Administrator-General from the widow the plaintiff lodged his claim in respect of these loans. The claim was rejected by the Administrator-General on the ground that it was time-barred. The plaintiff then sued under s. 27 (3) of the Administrator-General's Ordinance to enforce his claim. It was contended for the plaintiff that one loan was not time-barred as the deceased had by letter acknowledged the loan and purported to secure it on immovable property therein mentioned and so the loan was governed by art. 132 of the Indian Limitation Act 1908, whereunder the period of limitation is twelve years. It was also said that all the loans even if they had become time-barred were revived under s. 25 (3) of the Indian Contract Act 1872 firstly by virtue of such indebtedness having been entered on an estate duty affidavit made and filed by the widow of the deceased as administratrix of the estate on November 6, 1955, and secondly, by an offer, made by the advocates for the administratrix

in their letter of January 15, 1957, to the plaintiff's advocates, to transfer a plot of land in full settlement of the plaintiff's claim against the deceased's estate.

Held –

(i) article 132 of the Indian Limitation Act applies only to the relief against the property mortgaged and not to the personal relief against the mortgagor and since the remedy sought to enforce the debt against the deceased's estate was personal, art. 132 was not applicable.

(ii) the entry of time-barred indebtedness in an estate duty affidavit required by statute could not constitute a promise to pay such indebtedness within s. 25 (3) of the Indian Contract Act so as to revive such indebtedness.

(iii) the offer to transfer a plot of land in full settlement of the indebtedness was a conditional promise and unless such condition was fulfilled and the offer accepted, it did not constitute a promise to pay the indebtedness within the meaning of s. 25 (3) of the Act so as to revive the indebtedness.

Action dismissed.

Cases referred to in judgment:

(1) *Ganesh Lal Pandit v. Khetramoham Mahapatra* (1926), 5 Pat. 585.

(2) *Miller v. Runga Nath Moulick* (1885), 12 Cal. 389.

(3) *Chela Ram-Sant Ram v. Official Receiver, Rawalpindi* (1937), 18 Lah. 562.

(4) *W. P. Keen v. Administrator-General* (unreported) quoted in Henderson on the Law of Succession (5th Edn.) at p. 548.

(5) *Re Wolmershausen; Wolmershausen v. Wolmershausen* (1890), 62 L.T. 541.

(6) *Ballapragada Ramamurthy v. Thammana Gapavya* (1917), 40 Mad. 701.

(7) *Watson v. Yates* (1887), 11 Bom. 580.

(8) *Soore Venkatappayya v. Yalavarthi Venkatappayya* (1946), A.I.R. Mad. 72.

Judgment

Biron Ag J: The plaintiff is claiming from the Administrator-General as the administrator of the estate of Nurmohamed Abdulkarim Rahim Lilani, deceased, Shs. 47,094/- due as at the date of the filing of the suit and interest thereon after such date. It is not disputed that the deceased borrowed from the plaintiff a total sum of Shs. 28,200/- in various amounts over the period from February 27th, 1952, to November 4th, 1952, the loans being supported by promissory notes executed contemporaneously with the loans. According to the plaintiff the loans were to bear interest at 1 per cent. per mensem.

The deceased died on March 18, 1954. Letters of Administration were granted to his widow on December 21, 1956. At some subsequent stage the administration of the estate passed into the hands of the Administrator-General. On September 28, 1957, the plaintiff lodged his claim with the Administrator-General. The claim was rejected by the Administrator-General on the grounds that it was time-barred. This suit has accordingly been filed, apparently in accordance with s. 27 (3) of the

Administrator-General's Ordinance (Cap. 27), now, in the Revised Laws, s. 28 (3), which reads:

> "No notice of any claim which has been sent in and has been rejected or disallowed in part by the Administrator-General shall affect him, unless proceedings to enforce such claim are commenced within two months after notice of rejection or disallowance of such claim has been given and unless proceedings are prosecuted without unreasonable delay."

In the plaint the plaintiff contended that his claim was not time-barred on the ground that there was a fresh promise to pay the debt contained in a letter from the administratrix of the estate dated March 12, 1956, a copy of which is

annexed to the plaint as Annexure C. At the hearing of this case Mr. Vellani, for the plaintiff, has based his claim that the debt is not time-barred on three grounds, and I propose to deal with them seriatim.

The first ground with which I propose to deal is Mr. Vellani's contention that the loans should be treated as money charged on immovable property and so governed by art. 132 of the Indian Limitation Act, 1908, whereunder the period of limitation is twelve years. This contention is based on a letter in Gujerati from the deceased to the plaintiff, the agreed translation of which reads as follows:

> "To wit I have taken from you Shs. 3,000/- in words three thousand on a Promissory Note on interest for which I give in writing that our two Freehold plots situated at Bagamoyo first Registration No. 1381 square feet 4,672 and second first Registration 1382 square feet 8,568 and that I am not to sell or mortgage them till your money is not paid. The two plans of above (mentioned) two plots are herewith (attached)."

Mr. Vellani submits that this constitutes a promise to create a mortgage in favour of the plaintiff. Mr. Vellani is not suggesting that an equitable mortgage has been created by the deposit of title deeds, but he submits that it should be treated as such, as the plaintiff could in equity have enforced the promise. Even if this document could be so construed and an equitable mortgage is created thereby, the amount secured is only Shs. 3,000/-, which was an individual loan on February 27, 1952. Further, even if the loan for this amount could be treated as payment of money charged upon immovable property, or as an advance secured by an equitable mortgage, it is abundantly clear from the authorities that the period of twelve years limitation does not apply to the personal remedy against the mortgagor, but only as against the mortgaged property. And a suit for personal relief against this mortgagor, as this case is, is subject to the ordinary period for such personal relief, in this case, three years, whether under art. 57, "for money payable for money lent", or under art. 73, "on a bill of exchange or promissory note". There are numerous authorities for this proposition and I need cite only one. In *Ganesh Lal Pandit v. Khetramoham Mahapatra* (1) (1926), 5 Pat. 585, the relevant part of the headnote to which reads:

> "A suit to enforce a personal covenant in a mortgage deed is not one 'to enforce payment of money charged upon immovable property' within the Indian Limitation Act, 1877, Sch. 2, art. 132."

The Judicial Committee of the Privy Council quoted with approval a judgment of the High Court of Calcutta in *Miller v. Runga Nath Moulick* (2) (1885), 12 Cal. 389 as follows:

> "We are of opinion that the decision of the lower court upon this question of limitation is correct. The contention of the learned counsel for the appellant that art. 132 of Sch. II of the Limitation Act of 1877, refers to a claim to recover money charged upon immovable property quite irrespective of the remedy asked for, has been set at rest by the decision of the Judicial Committee of the Privy Council in the case of *Ramdin v. Kalka Pershad*. That decision was passed with reference to the corresponding article of the Limitation Act of 1871. That article provides a period of twelve years for suits of money charged upon immovable property. The Legislature in the present Limitation Act has used a different phraseology, viz.: 'to enforce payment of money charged upon immovable property'. The language of the present Act, viz: 'to enforce, etc.' is more in favour of the contention that the article in question refers only to suits 'to enforce payment of money charged upon immovable property' by the sale of the said property. This construction was put by the Judicial Committee of the

> Privy Council upon art. 132 of the Limitation Act of 1871, the language of which did not suggest it so clearly as that of the present Limitation Act. The claim to make the defendants personally liable has therefore been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action."

In this instant case the land in question was actually disposed of by the deceased and the remedy sought against the deceased's estate is the personal one in respect of which, as is abundantly clear from the authorities, the period of limitation is three years. The first ground of the plaintiff's claim is accordingly rejected as being without substance.

The second ground is based on two documents which Mr. Vellani submits contain a promise to pay within the meaning of s. 25 (3) of the Indian Contract Act, which reads:

> "An agreement made without consideration is void, unless –
>
>
>
> "(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law of limitation of suits.
>
> "In any of these cases, such an agreement is a contract."

The two documents are, first, a letter written by the administratrix's advocates to the plaintiff's advocates dated March 12, 1956, and an Estate Duty affidavit. The letter reads as follows:

> "Mr. Ali Karmali, 12th March, 1956.
>
> Dar-es-Salaam.
>
> Dear Sir,
>
> re: *The Estate of Noormohamed A. R. Lilani*
>
> We are instructed by Mrs. Mariambai Noormohamed Lilani to request you to forward to us any supporting document you may have in respect of the debt due to you by the above-named deceased. Our client will be petitioning the court for the grant of Letters of Administration to her and as such has also submitted the Estate Duty Affidavit.
>
> The Estate Duty Commissioners are not recognizing the various debts due by the said deceased as mentioned in the affidavit unless they have supporting documents of the debts. Unless the supporting documents are forthcoming shortly an arbitrary assessment will be made.
>
> We shall therefore be glad to receive the required supporting documents soon. We undertake to hold them in trust for you.
>
> Yours faithfully,
>
> G. Kaderbhoy & Ali."

Although at the date of this letter, Letters of Administration had not in fact as yet been granted to the widow, I am quite prepared to treat her as administratrix and authorized to deal with the estate. The Estate Duty affidavit, in the section headed "An account of debts due and owing by the deceased . . ." sets out the name of the plaintiff and the amount owing to him as Shs. 28,200/-. Mr. Vellani's contention is that these documents contain a promise to pay the debt. A promise must be distinguished from an acknowledgment, as to quote from Pollock and Mulla on the Indian Contract Act, (6th Edn.) at p. 203:

> "The distinction between an acknowledgment under s. 19 of the Limitation Act and a 'promise' within the meaning of this section is of great importance. Both an acknowledgment and a promise are required to be in writing signed by the party or his agent authorized in that behalf; and both have the effect of creating a fresh starting point of limitation. But while an acknowledgment under the Limitation Act is required to be made before the expiration of the period of limitation, a promise under this section to pay a debt may be made after the limitation period. After the period of limitation expires, nothing short of an express promise will provide a fresh period of limitation. The question occasionally arises whether a writing relating to a barred debt amounts to an acknowledgment or to a promise. Here the court must consider the language of the particular document before it in every case. If it amounts to an acknowledgment, the writing could not avail the plaintiff under this section; but it is otherwise where it amounts to a promise."

Mr. Vellani argues, somewhat ingeniously, that by submitting such affidavit and in consequence receiving the Estate Duty Commissioners' certificate, without which a grant of Letters of Administration would not be made, an agreement is thus created between the Estate Duty Commissioners and the administratix and by such agreement the administratrix undertook or promised to pay the debts due to the creditors in general and, for the purposes of this case, to the plaintiff in particular. Mr. Vellani further submits that although the plaintiff was not a party to such agreement he can sue as a third party for the benefit promised to him in such agreement and he has cited Indian cases in support of such contention. I do not consider it necessary to examine the law on these contentions, as I fail to see how a promise to pay can be extracted from either the letter referred to, or from the affidavit. There was a statutory duty on the administratrix to complete such affidavit and in order to do so to obtain the requisite particulars. Section 15 of the Estate Duty Ordinance (Cap. 187) reads:

> "(1) It shall be the duty of the executors of the deceased as soon as possible after the death to ascertain the particulars and principal value of the estate of the deceased, and to make and deliver to the Commissioners an affidavit in the prescribed form (in this Ordinance referred to as an 'estate duty affidavit') giving such particulars and value so far as known to him, and from time to time to make and deliver to the Commissioners any further estate duty affidavit which may be necessary to supplement any omission from or mistake in any previous estate duty affidavit: Provided that the Commissioners may, if they think fit, accept a statement as a correction of an estate duty affidavit, without requiring that statement to be verified on oath.
>
> "(2) Any executor who wilfully fails to perform any duty imposed on him by this section or who fails to make and deliver an estate duty affidavit within fourteen days after service of a notice from the Commissioners requiring him so to do shall be guilty of an offence against this Ordinance."

By s. 2 of the Ordinance:

> "'Executor' means the executor or administrator of a deceased person and includes, as regards any obligation under this Ordinance, any person who takes possession of or intermeddles with the personal property of a deceased person."

I therefore fail to see how a promise to pay can be extracted from a statement made under a statutory duty on a form duly prescribed by such statute and which form, the affidavit, incidentally, shows the estate to be insolvent. A case in

point is *Chela Ram-Sant Ram v. Official Receiver, Rawalpindi* (3) (1937), 18 Lah. 562, where:

> "In 1933 Manhk Chand" (I am quoting from the headnote) "applied to be declared an insolvent and in the Schedule of his creditors he mentioned the judgment-debtor Chela Ram-Sant Ram, execution of which was by then admittedly barred by time. The Official Receiver and the lower courts rejected the contention of Chela Ram-Sant Ram, that the entry in the Schedule, being an unconditional acknowledgment, implied a promise to pay and brought the case within s. 25 (3) of the Indian Contract Act."

In his judgment Dalip Singh, J., stated (at p. 565):

> "There can be no doubt that under the Privy Council ruling, *Maniram Seth v. Seth Rup Chand*, every acknowledgment implies a promise to pay and, therefore, but for the Statute might form a cause of action. But the Statute has laid down that such an agreement is void, unless the agreement is a promise which is made in writing and signed by the debtor. Whatever might have been the reasons which induced the Legislature to make this distinction, it is clear to my mind that the distinction exists. Where a debt is not time-barred, an unconditional acknowledgment implying as it does a promise to pay, may both serve to extend limitation under s. 19 of the Limitation Act or may be the basis for a suit as giving a fresh cause of action. But where a debt is already time-barred, then the Legislature lays down that the agreement or promise must be in writing. Now, as I understand the words of the section, this means not that the words 'I promise to pay' should occur in writing but it does mean that the words read as a whole should by themselves express a promise to pay. When they do this, there is a fresh cause of action within s. 25 (3) of the Contract Act. But it cannot be held that a mere acknowledgment, however unconditional, amounts to an express promise to pay. If the writing is merely an acknowledgment, ex-hypothesi it shows that the words by themselves do not amount to a promise to pay. The mere fact that the law implies a promise to pay in an unconditional acknowledgment is not the same thing as saying that the words by themselves amount to a promise to pay. Section 25 (3) in my opinion, clearly lays down that the promise must be in writing, not that some words which do not by themselves amount to a promise, but in which the law implies a promise, shall be sufficient to constitute a fresh cause of action.
>
> "In this case there can be no doubt that the mere mention of a debt in the schedule of creditors cannot amount to anything more than a mere acknowledgment. It cannot by any stretch of language be held to contain in itself a promise to pay."

A case more to the point, as the acknowledgment was by an administrator is that of *W. P. Keen v. Administrator-General* (4) (unreported), quoted in Henderson on the Law of Succession (5th Edn.) at p. 548. In that case:

> "It was held in the course of proceedings in the suit that where an estate was insolvent an administrator had no discretion to admit a barred debt, and that the mere fact of referring to a debt in a petition for a grant, was not a sufficient acknowledgment to give a fresh period of limitation."

Mr. Vellani expressed himself as somewhat sceptical of this unreported case. There is, however, to my mind, a much stronger authority in the English case of *Re Wolmershausen: Wolmershausen v. Wolmershausen* (5) (1890), 62 L.T. 541. In that case it was contended that the entry of the creditor's name and the amount owing in an affidavit made in reference to the claims of creditors of the estate, constituted an acknowledgment to take the case out of the statute of limitation. Stirling, J. in his judgment stated, (at p. 544):

> "It was in the first instance contended that the affidavit of the defendant of March 13, 1880, was a sufficient acknowledgment in writing to take the case out of the statute. Such an acknowledgment must however be one from which a promise to pay can be implied; but when exhibit A to the affidavit is examined it seems impossible to infer from such acknowledgment as is contained in the affidavit a promise to pay the whole of the £6,000 or such part of that sum as was due on the promissory note of July 29, 1871."

In that case it was held that such statement did not even constitute an acknowledgment. However, that was according to English law wherein an acknowledgment to take a case out of the statute must contain a promise, express or implied, to pay. Under Indian law such statement would constitute an acknowledgment under s. 19 of the Indian Limitation Act. But such acknowledgment to be effective must be made within the statutory period of limitation. It is of no effect if made when the debt is time-barred. The letter relied on by the plaintiff does constitute an acknowledgment within s. 19 of the Act as expressly conceded by the Administrator-General in his letter to the plaintiff rejecting the claim, but this letter is dated March 12, 1956, more than three years after the debts were contracted and the promissory notes executed, the last of which was on November 4, 1952. The affidavit likewise is dated November 6, 1955, also more than three years after the last of the loans. This ground therefore also fails.

It was further submitted by Mr. Vellani that the entry of the indebtedness of Shs. 28,200/- to the plaintiff constitutes an admission by the administratrix that interest on the loans had been paid up to the death of the deceased in March, 1954. Therefore the payment of interest would prevent the time from running until from the date of the last payment, which was some time in March, 1954. The plaintiff's claim would consequently be taken out of the statute by the acknowledgment of the indebtedness in the letter dated March 12, 1956, and in the Estate Duty affidavit. When this case commenced the plaintiff and two witnesses called by him gave direct evidence as to the payment of interest by the deceased. However, the claim that the time was prevented from running by this payment of interest was, at a later stage of the trial, specifically, and I may add categorically, abandoned by Mr. Vellani. Mr. Vellani, however, has since contended that he did not abandon the ground of the payment of interest completely, but only such ground as established in the evidence of the plaintiff and his witnesses, but he does not abandon the payment of interest as a ground for preventing the time from running in so far as such payment is proved or admitted by the administratrix. I must confess that like Mr. Dastur, who appeared for the Administrator-General, I was under the impression and so understood Mr. Vellani, that he was abandoning unequivocally the claim that the indebtedness was taken out of the statute by the payment of interest. Be that as it may, I fail to see how the entry of the figure of Shs. 28,200/- as the plaintiff's claim on the affidavit, which was the capital advanced, constitutes an admission that interest was paid and received until the death of the deceased. It could, I think, be equally well attributed to a repudiation of interest or to some other factor and does not necessarily constitute an admission that interest was in fact paid. Accordingly this ground set up by the plaintiff also fails.

The third and last ground on which the plaintiff relies is based on a letter written by the administratix's advocates to the plaintiff's advocates. This letter, dated January 15, 1957, a copy of which has by agreement been produced and exhibited (exhibit E) reads as follows:

> "Messrs. Vellani & Company, 15th January, 1957.
>
> Advocates,
>
> P.O. Box 527,
>
> Dar-es-Salaam.

Dear Sirs,

Re: *Ali Karmali and the Estate of the late Noormohamed A. R. Lilani*

We are instructed by Mariambai N. Lilani, the Administratrix of the above estate to state that she is willing to transfer the freehold land registered under title No. 8634, free from encumbrances (in Bagamoyo) in full settlement of your client's claim against the above estate.

As soon as you confirm the above, necessary arrangements would be made to obtain court's consent to transfer the said land.

Yours faithfully,

G. Kaderbhoy, Ali & Lilani."

It is submitted by learned counsel for the plaintiff that this constitutes an express promise to pay the plaintiff's claim and as such it would take the claim out of the statute under s. 25 (3) of the Indian Contract Act. Mr. Dastur again contends that this does not constitute an express promise and further it is not an offer to pay the whole debt as the land offered, according to the plaintiff himself, was worth only Shs. 6,000/- to Shs. 7,000/-. Even so, if otherwise valid as an unqualified promise, it would be sufficient to take the claim out of the statute even if it were construed as only a promise to pay part of the debt. I am quite prepared to hold that this letter constitutes an express promise to settle or satisfy the claim by the transfer of the land. It is not, however, an unconditional promise to pay, but a conditional promise, that is, conditional on the plaintiff accepting this land in full settlement of his claim. There is abundant authority that where a conditional promise is made, the debtor is not bound by such promise unless the condition is fulfilled. In this case the condition was that the land offered was accepted in full settlement for the debt. It was not so accepted but rejected by the plaintiff, as specifically stated by him in his affidavit produced as exhibit D. Authorities to the point are *Ballapragada Ramamurthy v. Thammana Gapavya* (6) (1917), 40 Mad. 701, where it was held:

"That where there is a promise to pay on a condition, that condition, in order that the promise may operate as an acknowledgment, must be fulfilled."

It is stated in the judgment (at p. 704):

"In cases of conditional acknowledgments of liability the law is clear that where there is a promise to pay on a condition, that condition in order that the promise may operate as an acknowledgment, must be fulfilled. In *In re River Steamer Company* which has been approved of by their lordships of the Privy Council in *Maniram Seth v. Seth Rupohand*, Lord Justice Mellish observed that in order to take the case out of the statute of limitation, there must either be an acknowledgment of the debt from which a promise to pay may be implied, or an unconditional promise to pay the debt, or a conditional promise to pay the debt and evidence that the condition has been performed. This case was referred to and followed in *Arunachella Row v. Rangiah Appa Row* where Subrahmanya Ayyar And Benson, JJ, were of opinion that the English and Indian Law are the same as regards conditional promises and that an acknowledgment of a conditional liability would not give a fresh start so long as the condition remained unfulfilled."

In *Watson v. Yates* (7) (1887), 11 Bom. 580, it was held, and I quote from the headnote:

"Where the defendant, after his debt had become barred by limitation, wrote as follows to his creditors in reply to a demand for payment: 'I bear the matter in mind, and will do my utmost to repay this money as soon as I possibly can.'

> "Held that this promise by the defendant was only a conditional promise, viz: to pay when he was able; and the plaintiff having failed to prove the defendant's ability to pay, the promise did not operate, and the plaintiff could not recover."

In *Soore Venkatappayya v. Yalavarthi Venkatappayya* (8) (1946), A.I.R. Mad. 72, where the creditor refused the debtor's offer to pay at the rate of 7 annas in the rupee if he was granted four months' time, it was held:

> "That s. 25 (3) was based on an agreement. As the plaintiff had refused the defendant's offer there was no agreement and hence the offer could not be made the basis of a claim under s. 25 (3)."

Further cases are quoted in Pollock and Mulla on the Indian Contract Act, at p. 205. In this instant case, as the offer was rejected by the plaintiff the condition was not fulfilled. The estate is therefore not bound by such offer or promise. This third ground relied on by the plaintiff thus also fails.

In the circumstances the plaintiff's claim must fail on the grounds that it is time-barred, and it is accordingly dismissed with costs to the defendant.

Action dismissed.

For the plaintiff:
Vellani & Co., Dar-es-Salaam
R. B. Vellani

For the defendant:
P. R. Dastur, Dar-es-Salaam

The Attorney-General v Khatoon Cassam Satchu and another
[1960] 1 EA 505 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	24 June 1960
Case Number:	262/1960
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Practice – Sealing – Sealing of court documents – Court order bearing ink impression of rubber stamp in place of embossed seal of court – Whether rubber stamp impression can be regarded as a seal of court – Meaning of "sealed with the seal of the court" – Validity of the order of court – Indian Code of Civil Procedure, 1908, *O.* 21, *r*. 24 – *Designs for Seals and Stamps Order, r*. 3 (*T*.).

Editor's Summary

The district court, Dar-es-Salaam, caused to be served on the appellants an order for the attachment of the salary of employee of the appellants. The order was in the prescribed form but bore no embossed impression indicating its authenticity but merely had thereon an ink impression of a rubber stamp bearing the words “Subordinate Court” and “Tanganyika”. Subsequently the appellants were charged with disobeying the said order contrary to s. 124 of the Penal Code, and the magistrate upheld the defence submission that there was no case to answer on the ground that the order for attachment of salary was not properly sealed in accordance with Indian Code of Civil Procedure, O. 21, r. 24. The Crown appealed by way of case stated under s. 333 of the Criminal Procedure Code.

Held – in the absence of any mechanical apparatus for the sealing of documents, a stamp such as was used on the order for attachment was sufficient to satisfy the requirements of O. 21, r. 24, of the Indian Code of Civil Procedure and accordingly the order for attachment of salary was valid.

Appeal allowed.

Cases referred to in judgment:

(1) *Re Smith Oswell v. Shepherd* (1892), 67 L.T. 64.

(2) *Re Sandilands sub nom Re Mayer* (1871), 24 L.T. 273; (1871) L.R. 6 C.P. 411.

(3) *R. v. The Inhabitants of St. Paul, Covent Garden*, 115 E.R. 476.

(4) *Sprange v. Bernard*, 29 E.R. 320.

(5) *Doe d. Duncan v. Edwards*, 48 R.R. 588; 112 E.R. 1322.

(6) *Re Court Bureau Co. Ltd*., [1891] W.N. 9.

(7) *R. v. Garrett Pegge and Others* (1911), 104 L.T. 649.

Judgment

Mosdell J: This is a case stated by the learned resident magistrate in the district court of Dar-es-Salaam, the facts being sufficiently stated therein. The Attorney-General requires to be submitted for the opinion of the High Court the following question of law: What meaning is to be attached to the words "sealed with the seal of the court" appearing in O. 21, r. 24 of the Civil Procedure Code, and in particular whether the order issued in Civil Case No. 63 of 1955 by the senior resident magistrate, Dar-es-Salaam, on July 2, 1955, requiring the abovenamed respondents to attach the salary of one G. P. Bhimji, their employee, was illegal.

As I pointed out to Mr. MacDonagh for the Attorney-General I regard myself as being confined to the first part of the question and I do not propose to consider the second part, namely whether the order for the attachment of the salary of Bhimji was illegal, if by that is meant illegal on grounds other than the invalidity of the purported seal, as the latter question does not arise out of the criminal proceedings in the district court. The question of the legality or otherwise of the order of attachment on grounds other than those affecting the propriety of the purported sealing of it was not raised in the lower court and formed no part of the learned resident magistrate's decision in holding that the respondents had no case to answer.

Under O. 21, r. 24 of the Civil Procedure Code it is clear that an order for the attachment of a salary is required "to be sealed with the seal of the court". The order for the attachment of Bhimji's salary, which the respondents were charged in the lower court with disobeying, was in the prescribed form but bore no embossed impression indicating its authenticity, but merely had thereon an ink impression of a rubber stamp bearing the words "Subordinate Court" and "Tanganyika" round the circumference and in the centre thereof "Dar-es-Salaam". The question here is, can the said order be deemed to have been sealed with the seal of the court as required by O. 21, r. 24, because authorities show that the requirements of this rule as to sealing are mandatory and unless complied with the order of attachment is illegal.

The authorities would seem to show that, at any rate in so far as deeds are concerned, an actual wax or wafer seal or an embossing is not necessary when a deed is stated to have been "sealed". In *Re Smith Oswell v. Shepherd* (1) (1892), 67 L.T. 64 Bowen, L.J., at p. 66 said:

> "A seal need not consist of wax nor of a wafer. It may be a mark affixed to the document. As was said by Byles, J., in the case which has been referred to of *Re Sandilands* 24 L.T. Rep. N.S. 273; L.R. 6 C.P. 411,

413 the sealing of a deed may be done by the end of a ruler or anything else. So long as it takes the place of a seal that will do."

Re Sandilands (2) (1871), L.R. 6 C.P. 411 a case of 1870, to which Bowen, L.J., referred was an exceptional case, and in Stroud's Judicial Dictionary, (3rd Edn.) Vol. 4 at p. 2682 under the heading "Seal (Deed)" it is referred to in the following terms:

> "In *Re Sandilands* it was held that a deed was proved to have been 'sealed' though no seal was affixed to it because pieces of ribbon were inserted in the parchment opposite to the signatures on which seals were to have been put and the attestation clause stated the deed to have been 'signed, sealed and delivered', but when cited that case seems always to be distinguished as an exceptional application of an undoubted principle. (See *National Provincial Bank v. Jackson* 33 Ch. D. 1, *Re Balkis* 58 L.T. 300, *Re Smith* 67 L.T. 64)."

Nevertheless in *Re Sandilands* (2) Bovill, C.J., said at p. 413:

> "I think there is prima facie evidence that this deed was sealed at the time of its execution and acknowledgment by the parties. To constitute a sealing neither wax nor wafer nor a piece of paper nor even an impression is necessary. Here is something attached to this deed which may have been intended for a seal but which from its nature is incapable of retaining an impression. Coupled with the attestation in the certificate I think we are justified in granting the application that the deed and other documents may be received and filed by the proper officer pursuant to the statute",

and in the same case Byles, J., said:

> "I am of the same opinion. The sealing of a deed need not be by means of a seal, it may be done with the end of a ruler or anything else. Nor is it necessary that wax should be used. The attestation clause says that the deed was signed, sealed and delivered by the several parties and the certificate of the two special commissioners says that the deed was produced before them and that the married women 'acknowledged the same to be their respective acts and deeds'. I think there was prima facie evidence that the deed was sealed."

Other cases support the submission of Mr. MacDonagh concerning deeds including *R. v. The Inhabitants of St. Paul, Covent Garden* (3), 115 E.R. 476, and *Sprange v. Bernard* (4), 29 E.R. 320, but the question is, is there a distinction to be drawn between deeds and documents requiring to be sealed with the seal of a court? Mr. MacDonagh submitted that there was not. Mr. Lockhart-Smith, for the respondents, submitted that there was, although he could cite no authority. He submitted that from time immemorial the seal of a court has meant a seal such as that of the High Court at present in use.

Authority on what can be regarded as seal of a court is very sparse. Two cases appear to have some bearing on the issue, though they are not wholly in point. One was mentioned by Mr. MacDonagh and is *Doe d. Duncan v. Edwards* (5), 48 R.R. 588, but this case appears to be an authority merely for the proposition that where a seal purports to be that of a court judicial notice will be taken that it is so. The other case is *Re Court Bureau Co. Ltd.* (6) [1891] W.N. 9. In the latter case new general rules had been made pursuant to the Companies (Winding Up) Act 1890 and r. 35 thereof provided that every petition, unless presented by the company, should be served in one of the places and upon one of the persons specified in the rule. The appendix to the rules gives, in No. 14 and No. 15, the forms of the affidavits of service of the petition to be made in the cases therein specified, and in each of these forms the deponent purports to swear that he has served a copy of the petition "duly sealed with the seal of the court", and in each case the affidavit concludes with the statement "A sealed copy of the said petition is hereunto annexed". By the interpretation rules, in r. 2 the term "sealed" means "sealed with the seal of the court". An application was made to the court for the petitioner in the matter for direction as to what seal was to be used, or for leave to omit the words referring to sealing from the affidavit. Counsel for the petitioner said that upon application

on behalf of the petitioner at the Registrar's office to seal a copy of the petition with the seal of the court the applicant was informed that there was no such seal and that the only stamps in use were the Registrar's stamp and the entry clerk's stamp. The difficulty had probably arisen from the adoption of a form similar to that in use in the Court of Bankruptcy, which court was possessed of a seal. Stirling, J., said that he could not direct the omission of the words from the affidavit, but that in his opinion as there was at present no seal of the court the omission of the words would not vitiate the proceedings if the service of the petition and the affidavit were in accordance with the old practice before the Act of 1890 came into operation. The question would have to be considered and decided when it became necessary to put in force r. 39 and r. 40 as to service of an order to wind up which specifically referred to the seal of the court. The latter case is, therefore, inconclusive on the point in issue here but in so far as it goes tends to support the submissions of Mr. Lockhart-Smith.

Another case which deals with the requirement of sealing is a case which concerns a summons issued by a justice of the peace and the lack of a seal thereon. It is *R. v. Garrett Pegge and Others* (7) (1911), 104 L.T. 649. In this case a summons for assault issued by a justice of the peace was signed but not sealed by him. The defendant, who appeared before the court by a solicitor merely to take the objection that the summons was not sealed and that therefore the justices had no jurisdiction, was convicted. A ruling having been obtained to quash the conviction it was held that even if the omission of the seal from the summons was a defect it was a defect in form within the meaning of s. 1 of the Summary Jurisdiction Act, 1848, which provides that no objection shall be taken or allowed to any summons for any alleged defect in substance or in form, and that therefore the objection that the summons was not sealed could not be taken. The question in this case was not whether what purported to be a seal was in fact a seal, but whether the absence of any sort of seal was a fatal defect in the form of summons. Again therefore, it is inconclusive as to the point in issue in the case stated. But there are some obiter dicta of Hamilton, J., which are of interest. He said, inter alia, in referring to the Summary Jurisdiction Rules, 1886, made under the Summary Jurisdiction Act, 1848:

> "I think that on the construction of s. 1 of the Act of 1848 in combination with the Rules of 1886 the summons must be in the form prescribed by the Rules of 1886. Those rules by a sign, by the letters 'L.S.' though not by words, include as part of the form a place for a seal, with an implied direction that the place shall be occupied by a seal, and therefore in my view that is now the form authorised by the legislature and the summons is not a formally correct summons unless there is a seal affixed to it. What seal is to be affixed and how it is to be affixed are matters that are not prescribed and are probably of very small moment. Whether it is of wax or is a wafer or is made by printer's ink, and whether it is the justice's own seal or some other person's seal does not seem to matter. The justice is not required to have a seal, but that a seal or something equivalent should be affixed to or imprinted upon the summons seems to be required by the legislature for reasons into which it is not necessary to enquire but which are probably connected with the ancient tradition of justices of the peace, which is probably due to the use of a seal being believed to be a solemn identification of the justice's act."

There appears to be no direct authority, therefore, for the submission that the principles which apply to the sealing of deeds apply equally to documents requiring to be sealed with the seal of a court. The sealing of a document by a court is a solemn act, but can the solemnity inherent in the act of sealing by a court be said to be greater than that attending the sealing of a deed?

What are the local provisions regarding sealing of documents by a subordinate court? Section 12 of Cap. 3 reads as follows:

> "Subordinate courts shall use seals of such nature and pattern as the Governor may by order in the *Gazette* direct, provided that until the Governor gives such directions as aforesaid the seals which were in use in courts subordinate to the High Court immediately prior to the commencement of this Ordinance shall continue to be used in the district courts."

Under that section an order has been made intituled "The Designs for Stamps and Seals Order", which in so far as is relevant to the issue in the case stated reads as follows:

> "3. The design for stamps or seals used by subordinate courts shall consist of a circle with the words 'Tanganyika Subordinate Court' round the circumference and the name of the district or sub-district in the middle."

A point which arose in the lower court at the hearing of the charge against the respondents, and again in the hearing of this case stated, was that even if the impression on the order of attachment of the subordinate court could be regarded as a seal the impression did not comply with the requirements of r. 3 quoted above in that on the impression the word "Tanganyika" is dissociated from the words "Subordinate Court", and that the words neither read "Tanganyika Subordinate Court" nor "Subordinate Court Tanganyika", but "Subordinate Court" and, completely dissociatedly, "Tanganyika". I think the requirements of r. 3 must be construed with a modicum of common sense and I interpret the rule as meaning that provided in the outer circle the three words "Tanganyika", "Subordinate" and "Court" appear it does not matter whether "Tanganyika" precedes "Subordinate Court", follows "Subordinate Court", or is completely dissociated with it.

A reference to the Shorter Oxford English Dictionary (3rd Edn.), ever present with its succour when authority is scarce, discloses that the noun "seal" is derived from the latin sigillum, "a small picture, engraved figure, seal diminutive of signum", and its meaning includes "an impressed mark serving as visible evidence of something", and the verb "to seal", although firstly given the meaning of

> "to place a seal upon a document as evidence of genuineness or as a mark of authoritative ratification or approval",

later is given the meaning

> "to place an official stamp on (merchandise) to certify that it is of standard measure or quality."

It appears that the district court of Dar-es-Salaam does not possess a lever type seal so admirably made by Messrs. Waterlow & Sons Ltd., but has used and is still using a rubber stamp which, in order to authenticate documents issued by the court and requiring to be "sealed" leaves an ink impression bearing the words abovementioned in dissociation.

In the absence of any conclusive authority one is thrown back on one's resources of common sense and the analogy to be drawn from the decisions to which I have referred, and others, relating to the requirements of sealing of a deed. In my view, in the absence of any mechanical apparatus for the sealing of documents, a stamp such as was used on the order of attachment issued by the district court of Dar-es-Salaam is sufficient to satisfy the requirements of O. 21, r. 24. However, I would add that it is desirable, in my opinion, for subordinate courts, at any rate resident magistrates' courts, to have some embossing

apparatus so that more solemnity can be attached to the sealing of documents issued by the court than is required by the mere application thereto of a rubber stamp. Moreover, this would bring such subordinate courts into line with the High Court in this respect. It follows then, that I uphold the submissions of Mr. MacDonagh and that I hold that the learned resident magistrate came to a wrong decision in upholding Mr. Lockhart-Smith in the lower court that the two respondents had no case to answer on the ground of the invalidity of the purported "seal". In his judgment however, the learned resident magistrate was so preoccupied with the question of the validity or invalidity of the purported sealing of the attachment order that he did not reach any decision on the other points submitted by Mr. Lockhart-Smith, except that dealing with contempt of court. They were the fact that the first respondent was not apparently served with the order and that she knew nothing about the business, which was run by her husband, and that there was no deliberate defiance of the order on the part of either of the respondents. Mr. Lockhart-Smith moreover pointed out to the lower court that the second respondent wrote to the district court on July 19, 1957, somewhat inadvisedly he conceded, explaining that there was no salary due to Bhimji which could be attached as he owed the firm money. Apparently there was no reply sent to this letter.

Mr. Lockhart-Smith made his submission that there was no case to answer on October 26, 1959, and the learned resident magistrate reserved his ruling. This ruling was not given until May 5, 1960, and although the learned resident magistrate says in para. 2 of his case stated "the reasons for the delay being given elsewhere" I can find no such reasons on or with the record.

The High Court, under s. 337 of the Criminal Procedure Code, is given wide powers upon the determination of a case stated, and although my decision has gone in favour of the Attorney-General I do not propose to send the case back to the district court either for the trial of the respondents to start de novo or for the respondents to be put on their defence. I reach this decision firstly because of the delay which occurred in bringing the prosecution in the lower court and between the hearing and the delivery of the learned resident magistrate's ruling, and secondly because it would appear to be doubtful whether on one or more of the other grounds to which I have referred there was in fact a prima facie case for the respondents to answer, or alternatively, if it were held that there was a prima facie case to answer, because it would seem that the respondents would have good defences to the charge.

Appeal allowed.

For the appellant:
The Attorney-General, Tanganyika
D. M. MacDonagh (Crown Counsel, Tanganyika)

For the respondents:
W. J. Lockhart-Smith, Dar-es-Salaam

R v Sanmukhbhai G Patel
[1960] 1 EA 511 (HCT)

Division: HM High Court of Tanganyika at Dar-es-Salaam

Date of judgment: 27 May 1960

Case Number: 79/1960

Before: Law J

Sourced by: LawAfrica

[1] Street traffic – Motor vehicle – Brakes not maintained in good and efficient working order – Proof required to justify conviction – Traffic Ordinance (*Cap.* 168), *s.* 43 (*a*) *and s.* 70 (*T.*).

Editor's Summary

The accused applied for revision of his conviction of driving a motor vehicle with defective brakes contrary to s. 43 (*a*) and s. 70 of the Traffic Ordinance. He submitted that the prosecution had failed to prove that the brakes were inefficient in the respects envisaged by s. 43 (*a*), which requires two independent means of operation and that the brakes be of such efficiency that the application of either means to the vehicle shall cause two of its wheels on the same axle to be held or shall bring the vehicle to stop within a distance of twenty-five feet when running at fifteen miles per hour on a dry, hard-surfaced and level road.

Held –

(i) the test for checking the efficiency of brakes as laid down in s. 43 (*a*) of the Traffic Ordinance only provides one means of proving that brakes are not effective, but is not the only and exclusive means, and accordingly it was open to the prosecution to prove the inefficiency of the brakes by other means, namely, by proving that the foot brake was not operating on one wheel of the rear axle at all.

(ii) the test of efficiency laid down in s. 43 (*a*) was not one which must in all cases be carried out before a person can be prosecuted for driving a car with inefficient brakes but it was an objective standard for the determination of the working efficiency of the brakes.

Application refused.

Judgment

Law J: This is an application for the revision by this court of the proceedings in Tanga district court criminal case No. 124 of 1960, in which the applicant Mr. Sanmukhbhai G. Patel was convicted of driving a motor vehicle with defective brakes, contrary to s. 43 (*a*) and s. 70 of the Traffic Ordinance (Cap. 168). The relevant part of s. 43 (*a*) reads as follows:

> "Every motor vehicle when in use on a road shall be equipped with two entirely independent and efficient braking systems or with one efficient braking system having two independent means of operation and maintained in good working order and of such efficiency that the application of either to the vehicle shall cause two of its wheels on the same axle to be so held that the wheels shall be effectually prevented from revolving or shall bring the motor vehicle to a stop in a distance of twenty-five feet when running at a rate of fifteen miles per hour on a dry, hard-surfaced and level road".

The applicant's car had been involved in an accident and marks on the road indicated that it had swerved before coming to a stop. The car was driven to Tanga where it was examined by Mr. Coney, a qualified vehicle examiner. Mr. Coney gave the following evidence at the trial:

“I found the brakes defective. The foot-brakes were operating on one wheel only – the near side rear. On application the vehicle skidded on this one wheel. Hand-brake was serviceable.

> "By Court: I carried out just a road test. The defect I found in the foot-brake could be for a variety of reasons."

Mr. Singh for the accused submitted at the close of the case for the prosecution that there was no case to answer, as no evidence had been led as to whether the vehicle had one or two braking systems, and as the test laid down in s. 43 (*a*) had not been carried out. The learned resident magistrate ruled that there was evidence that the vehicle had a foot-brake and a hand-brake and that therefore it had two independent systems. With respect, I cannot follow the logic of this ruling, because the evidence was equally consistent with the vehicle having one system with two independent means of operation, one of which (the hand-brake) was efficient and the other (the foot-brake) inefficient. The misdirection was not however in my view fatal, as the prosecution evidence covered both the possible systems envisaged by s. 43 (*a*). The learned magistrate went on to rule that the test of efficiency laid down in s. 43 (*a*) is not one which must in all cases be carried out before a person can be prosecuted for driving a car with inefficient brakes, but that it was an objective standard for the determination of the working efficiency of the brakes. On this point I agree with the learned magistrate. In many cases the test would not be capable of application, as for instance in this case, because Mr. Coney's evidence (which was not challenged by the defence) was to the effect that the foot-brake operated on one wheel only of the rear axle, so that no test could be conducted to find out whether the two wheels on the rear axle could be held as provided in s. 43 (*a*). In my opinion, the so-called "test" provides one means of proving that brakes are not effective, but is not the only and exclusive means.

Faced with this ruling, the defence called no evidence, and the learned magistrate found the offence proved, convicted the applicant and fined him Shs. 60/-. In my opinion, the evidence amply supported the conviction. Mr. Coney had deposed that the foot-brake was not operating on one of the rear wheels at all, and in those circumstances the vehicle – whether it had one or two independent braking systems – did not comply with the requirements of s. 43 (*a*) and an offence was proved to have been committed. The sentence was not excessive. The application for revision is refused.

Application refused.

For the Crown:
The Attorney-General, Tanganyika
R. A. Caldwell (Crown Counsel, Tanganyika)

The accused did not appear and was not represented.

The Attorney-General v Mathias s/o Jengo

[1960] 1 EA 513 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	17 June 1960
Case Number:	215/1960
Before:	Law J

Sourced by: LawAfrica

[1] Harbour – Meaning of "harbour premises" – Prosecution for refusal to obey lawful order of harbour management whilst on "harbour premises" – Whether "harbour premises" includes open land within harbour area or only land in vicinity of harbour buildings – East African Harbours Regulations, 1952, *reg.* 2, *reg.* 273 *and reg.* 299.

Editor's Summary

During a strike of railway workers at Tanga the harbour master saw a group of men near the harbour cranes barracking the volunteers manning the cranes. As he moved towards his office to obtain police help to remove this crowd which he considered a danger to themselves and the installation he stopped the respondent, a striker, who was cycling towards the crowd from the port gates and carrying placards. He stopped the respondent and told him that if he was not a worker he must leave. The respondent ignored this order and proceeded towards the cranes. The respondent was later charged with refusing while on harbour premises to obey a lawful order of an authorised servant of the management contrary to the Harbour Regulations. At the trial the respondent's advocate submitted that there was no case to answer since "lawful order" was not defined in the regulations and it had not been proved that the harbour master was an authorised servant or the extent of his powers. The magistrate found there was no case against and acquitted the respondent but on the ground that the incident appeared to have taken place in an open part of the harbour area and had not been proved to have occurred on "harbour premises" which he interpreted as "houses or buildings with ground and appurtenances". The Crown applied for a case to be stated upon the meaning of "harbour premises".

Held –

(i) since reg. 273 refers to both "harbour area" and "harbour premises" the magistrate was right in holding that these expressions were not synonymous but had different meanings.

(ii) the expression "harbour premises" is not confined to actual building but may include land; the proper test is the relationship of the land to the buildings and since the place where the incident occurred was in the harbour area and essential to the carrying on of the business of the Harbours Administration, it was within the "harbour premises".

Appeal allowed. Case remitted to the magistrate for hearing and determination accordingly.

Case referred to Judgment in:

(1) *Re Alloway*, (1916) N.Z.L.R. 433.

(2) *Doe d. Hemming v. Willetts* (1849), 7 C.B. 709.

(3) *Lethbridge v. Lethbridge* (1862), 4 De G. F. & J. 35; 45 E.R. 1095.

Judgment

Law J: This is an appeal by the Attorney-General by way of case stated from a decision of the learned Senior Resident Magistrate at Tanga acquitting one Mathias s/o Jengo on a charge laid under reg. 273 and reg. 299 of the East African Harbours Regulations, 1952. The charge was as follows:

> "Statement of Offence
>
> While on harbour premises did refuse to obey lawful order or directions of the management or authorised servants of the Administration, contrary to reg. 273 and reg. 299 of the East African Harbours Regulations, 1952.
>
> Particulars of Offence.
>
> The person charged on the 9th day of February, 1960, in Tanga Harbour Area, within the Township and District of Tanga, while on the Harbour premises, did refuse to leave the said harbour premises when lawfully ordered by the Harbour Master, in charge Tanga Harbour, to do so."

The facts as found by the learned magistrate were that on February 9, 1960, the African railway workers were on strike, and the cranes in the harbour area were being manned by volunteers. The harbour master (Mr. H. T. V. Church) saw a group of twenty to thirty men near the cranes in the harbour. There was some barracking of the volunteer workers going on, and Mr. Church thought the presence of this crowd a danger to themselves and the installation. As he moved towards his office, intending to obtain police assistance to remove the crowd, he saw the accused, a welder employed by the Railways Administration, who was also on strike, cycling from the port gates towards the crowd. This was in an open part of the harbour area. Mr. Church saw that the accused was carrying placards. He stopped the accused and asked him several times what he was doing. The accused made no reply. Mr. Church told him that if he was not a worker in the port, he must leave. The accused ignored this order, and proceeded towards the cranes. The learned magistrate found that the incident occurred in an open part of the harbour area, but not in the vicinity of any house or building. At the close of the prosecution case, the accused's advocate Mr. Singh submitted that there was no case to answer on two grounds as follows:

(1) that the expression "lawful orders" is not defined in the Regulations, and

(2) that the prosecution had not proved that Mr. Church was an "authorised servant" of the Administration, or the extent of Mr. Church's powers.

The learned magistrate found that there was no case to answer and acquitted the accused, but on grounds other than those relied upon by Mr. Singh which were not dealt with. The basis of the learned magistrate's decision was that the incident had not been proved to have occurred on "harbour premises", which expression he interpreted as meaning "houses or buildings with ground and appurtenances". The learned magistrate held that as the incident had occurred in an open part of the harbour area, and not in the vicinity of a house or building, the accused's refusal to obey Mr. Church's order was not within the mischief of the regulation. The question of law to be determined by this court is stated as follows:

> "What meaning should be attributed to the words 'harbour premises' in regulation 273 of the East African Harbour Regulations, 1952, made under s. 99 of the East African Railways and Harbours Administration Act, 1950, and in particular whether on the 9th day of February, 1960, the respondent was on harbour premises at the time when he received and failed to obey a lawful order from an authorised servant of the Administration, namely the harbour master Mr. A. T. V. Church."

With respect the question as framed above is not strictly correctly stated, as it assumes two facts as to which no findings have yet been made, that is to say that the order given by Mr. Church was a "lawful order" and that Mr. Church was "an authorised servant of the Administration". I propose to deal with the question as if the words:

> "assuming that the said order was a lawful order and that the said Mr. Church was an authorized servant".

were added to the question as stated in the case.

The Regulations under which the accused was charged read as follows:

> "273. All persons leaving or entering a harbour area shall do so through the harbour entrances or exits provided for the purpose; and, while on harbour premises shall be subject to the lawful orders and directions of the management or authorised servants of the Administration.
>
> "299. Except in the case of any Regulation under which any less penalty is expressly provided, every person doing anything prohibited by any of these Regulations or omitting to do anything required by any of them to be done, or otherwise contravening these Regulations, shall be liable to a fine not exceeding Shs. 2,000/- or to imprisonment for a term not exceeding 2 months or to both such fine and imprisonment."

The expression "harbour area" as defined in reg. 2 of the Regulations in relation to Tanga means:

> "the limits of any harbour as defined by an order made under the provisions of the East African Railways and Harbours Administration Act, 1950, and in addition to such limits includes . . . the enclosed wharf area and water-front and the enclosed land adjacent thereto, . . . and such other areas or places . . . as may by notice in the *Gazette* be declared to be included in any harbour area for the purposes of these Regulations."

By Legal Notice No. 33 of 1953 the limits of Tanga Harbour are defined, and consist of a large area of water. Thus the Tanga Harbour area consists of both land and water.

The expression "harbour premises" is not defined in the Regulations, but as reg. 273 refers to both "harbour area" and "harbour premises", the learned magistrate was clearly right in holding that the two expressions were not synonymous but had different meanings. In the context of that Regulations, "harbour premises" must have a more restricted meaning than "harbour area" because the word "premises" is not, in my opinion, applicable to that part of the sea which forms Tanga's inner and outer harbours as defined in Legal Notice No. 33 of 1953. What I have to decide is whether the learned magistrate was right in restricting the meaning of the expression "harbour premises" to houses and buildings such as sheds, offices and workshops in the harbour area and to land in the vicinity thereof, and in holding that the expressions did not include an open part of the harbour area which was not in the vicinity of any such house or building.

Mr. Jhaveri, who appeared for the accused at the hearing of this appeal, not only relies on the learned magistrate's interpretation but submits that as the interpretation of a penal provision is involved, the expression should be even more narrowly interpreted and should be restricted to actual buildings, exclusive of any land whatsoever. I do not consider that this latter submission can be correct, because if it were, the regulation would have provided that persons in and not on harbour premises were subject to lawful orders of the management. "On" harbour premises must have a wider meaning than "in" harbour premises.

Mr. Thornton for the Attorney-General submits that all land within the harbour area which is connected with the operation of the harbour is included in the expression "harbour premises", and he has cited a number of cases and authorities in support of this contention. For instance in the Dictionary of English Law (1959) under the heading "premises" at p. 1389, the following appears:

> ". . . 'premises' has gradually acquired the popular sense of land or buildings. Originally, it was only used in this sense by laymen, and it was never so used in well-drawn instruments, but it is now frequently found in instruments and in Acts of Parliament as meaning land or houses, e.g. the Public Health Act, 1875, s.4, where 'premises' includes messuages, buildings, lands, easements, tenements and hereditaments of any tenure."

In *Re Alloway* (1), (1916) N.Z.L.R. 433, referred to at p. 323 of Vol. 4 of Burrow's Words and Phrases Judicially Defined, it was held that the word "premises" in the case of a man engaged in business signifies the place in which he carries on his business. Such premises may be wholly buildings, as in the case of many shopkeepers; or wholly land, as in the case of a timber yard; or partly buildings and partly land.

In *Doe d. Hemming v. Willets* (2) (1849), 7 C.B. 709, Wilde, C.J. said:

> "the word premises is commonly used as comprising land and houses and other matter."

In *Lethbridge v. Lethbridge* (3) (1862), 4 De G. F. & J. 35, Turner, L.J. said:

> ". . . the word premises as used in this clause must, I think, be taken to mean premises in immediate connection with the mansion, and without the occupation of which the mansion could not be conveniently occupied and enjoyed; and it was upon this ground we held the Petitioner to be entitled to the occupation of the park."

After consideration of these and other authorities I find myself in agreement with the learned magistrate that the expression "harbour premises" is not confined to actual buildings within a harbour area, but may include land. Where I differ from the learned magistrate is in his finding that only land in the vicinity of buildings is included. In my opinion, the true test to be applied is not only the vicinity of the land to buildings, but whether the land is immediately connected with the buildings and necessary for the purposes of the business or activity carried on in the buildings. I agree with Mr. Thornton that the usage to which the land is put, and its relationship to the buildings is the proper test to be applied, rather than whether the land is or is not in the immediate vicinity of the buildings. In the case now under consideration, the incident involving the accused was proved to have occurred in an open part of the harbour area, between the gates and the cranes on the wharf. No doubt this land is essential for the convenient occupation and enjoyment of the harbour area, as without it goods could not be removed from the wharf where they are unloaded to places outside the harbour area through the gates, and the Administration would be unable to carry on its business. I find that the place in the harbour area where the incident occurred was part of the harbour premises within the meaning of that expression in reg. 273 of the East African Harbour Regulations, as that place, although consisting of open land within the enclosed part of the harbour area, was immediately connected with the wharf, warehouses and other buildings used and occupied by the Administration for the purposes of the operations which it undertakes.

This appeal by the Crown accordingly succeeds, as I find that the learned magistrate erred in law in defining the expression "harbour premises" as being confined to buildings and land in the vicinity thereof. The case is returned to the learned magistrate with the direction that the incident involving the accused occurred on the harbour premises. The submissions raised by the defence at the close of the prosecution case must now be dealt with, and the defence is at liberty to make further submissions or to call evidence as it may see fit, and the

learned magistrate must proceed with the hearing and determination of the case according to law.

Appeal allowed. Case remitted to the magistrate for hearing and determination according to law.

For the appellant:
The Attorney-General, Tanganyika
G. C. Thornton (Crown Counsel, Tanganyika)

For the respondent:
Patel, Desai and Jhaveri, Dar-es-Salaam
K. L. Jhaveri

Oberi s/o Alinani v R
[1960] 1 EA 517 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	4 June 1960
Case Number:	228/1960
Before:	Crawshaw Ag CJ
Sourced by:	LawAfrica

[1] Criminal law – Charge of breaking and stealing – Conviction of conveying or possessing property suspected of having been stolen or unlawfully obtained – Whether "conveying" and "possession" had terminated – Penal Code, s. 296 (1) *and s.* 312 (*T.*) *– Criminal Procedure Code, s.* 187 (1) (*T.*).

Editor's Summary

The appellant with two others had brought twelve bags of coffee for sale to the store of one, K, who took delivery of them and weighed them. Subsequently K became suspicious that the coffee was stolen and placed the bags in his car and drove off to fetch a police officer. K returned with a police officer who questioned the three men and, not being satisfied with their answers, arrested them and seized the coffee. Later on, the appellant was charged with one, B, with store-breaking and stealing contrary to s. 296 (1) of the Penal Code. The magistrate considered that he could not rely on the evidence identifying the coffee as that stolen and therefore the charge under s. 296 (1) could not stand. The magistrate, however, invoked s. 187 (1) of the Criminal Procedure Code and convicted the appellant of having in his possession or conveying property suspected of having been stolen or unlawfully obtained contrary to s. 312 of the Penal Code. On appeal.

Helds – s. 312 of the Penal Code was not applicable because the "conveying" had come to an end and also the "possession", which had passed to K.

Appeal allowed. Conviction quashed and sentence set aside.

Cases referred to in judgment:

(1) *R. v. Msengi s/o Abdullah* (1952), 1 T.L.R. (R.) 107.

(2) *Hadley v. Perks* (1866), L.R. 1 Q.B. 444.

(3) *R. v. Pilimon s/o Mwakalindile*, Tanganyika High Court Criminal Appeal No. 551 (1959) (unreported).

Judgment

Crawshaw Ag CJ: This is yet another appeal from a conviction under s. 312 of the Penal Code which relates to a person

> "having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained,

> and who shall not give an account to the satisfaction of such court of how he came by the same . . .”

The section, which is not an easy one, is clearly misunderstood by many prosecutors and magistrates. The appellant was charged with one Belo with store-breaking and stealing contrary to s. 296 (1) of the Penal Code. Belo was convicted of receiving and has not appealed, and the appellant’s conviction under s. 312 was under the alternate provision contained in s. 187 (1) of the Criminal Procedure Code.

The evidence of P.W.2, K.M. Kassam, is to the effect that he was a licensed coffee dealer and that on the night of October 26/27 last two of his stores were broken into and, inter alia, twenty-one bags of coffee were stolen. On the afternoon of October 30 a lorry drew up at his shop containing the appellant and two other persons, Jim and John, and twelve bags of coffee. Jim asked him to buy the coffee and it would seem that Kassam agreed, for his employees then assisted the others to offload it and Kassam weighed it. He became suspicious and took a sample from one of the bags which he says looked like his coffee which had been stolen. He placed the coffee in his Peugeot pickup and informed Jim and John that it was part of his stolen coffee and that he was going to report to the police. Jim and John thereupon said that the coffee in fact belonged to the appellant, which the appellant denied saying it belonged to Jim and John. Kassam then went to the police in, it seems probable, the Peugeot with the coffee, telling his employees to keep watch over Jim, John and the appellant. He returned with a sub-inspector of police who questioned the three men and, not being satisfied with their answers, arrested them and seized the coffee.

The magistrate was of the opinion that he could not rely on Kassam’s identification of the coffee as that stolen, and that the charge under s. 296 could not therefore stand. He referred to the well known case of *R. v. Msengi s/o Abdullah* (1) (1952), I.T.L.R. (R.) 107, and said he was satisfied that the inspector was acting in the exercise of his powers contained in s. 24 of the Criminal Procedure Code and that it was clear that the appellant, Jim and John were in the act of conveying property reasonably suspected of having been stolen or unlawfully obtained, and that he was not satisfied with their explanation as to how they came in possession of it.

This may perhaps be regarded as a case which borders on the applicability of s. 312 of the Penal Code, but to my mind it is just outside the provisions of that section. There is no need for me to refer at length to the detailed consideration which was given to that section by the bench of three judges in the Msengi case, but it was there said that the “possession” must be ejusdem generis with “conveying”. Shee, J., in *Hadley v. Perks* (2) (1866), L.R. 1 Q.B. 444 gave as the reason for the powers of a police officer to detain and search, as in our s. 24, that if the person

> “were not apprehended at once he might get out of the way and evade detection altogether.”

The authorities show that the powers do not necessarily have to be exercised whilst the person is on a highway. The court said in the *Msengi case*,

> “possession is not restricted to possession on conveying in streets, but is also applicable to conveying in the course of a journey irrespective of where the property is found.”

In the *Hadley* case the person had even entered his ultimate destination, a shop, when detained in possession, but there the police officer had been following him along the street, and it was therefore one continuous act. In a recent case, *R. v. Pilimon s/o Mwakalindile* (3), Tanganyika High Court

Criminal Appeal No. 551 of 1959 (unreported), the circumstances briefly were that the accused conveyed to a stall in the market for sale on his behalf certain articles, and then left. The same day, and before the articles were sold, a police constable on information took possession of the articles and arrested the appellant. The magistrate was of the opinion that the appellant was still in constructive possession of the articles and convicted him under s. 312. Counsel for the Crown was doubtful if he could support the conviction, which was duly quashed. In so doing the judge, who was myself, observed,

> "not only had the conveying apparently terminated, but the person and the goods had become separated."

Applying the above principles and authorities, it seems to me that in the instant case the "conveying" had come to an end and also that the "possession", although possibly not ownership, had passed to Kassam. He had weighed the coffee and placed it in his own vehicle and had adopted it to the extent of taking it to the police station and bringing it back in the company of the inspector who then formally seized it. This cannot I think be said to be a detention or search by a police officer within the meaning of s. 24; it was property found by the police officer in the possession of someone else, Kassam. Further, the persons concerned had already been detained by Kassam. The circumstances are clearly distinguishable from the *Hadley* case. I allow the appeal, quash the conviction and sentence, and order that if the appellant is not otherwise in lawful custody he must be immediately released.

I have said that the conviction under s. 312 was under the powers contained in s. 187 (1) of the Criminal Procedure Code, which inter alia, provides that when a person is charged with stealing he may be convicted or conveying under s. 312 even though he has not been charged with it. This to my mind seems at variance with the express condition in s. 312 that a person is

> "brought before a court charged with having in his possession or conveying . . ."

I am of opinion that there is a distinct danger in invoking the power in s. 187 (1), especially as there is a change of onus, for a person charged with theft, as in the instant case, might well after hearing the prosecution evidence be satisfied that the prosecution have not proved that the property was stolen, and decide that it was in his best interests to say nothing in his defence. It would, I suggest, be most unfortunate if he was then to be informed that although the court also was satisfied that the theft had not been proved, yet as he had failed to give an account to the satisfaction of the court, or any account at all, as to how he came by the property, he is convicted of an offence under s. 312, with which he has never been charged. In the instant case I am glad to see that the magistrate very fairly and properly informed the appellant after the latter had given his evidence and been cross-examined thereon, that it appeared to the court that the appellant had committed an offence under s. 312 and asked the appellant if he had any explanation to offer as to how he came into possession of the coffee. In my view it would be most improper to invoke the power contained in s. 187 (1) in such circumstances without first giving the accused an opportunity to explain. The position, I apprehend, is different where a person is charged with theft and under the powers contained in s. 187 (1) is convicted of receiving, for there the accused has heard proof that the property was stolen and, knowing himself to be in possession of it, at his own risk fails to give an account as to how he came by it.

As I have said, Belo has not appealed, but Crown counsel has agreed to be heard in revision and does not support the conviction. The only evidence against Belo, apart from what Oberi may have said, would appear to be that he was a driver and obtained a lorry from one Selemani on to which the coffee

was first loaded, but which broke down on the way to Mbeya. Belo was then left to look after the lorry on the roadside, and the coffee, whilst Oberi went to obtain another lorry from Mbeya. The magistrate in his judgment says that to Manfred, P.W.3, who came back with Oberi from Mbeya in a lorry to collect the coffee from the broken-down lorry, both accused admitted ownership of the coffee. This is not so however, for what Manfred said was, "Accused I said the coffee belonged to both himself and Belo"; in view of the suspicion which rests on Oberi his evidence as to this was not to be relied on. Without that misdirection it is at least doubtful if the magistrate would have convicted Belo of any offence, for he might well have been an innocent driver even though his own denial of having had anything to do with the matter was disbelieved. To my mind, no more than suspicion can on the evidence attach to Belo. In any event it is difficult to see how he could have been convicted of receiving when Oberi was not likewise convicted. Not only that, but there is no evidence that the coffee was stolen or had otherwise been dishonestly obtained from anyone, and in the circumstances, it would not have been proper to have charged him with receiving, let alone convict him. I quash the conviction and sentence against Belo and order that if he is not otherwise in lawful custody he must be immediately released.

As the coffee has not been proved to belong to Kassam and as Oberi, Belo, Jim and John all deny ownership of it, I make no order that the coffee be returned to any of them.

Appeal allowed. Conviction quashed and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
R. A. Caldwell (Crown Counsel, Tanganyika)

Re Sugrabai Mohamedali Alibhai Karimjee Charity Trust
[1960] 1 EA 521 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	12 May 1960
Case Number:	35/1960
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Trust and trustee – Trust for charity – General charitable intention including benefit to community – Exemption from income tax – Application for variation of trust deed – Scheme to avoid liability to income tax – No impossibility of attainment of any object of trust – Cy près doctrine – East African Income Tax (*Management*) *Act*, 1958, *First Schedule, para.* 29.

Editor's Summary

The petitioners as trustees of a charitable trust applied to the court to vary the terms of the trust by omission therefrom of any reference to trusts "for purposes beneficial to the community" so that the charitable objects may wholly fall within the exemption from income tax in para. 29 of the First Schedule to the East African Income Tax (Management) Act, 1958. The application was opposed by the Crown and it was submitted that cy pres doctrine could only be applied if it was impossible to carry out the objects of the trust and that the court had no jurisdiction to remove one of the objects of the trust unless it had become impossible or impracticable to attain, which was not so in the instant case.

Held – the variation sought did not amount to a variation of the mode of attainment of the settlor's intention or a way of effectuating a wider charitable intention on the settlor's part on the impossibility or impracticability of attaining an object of a charity laid down by the settlor and accordingly the petition must be dismissed.

Petition dismissed.

Cases referred to in judgment:

(1) *Re Queen's School, Chester*, [1910] 1 Ch. 796.

(2) *Re Wilson*, [1913] 1 Ch. 320.

(3) *Re Royal Society's Charitable Trusts*, [1955] 3 All E.R. 14.

(4) *Re Basden's Settlement Trusts*, [1943] 2 All E.R. 11.

(5) *Re Weir Hospital*, [1910] 2 Ch. 124.

(6) *In Re Campden Charity* (1881), 18 Ch.D. 310.

(7) *In Re Robinson*, [1923] 2 Ch. 332.

(8) *Re Dominion Students Hall Trust*, [1947] Ch. 183.

Judgment

Mosdell J: The trustees of five charitable trusts have applied to the court to vary the terms of the trusts so that the charitable objects may wholly fall within the exemption from income tax laid down in para. 29 of the First Schedule to the East African Income Tax (Management) Act, 1958 (hereinafter called "the said Act").

Prior to the coming into force of the said Act the income derived from the investments of each of these charitable trusts was free of income tax. Now, owing to the change in the law effected by the said Act it would appear that the income of the various trust funds is subject to income tax.

The facts in case No. 35 of 1960, which concerns the Sugrabai Mohamedali Alibhai Karimjee Charity Trust, with which I will deal in particular, are that on December 9, 1949, by deed the settlor, Sugrabai Mohamedali Alibhai Karimjee settled funds on trustees, of whom she was one, upon the following trust:

> "3. The trustees shall hold the net income of the trust fund upon trust to apply and use the same in perpetuity for such charitable purposes

> whether in East Africa or overseas as the trustees shall think fit. Amongst the objects of the charity to be patronised by the trustees may be included scholars pupils schools colleges hospitals maternity homes orphans mosques indigent Muslims and friends and relatives of the settlor and her family who may be considered deserving help."

By supplemental deed dated November 23, 1950, the settlor added further funds to the trust investments to be held on the same trusts.

It will be noted that after setting forth a general charitable intention in cl. 3 of the deed of December 9, 1949, the settlor particularised some of the objects which she intended should be benefited by the trust. Her list, however, would not appear to be exhaustive as the second sentence of cl. 3 commences:

> "Amongst the objects of the charity to be patronised by the trustees may be included . . . ".

It would appear, therefore, that by cl. 3 the settlor has expressed a general charitable intention and then itemised various persons and institutions which the trustees should regard as falling within the settlor's general charitable intention.

The four classes of charity are well known and the matter is thus put in Halsbury's Laws of England (3rd Edn.), Vol. 4, at p. 213:

> " 'Charity' in the legal sense derived through the ancient statute of Elizabeth comprises four principal divisions into which charitable objects have been classified: trusts for the relief of poverty, trusts for the advancement of education, trusts for the advancement of religion, and trusts for other purposes beneficial to the community not falling under any of the preceding heads. All claims to embrace an object under the head of charity must assert that it comes within one of these four divisions. The test of benefit to the community goes through them all, though as regards the first three it may be assumed unless the contrary appears. Within one of these divisions all charity to be administered by the court must fall, though every object which might be brought within one of them is not necessarily a charity, for it must, further, be of a public nature and be capable of administration by the court."

Until the coming into force of the said Act the income of the charitable trust funds covering any or all four of these objects was free of income tax. However, from the date of coming into force of the said Act, as I have already stated, income derived from funds held on a charitable trust with objects in the fourth class, namely

> "purposes beneficial to the community not falling under any of the preceding classes",

has been excluded from the exemption from income tax previously obtaining. Paragraph 29 of the First Schedule to the said Act, so far as is relevant, reads as follows:

> "Subject to s. 25, the income of any institution, body of persons, or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education, in so far as the Commissioner is satisfied that such income is to be expended either within East Africa or in circumstances in which the expenditure of such income is for purposes which result to the benefit of the residents of East Africa."

Now it is at once apparent that if the trustees in the instant case could eliminate the fourth class of charity from the objects laid down by the settlor the exemption from the payment of income tax on the income from the trust funds could continue to be enjoyed and there would be more money available

for desired beneficiaries. It is the elimination of the fourth class of charity that Mr. Bechgaard, for the trustees, seeks with the court's approval to achieve. The issue here is, has the court power to grant the variation of the trust deed which is sought?

Mr. Wickham, for the Attorney-General, opposes the application on the ground that the court has no jurisdiction to grant the variation asked for. I have assumed that as no specific statutory provision has been mentioned by Mr. Bechgaard he is asking the court to act under its inherent jurisdiction.

I was referred to the cy pres doctrine and its application as expounded in Halsbury, op. cit. p. 317, where is to be found the following:

> "Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode cy pres, that is, as near as possible to the mode specified by the donor.
>
> "There can be no question of an application cy pres until it is clearly established that the mode specified by the donor cannot be carried into effect and that the donor had a general charitable intention. If, however, the mode specified by the donor is perpetual and has been carried into effect, but ceases to be practicable, there will nevertheless be a cy pres application independently of any general charitable intention. In order to establish whether the mode specified by the donor is practicable, the court may direct an inquiry.
>
> "An application cy pres results from the exercise of the ordinary jurisdiction of the court to administer a charitable trust of which the particular mode of application has not been defined by the donor. Where the donor has in fact prescribed a particular mode of application and that mode is incapable of being performed but the donor had a charitable intention which transcended the particular mode of application prescribed, by the donor was the essence of his intention (which may be shown by a condition or by particularity of language) and that mode is incapable of being performed, there is nothing left upon which the court can found its jurisdiction, so that in such circumstances the court has no power to direct any other charitable application in place of that which has failed."

And p. 324 where is the following:

> "Where the original foundation is capable of taking effect, the court has no authority to vary it and to apply the charity estates in a manner which it conceives to be more beneficial to the public, or even in a manner which the court may surmise that the founder would himself have contemplated could he have foreseen the changes which have taken place by lapse of time.
>
> "In like manner gifts for the poor of a particular locality, or for a particular church or school, or for the benefit of a particular class of persons or a particular congregation of nonconformists, or to endow a particular lectureship, must be confined within the limits named, unless it can be said on failure of such purposes that they were merely modes of effectuating a wider charitable intention."

I was referred to several authorities by Mr. Bechgaard, the first of which was *Re Queen's School, Chester* (1), [1910] 1 Ch. 796, the headnote of which reads as follows:

> "Where the primary object for which a secondary school was originally founded cannot be given effect to under its existing constitution without the aid of grants from the Board of Education, the court will modify the scheme of the Charity Commissioners under which the school was being administered, so far as necessary to comply with the regulations of the Board of Education and enable the school to secure the grants."

The ratio decidendi in this case is to be found in the judgment of Eve, J., at p. 803, where he says:

> "On the facts of this case, having regard to the unanimity of the governors and having further regard to this consideration, that the primary object of this charity cannot be given effect to if matters are allowed to continue as they are, I think I ought to accede to the prayer of the petition. When I say that I do so with regret. I am not meaning to say that this is not preeminently a case in which I think an order ought to be made, but I share with the governors the regret which I am quite sure they feel that the necessity has arisen for their introducing this change into the constitution. But this is a very modern charity established only some thirty years ago, and therefore, although I make the order, I propose to preface it by some words which will shew that I make it on the ground that the main object of the charity cannot be carried out under the existing constitution – in other words, I treat the case as one where the continuance of the charity under its existing constitution is proved to be impracticable, and where, therefore, the court has to determine by what modifications in its constitution its continuance can be secured."

In *Re Wilson* (2), [1913] 1 Ch. 320, Parker, J., divided the authorities for the purposes of that case (and in my opinion the instant case can be placed in the same category) into two classes. At p. 320 he said as follows:

> "For the purposes of this case I think the authorities must be divided into two classes. First of all, we have a class of cases where, in form, the gift is given for a particular charitable purpose, but it is possible, taking the will as a whole, to say that, notwithstanding the form of the gift, the paramount intention, according to the true construction of the will, is to give the property in the first instance for a general charitable purpose rather than a particular charitable purpose, and to graft on to the general gift a direction as to the desires or intentions of the testator as to the manner in which the general gift is to be carried into effect. In that case, though it is impossible to carry out the precise directions, on ordinary principles the gift for the general charitable purpose will remain and be perfectly good, and the court, by virtue of its administrative jurisdiction, can direct a scheme as to how it is to be carried out. In fact the will will be read as though the particular direction had not been in the will at all, but there had been simply a general direction as to the application of the fund for the general charitable purpose in question.
>
> "Then there is the second class of cases, where, on the true construction of the will, no such paramount general intention can be inferred, and where the gift, being in form a particular gift, – a gift for a particular purpose – and it being impossible to carry out that particular purpose, the whole gift is held to fail. In my opinion, the question whether a particular case falls within one of those classes of cases or within the other is simply a question of the construction of a particular instrument."

In that case it was held that the gift fell within the class of case where, on the true construction of the will, no paramount general charitable intention can be inferred, but the gift was for a particular purpose and that as it was impossible to carry out that purpose the gift failed altogether.

In *Re Royal Society's Charitable Trusts* (3), [1955] 3 All E.R. 14, the court did authorise the proposals of the trustees but only by way of a scheme. The decision in the latter case is very limited in scope, it merely authorised investment of trust funds beyond the range of authorised trust investments and the consolidation of different trust funds. Vaisey, J., said, at p. 16:

> "Now, on this question of jurisdiction I have come to the conclusion that the court has, at the instance of the trustees, jurisdiction, where the Attorney-General consents or does not object, to authorise such proposals as the present by way of scheme. I emphasise those last four words. It seems to me that, although the Attorney-General does in a sense represent all the objects of the charity, he cannot act except with the authority of the court, and in practice it may be equally true that the court cannot act without the concurrence of the Attorney-General, to whose views it must always pay the closest attention. In the present case, counsel for the Attorney-General has assisted the court by criticising and commenting on both the proposals which the applicant desires to have made operative, and subject, then, to any additions, embellishments or alterations which may be made by me in chambers, I propose, by way of scheme, to make an order in terms which I will presently mention. This is, however, in my view, an exceptional case."

Re Basden's Settlement Trusts (4), [1943] 2 All E.R. 11, dealt with the court's attitude to an application to vary trusts in order to avoid income tax, and it was held that the court had no power in the circumstances to sanction the variations asked for though it was argued that it would be in the interests of the child beneficiaries were the variations made. Vaisey, J., said at p. 14:

> "The suggestion, then, that the trustees should be authorised to assent to a variation of the trust because thus and thus alone could the infants' interests be safeguarded, falls to the ground and, in my judgment, ought never to have been made.
>
> "This alone is sufficient ground for refusing this application, but, even if I were satisfied, as I am not, that the alternative presented to the court was a real one and that there was a real apprehension of the infants' potential income from the settlement being exhausted by taxation by reason of the continued existence of the company, it would still be a serious question how far the court should, in the exercise of a statutory or inherent jurisdiction, sanction a bargain of this kind. The settlor thought fit to arrange his affairs in such a way as would, he hoped, reduce his share of taxation and increase the share of others. Temporarily he succeeded, but his success was short-lived. He is left, so far as taxation is concerned, in substantially the same position as if he had made no such arrangement. So, too, the infants are in no worse position than they would have been. I have grave doubts whether in such a case it is the duty of the court, under the guise of protecting the interests of infants, to come to his rescue and assent to a variation of the settlement as part of a general scheme for reducing the quantum of his taxation."

Mr. Bechgaard argued that in the instant case the position was different as the trustees had nothing to gain, the sufferers if the application were not granted would be the beneficiaries. He said that it could not have been the intention of the legislature that charitable trusts should lose their former exemption from payment of income tax. He further intimated that the trustees desired to achieve a closer relationship between the objects of the trust and the grants it in fact makes which were mainly as shown in para. 4 of the petition, namely

> "moneys have been generally spent for religious and educational purposes more particularly in East Africa".

Mr. Wickham, in opposing the application, urged that the trust must be construed literally and that funds given for a particular purpose cannot be applied cy pres unless the object of the trust is impossible of achievement. He cited four cases in support of his contention: *In Re Weir Hospital* (5), [1910] 2 Ch. 124; *In Re Campden Charity* (6) (1881), 18 Ch.D. 310; *In Re Robinson* (7), [1923] 2 Ch. 332; *Re Dominion Students Hall Trust* (8), [1947] Ch. 183. The first two cases he cited would appear to support his contention. I shall refer to the two latter cases later herein.

The main burden of Mr. Wickham's argument was that the cy pres doctrine can only be applied if it is impossible to carry out the objects of the trust and that the court has no jurisdiction to remove one of the objects of the trust unless it has become impossible or impracticable to attain, which was not so in the instant case.

I cannot derive any support for the granting of this application either from the cases cited to me or from Halsbury, op. cit. Mr. Bechgaard contended that *In Re Robinson* (7) was in his favour. I cannot agree with him. In that case one of the conditions of the trust was impracticable and being subsidiary to the main charitable object it was held that the condition might be dispensed with. Lawrence, J., at p. 336, said:

> "The contention on behalf of the petitioner is that the condition as to the wearing of a black gown in the pulpit is impracticable, but that it is subsidiary to the main purpose of the bequest, and that the present case falls within that class of cases when the main charitable purpose is practicable, but a subsidiary purpose is impracticable. If that contention be correct, I am satisfied that the court, on assuming the execution of the charitable trusts declared by the testatrix, has ample jurisdiction to execute those trusts cy pres and to sanction a scheme, modifying the trusts by dispensing with the subsidiary purpose, so as to carry out, as nearly as possible, the main charitable intentions of the testatrix."

The analogy between the facts in *In Re Robinson* (7) and the instant case, argued Mr. Bechgaard, is that as in *In Re Robinson* (7) the object desired to be dispensed within the instant case is merely subsidiary to the other charitable objects, namely the relief of poverty and the advancement of religion and education. I cannot agree that this is so. Though the object desired to be dispensed within in the instant case is not listed among the particularised objects which the trustees may patronise, it surely falls within the earlier part of cl. 3 of the deed of December 9, 1949, and the list in the latter part of cl. 3 is not intended in my opinion from its very phraseology to be exhaustive.

Nor, I consider, can Mr. Bechgaard derive much comfort from the decision in *In Re Dominion Students Hall Trust* (8). Here again there was an impossibility, namely that the intention of the charity could not be carried out unless the colour bar was removed.

I cannot state, as urged by Mr. Bechgaard, that if what the trustees desired in the instant case were granted it would merely amount to a variation of the mode of attainment of the settlor's intention, or a way of effectuating a wider charitable intention on the settlor's part on the impossibility or impracticability of attaining an object of a charity laid down by the settlor.

Though the courts appear to look upon desired variations in charitable trusts effected by deed with more liberality than those in charitable trusts effected by will, I search in vain for an authority which would enable me to grant the application in the instant case.

I therefore dismiss the petition in the instant case, and as the circumstances in each of the four other applications consolidated with it are the same, it follows that I also dismiss the petitions in cases Nos. 36, 37, 38 and 40 of 1960 respectively. I direct that costs of this application be shared equally by each of the five charities and be paid out of the income thereof respectively.

Petition dismissed.

For the petitioners:
Mohamed Hussein & Company, Tanga
K. Bechgaard, Q.C., and *Mohamed Hussein*

For the respondent:
The *Attorney-General,* Tanganyika
W. R. Wickham (Crown Counsel, Tanganyika)

Jumbe Mohamed Bin Tambaza v Hashil Hemed and another
[1960] 1 EA 527 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	23 May 1960
Case Number:	109/1960
Before:	Biron Ag J
Sourced by:	LawAfrica

[1] Appeal – Jurisdiction – Private prosecutor – Accused acquitted by magistrate – Appeal by private prosecutor by way of case stated – Whether appeal competent – Criminal Procedure Code (*Cap.* 27), *s.* 360 (1) *and s.* 367 (*K.*) *– Criminal Procedure Code* (*Cap.* 20), *s.* 87 *and s.* 333 (*T.*).

Editor's Summary

Pursuant to. s. 88 of the Criminal Procedure Code the appellant made a complaint against the respondents of contravening s. 127 and s. 128 of the Penal Code and the magistrate gave permission for the conduct of the prosecution in accordance with s. 87 of the Criminal Procedure Code. The prosecution was conducted by counsel briefed by the appellant and after a protracted trial the magistrate found the respondents not guilty and acquitted them. The appellant appealed by way of case stated but a preliminary objection was taken by the respondents that the appeal was incompetent because a private prosecutor had no right of appeal by way of case stated against an acquittal.

Held – a private prosecutor has no right of appeal by way of case stated against an acquittal.

Appeal dismissed as incompetent.

Cases referred to in judgment:

(1) *Riddlesbarger v. Robson*, [1959] E.A. 841 (C.A.).

(2) *Benson v. Northern Ireland Transport Board*, [1942] 1 All E.R. 465.

Judgment

Biron Ag J: This is an appeal by way of case stated from a decision and order of the Dar-es-Salaam district court acquitting the two respondents on two charges; offering an indignity to a human corpse contrary to s. 127 of the Penal Code, and, disinterring the dead body of a person contrary to s. 128 of the Penal Code; brought by the appellant, a private prosecutor. On the appeal coming up for hearing, learned counsel for the respondents has raised a preliminary objection that the appeal will not lie and is incompetent.

The proceedings against the respondents were initiated by a complaint made by the appellant under s. 88 of the Criminal Procedure Code. Permission for the conduct of the prosecution was duly given by the learned magistrate in accordance with s. 87 which reads:

> "(1) Any magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person, but no person other than a public prosecutor or other officer generally or specially authorised by the Governor in this behalf shall be entitled to conduct the prosecution without such permission.
>
> "(2) Any such person or officer shall have the like power of withdrawing from the prosecution as is provided by the last preceding section, and the provisions of that section shall apply to any withdrawal by such person or officer.
>
> "(3) Any person conducting the prosecution may do so personally or by an advocate.
>
> "(4) In a summary trial, if the prosecutor is a private person, his name shall appear in the title of the proceedings as the prosecutor and, if the prosecutor is a police officer, it shall be sufficient if, in the title of the proceedings, the prosecutor is described as the Commissioner of Police."

After a protracted trial the learned magistrate found the respondents not guilty and acquitted them. It is from this decision that this appeal has been brought. Learned counsel for the respondents has raised the preliminary objection that this appeal is incompetent because in this territory a private prosecutor has no right of appeal by way of case stated against an acquittal. It is strange that such an important point has never been raised before, and there is therefore no direct authority on the position in law. Learned counsel bases his submission in the main on a recent decision of the East African Court of Appeal in *Rufus Riddlesbarger v. Brian John Robson* (1), [1959] E.A. 841 (C.A.). That case was a second appeal from a judgment of the Supreme Court of Kenya, dismissing an appeal by way of case stated from a decision of the resident magistrate, Nairobi, acquitting the respondent on a count of obtaining money by false pretence. Learned counsel has submitted that the principle underlying the decision and the relevant provisions of the Kenya Criminal Procedure Code are the same as in our Code, and therefore the same ruling should be applied here. That appeal was brought under s. 360 (1) of the Kenya Criminal Procedure Code (as amended by the Criminal Procedure Amendment Ordinance, 1959) which reads:

> "Any party to an appeal from a subordinate court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact."

The Court of Appeal held that in a criminal case there are only two parties, the Crown and the accused and, therefore, no right of appeal lay in a private prosecutor. Both in the judgment of the Court of Appeal and in argument before me, the various relevant provisions were examined and discussed, and in the argument before me the various provisions of the Kenya Code were compared and contrasted with the corresponding provisions in our Code. The matter is by no means free from difficulty. Nor is the difficulty at all eased by the different meanings attached to the term "a private prosecutor" in the several provisions.

This present appeal has been brought under s. 333 of the Criminal Procedure Code which reads:

> "After the hearing and determination by any subordinate court of any charge either party to the proceedings before the said subordinate court

> may, if dissatisfied with the said determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within thirty days after the said determination to the said subordinate court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court, and such party (hereinafter called 'the appellant') shall:
>
> (*a*) within fourteen days after receiving the case transmit the same to the High Court; and
>
> (*b*) within thirty days after receiving the case serve a copy of the case so stated and signed on the other party to the proceedings in which the determination was given (hereinafter called 'the respondent')".

Learned counsel for the respondents submits that "party" in this section should be construed the same as "party" in s. 360 (1) of the Kenya Criminal Procedure Code was construed by the Court of Appeal. It is not disputed that with two exceptions, with which I shall deal, the relevant provisions in our Code are similar, if not identically the same in wording, to the corresponding provisions in the Kenya Code, and as the provisions in the Kenya Code were considered and fully discussed in the judgment of the Court of Appeal, and before me, they were very carefully and painstakingly compared and contrasted with the corresponding provisions in our Code, by learned counsel, to whom I am indebted for their lucid and persuasive arguments. I will, I hope, be forgiven for not setting them out here.

Although the Court of Appeal was dealing with the Kenya Code it quoted with approval an earlier decision wherein the court had stated:

> "In Uganda, as in the other East African territories, in all criminal matters the prosecutor is in law the Crown."

One of the reasons given by the court for such proposition is:

> ". . . under the Criminal Procedure Code the proper respondent in every criminal appeal is the Crown, represented by the Attorney-General or someone instructed by him. The confusion that has arisen in this case and probably many others of like character, is we think, due to the fact that the parties have failed to realize that even in a private prosecution the prosecutor is in law the Crown at the instance of the private prosecutor, whoever he may be. That this must be so flows directly from the provisions of s. 82 of the Code, which gives the Attorney-General a residuary control over every criminal case at any stage thereof. Furthermore, it should not be overlooked that under s. 88 no person can conduct a private prosecution without permission of the magistrate."

The two sections quoted; s. 82 corresponds with our s. 81 and s. 88 corresponds with our s. 87.

The principle underlying the Court of Appeal decision is set out at p. 845 and I make no apology for quoting the passage in extenso:

> "When it comes to an application for a case to be stated under s. 367 of the Code, the applicant, in the case of an acquittal, is still in law the Crown, though the application must, of necessity, be made by someone on behalf of the Crown. If the application is made by the Attorney-General, he does not thereby become the appellant. The appellant is still the Crown, though acting at the instance of the Attorney-General. The proviso applies to a case where in the original prosecution the Crown was acting at the instance of a private complainant and enables a complainant who has had the conduct of the prosecution to make application for a case to be stated. But such application is still in law an application by the Crown, and the right of the complainant is further restricted by the necessity of obtaining the consent

> in writing of the Attorney-General. When it is remembered that the appeal is one against acquittal, the safeguard is very necessary to prevent the accused being put in jeopardy a second time except upon the soundest grounds. In the absence of special provisions the Crown acts at the instance of the Attorney-General, Halsbury's Laws of England (3rd Edn.), Vol. 7, p. 380."

With respect, I am in complete agreement with the principle declared and in the words of the relative part of the headnote to *Benson v. Northern Ireland Transport Board* (2), [1942] 1 All E.R. 465. a House of Lords case.

> "A right of appeal from a decision dismissing a criminal charge can only be given by statute and, in that case, only by words which are clear, express, and free from ambiguity."

It is now necessary to examine and compare the provisions of our Code with those of their opposite and different numbers in the Kenya Code. The corresponding provision to our s. 333 in the Kenya Code is s. 367. That section reads as follows:

> "After the hearing and determination by any subordinate court of any summons, charge, information or complaint, either party to the proceedings before the said subordinate court may, if dissatisfied with the said determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within thirty days after the said determination to the said subordinate court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Supreme Court, and such party, hereinafter called the appellant, shall within fourteen days after receiving the case transmit the same to the Supreme Court, and within thirty days after receiving the case serve a copy of the case, so stated and signed, on the other party to the proceedings in which the determination was given, hereinafter called the respondent.
>
> "Provided always that no application shall be made under this section by a private prosecutor within the meaning of s. 171 of this Code without the previous consent in writing of the Attorney-General."

It will be noted that but for the proviso the section corresponds with, and is the same as our s. 333. This proviso was added in 1942. There is, however, no corresponding proviso in our Code. It is abundantly clear from the whole tenor of the judgment of the Court of Appeal that this proviso is an enabling one, and that but for such proviso a private prosecutor in Kenya would have no right of appeal by way of case stated from an acquittal. It is only necessary to refer to the passage I have already quoted wherein it is stated:

> "The proviso applies to a case where in the original prosecution the Crown was acting at the instance of a private complainant and *enables* (my underlining) a complainant who has had the conduct of the prosecution to make application for a case to be stated."

Mr. Fraser Murray, for the appellant, relies on our s. 87 (above set out) sub-s. 4 of which reads:

> "In a summary trial, if the prosecutor, is a private person, his name shall appear in the title of the proceedings as the prosecutor and, if the prosecutor is a police officer, it shall be sufficient if, in the title of the proceedings, the prosecutor is described as the Commissioner of Police."

A summary trial is defined in s. 2 of the Code as any trial held by a subordinate court. There is no corresponding provision to sub-s. 4 in the Kenya Code.

Mr. Fraser Murray in his address stated:

> "Now my Lord here lies the whole distinction between the Tanganyika Law and the Kenya Law. The Kenya Law is clearly silent and has no such proviso."

Learned counsel submits that because of this intitulement a private prosecutor is thus recognized as a party to criminal proceeding, and he calls in aid several passages in the Court of Appeal judgment stressing the importance of the correct intitulement of proceedings.

The respondent's case thus rests on this provision in sub-s. 4, which in learned counsel's contention distinguishes Tanganyika law from the Kenya law.

It is, therefore, necessary to examine this sub-section a little more closely. It is obviously a later addition to the rest of the section and does not really harmonize well and happily with the remainder of the section. It was in fact added by an amendment passed in the Criminal Procedure Code (Amendment) Ordinance, 1936. To my mind it does no more than provide for as stated in the marginal note:

"'(The)' title of summary proceedings."

It is not irrelevant to note that in the "Objects and Reasons" to the Bill, it was stated,

> "it is considered convenient that the title of the proceedings in a summary trial should indicate whether the prosecution is a police or a private prosecution."

To my mind, just as the intitulement "the Commissioner of Police" would not make the commissioner the party to the proceedings so as to oust the Crown as the party, likewise the name of the private prosecutor in the intitulement would not oust the Crown as the party. As indicated earlier, in the words of the House of Lords judgment:

> "A right of appeal from a decision dismissing a criminal case can only be given by statute and in that case only by words which are clear, express, and free from ambiguity."

I am not persuaded that this sub-section can be construed as giving such a right. To my mind, as already indicated, the principle underlying the Court of Appeal decision would apply equally well to these instant proceedings, the reasons behind such decision based on the several enactments also apply equally well here, and there is no provision in our Code corresponding to the proviso in s. 367 of the Kenya Code, which enables a private prosecutor to bring an appeal by way of case stated against an acquittal, but for which provision, it is abundantly clear from the Court of Appeal judgment he would have no such right. Therefore, in the absence of such express provision in our Code, I consider myself constrained to hold that a private prosecutor in this territory, on the law as it at present stands, has no right of appeal by way of case stated against an acquittal. The preliminary objection raised by the respondent is, therefore, upheld and the appeal is accordingly dismissed as incompetent.

Appeal dismissed as incompetent.

For the appellant:

Fraser Murray, Thornton and Co., Dar-es-Salaam

W.D. Fraser Murray

For the respondents:

W. J. Lockhart-Smith, Dar-es-Salaam

Re a Notice of Marriage Given by Sansone Banin

[1960] 1 EA 532 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	8 June 1960
Case Number:	5/1960
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Nullity – Foreign decree – Husband and wife married in Palestine under Foreign Marriage Act, 1892 *– Husband a British subject – Wife at the time domiciled in Palestine – Subsequent residence of husband and wife in Britain and Kenya – Wife returns to Israel and there obtains decree of nullity on religious grounds – Whether Israel court has jurisdiction to make decree – Recognition of decree by Kenya courts – Marriage Ordinance* (*Cap.* 144), *s.* 15 (*K.*) *– Foreign Marriage Act*, 1892.

Editor's Summary

The Attorney-General entered a caveat in respect of a notice of intended marriage of one, S.B., with one, F.S., whose former marriage to one, C.S., on March 25, 1948, before the District Commissioner, Haifa, Palestine (as it then was) under the Foreign Marriage Act, 1892, had been declared invalid by a foreign decree. C.S. was at the time of his marriage a British subject domiciled in England and was serving in the Palestine Police Force. F.S., though born in Poland, was domiciled in Palestine at the time of the marriage. After the marriage the parties lived and cohabited together as man and wife in the United Kingdom from April, 1948, until November, 1955, where they had two children. In December, 1955, C.S. came to Kenya and was followed by F.S. in December, 1956, and they lived together in Kenya until January, 1959, when F.S. returned to Palestine. At the hearing which followed the caveat F.S. said that she finally left C.S. in January, 1959, because of his cruelty and returned to Israel with the intention of remaining there. On June 28, 1959, the Rabbinical Court at Haifa, upon the petition of F.S. issued a decree declaring the marriage between her and C.S. to be invalid on the grounds that F.S., as a Jewess, had not, under religious law, the Torah, the capacity to contract a marriage with C.S. who was not a Jew. It was contended for the Crown that (1) the marriage, performed as it was under the Foreign Marriage Act, was valid by the law of England (2) the decree of annulment by the Rabbinical Court at Haifa was invalid for want of jurisdiction (3) the only court of competent jurisdiction was the court of the intended matrimonial domicile, namely, England, and (4) the intended wife, if the marriage was valid, took the domicile of her husband C.S., and if invalid, acquired a domicile of choice firstly in England and later in Kenya, and that she did not acquire a further domicile of choice in Palestine at the time she petitioned the Rabbinical Court. Counsel for F.S. submitted that at the time of the petition and of the grant of the decree of nullity, F.S., who was the petitioner, was domiciled in Palestine and that it should, therefore, be held that the Haifa Court had jurisdiction.

Held –

(i) that as on her return to Israel F.S. had formed the intention to remain there permanently and had abandoned her domicile of choice in Kenya, she had acquired a new domicile in Israel.

(ii) as she was domiciled in Israel at the time of her petition and as the marriage had been celebrated in Israel, where at the time was domiciled, the Rabbinical Court at Haifa had jurisdiction to pronounce the decree of nullity, and this court was bound to recognise it.

Order that the word “forbidden” in the marriage notice book be cancelled and the Registrar of Marriages issue the appropriate certificate under the Ordinance.

Cases referred to in judgment:

(1) *Salvesen v. The Administrator of Austrian Property*, [1927] A.C. 641.

(2) *De Reneville v. De Reneville*, [1948] P. 100; [1948] 1 All E.R. 56.

(3) *Chapelle v. Chapelle*, [1950] P. 134; [1950] 1 All E.R. 236.

(4) *Kenward v. Kenward*, [1951] P. 124; [1950] 2 All E.R. 297.

(5) *Ponticelli v. Ponticelli*, [1958] P. 24; [1958] 1 All E.R. 357.

(6) *Casey v. Casey*, [1949] P. 420; [1949] 2 All E.R. 110.

(7) *Simonin v. Mallac* (1860), 2 Sw. & TR. 67.

(8) *Sottomayer v. De Barros*, [1877] 3 P.D.1.

(9) *Mitford v. Mitford*, [1923] P. 130.

(10) *Ramsay-Fairfax v. Ramsay-Fairfax*, [1956] P. 115; [1956] 2 All E.R. 709.

(11) *Corbett v. Corbett*, [1957] 1 All E.R. 621.

(12) *Roberts v. Brennan*, [1902] P. 143.

(13) *White v. White*, [1937] P. 111; [1937] 1 All E.R. 708.

Judgment

Edmonds J: These proceedings arise as the result of a caveat entered by the Attorney-General under s. 15 of the Marriage Ordinance, Cap. 144, Vol. 2 of the Laws of Kenya in respect of a notice of marriage given by Sansone Banin of his intended marriage to Frajda Smettem (to whom I will hereinafter refer as the intended wife). The words of the caveat are as follows:

> "Forbidden. The purported decree of annulment or divorce of Mrs. Frajda Smettem's previous marriage is invalid in Kenya."

The facts leading up to the notice of marriage may be set out as follows. The intended wife was married to Clive Edward Smettem on March 25, 1948, before the District Commissioner, Haifa, Palestine (as it then was) under the provisions of the Foreign Marriage Act, 1892. Smettem at the time was a British subject domiciled in England and was serving in the Palestine Police Force. The intended wife was born in Poland and was domiciled in Palestine at the time of the marriage. After the marriage the parties lived and cohabited together as man and wife in the United Kingdom from April, 1948, until November, 1955. During this period they had two children born, respectively, on January 11, 1950, and on May 12, 1952. In December, 1955, Smettem came to Kenya and was followed by the intended wife in December, 1956, and they lived together in Kenya until January, 1959, when the intended wife returned to Palestine.

Evidence was given by the intended wife, which was not contested, that there were differences between the parties before they came to Kenya; that after Smettem's departure for Kenya she was reluctant to join him and wished to return to Palestine (then the State of Israel), but finally agreed to join him in Kenya out of consideration for the children and in an effort to save the marriage. She said that she finally left Smettem in January, 1959, because of his cruelty, and returned to Israel with the intention of

remaining there. On June 28, 1959, the Rabbinical Court of Haifa, upon the petition of the intended wife, issued a decree declaring the marriage between her and Smettem to be invalid on the grounds that one of the parties to the marriage, namely Smettem, was not a Jew, and that the intended wife as a Jewess had not, under her religious law, the Torah, the capacity to contract a marriage with a Christian. On September 11, 1959, Smettem went through a second form of marriage with one Olive Joyce Hart in Kenya with whom he has since lived and cohabited.

It is contended for the Crown:

(1) that the marriage, performed as it was under the Foreign Marriage Act, was valid in accordance with English law;

(2) that the decree of annulment by the Rabbinical Court of Haifa is invalid for want of jurisdiction;

(3) that the only court of competent jurisdiction was the court of domicile of the intended maritable home, namely England, and

(4) that the intended wife, if the marriage was valid, took the domicile of her husband Smettem, and if invalid, acquired a domicile of choice firstly in England and later in Kenya; and that she did not acquire a further domicile of choice in Palestine at the time she petitioned the Rabbinical Court.

In making his submissions, though he made it clear that he was appearing for the Crown principally in the role of amicus curiae, Mr. Hancox took as one of his early grounds in support of the caveat the point that a court, where there are children of a marriage, will always lean if it possibly can, when construing the law, towards a conclusion that the children of the marriage are legitimate. I appreciate that on the facts appearing in this case, whatever my decision is, either the children or Smettem and the woman with whom he is now living, will suffer. If I declare that the Haifa decree is binding on this court, the result will be that the children are illegitimate. If I rule the opposite, the result will be that Smettem will be guilty of a bigamous union. Either result is disastrous, but I do not think that I can allow these consequences to influence my decision as to the law. The fact must not be lost sight of that the issue I have to decide is not whether the purported marriage between Smettem and the intended wife was valid. It is not my function as it were to constitute myself an Appeal Court and to declare whether or not the decree of the Rabbinical Court of Haifa was based on good or bad law.

> "It is now established beyond any doubt that in an action on a foreign judgment the English court is not entitled to investigate the propriety of the proceedings in the foreign court. Erroneous judgments delivered by a foreign court are not void in England. The merits of the case have been argued and determined, and if one of the parties is discontented with the decision his proper course is to take appellate proceedings in the forum of the judgment. The English tribunal, in other words, cannot sit as a Court of Appeal against a judgment pronounced by a court which was competent to exercise jurisdiction over the parties. The defendant in England may show that the foreign court had no jurisdiction to try the case, or he may plead a limited number of defences, such a fraud, which will be considered later, but he is not at liberty to show that the court mistook either the facts or the law upon which its judgment was founded."

(Cheshire on Private International Law, (5th Edn.), p. 630.)

I am thus faced with the question only as to whether the decree of nullity granted by the Rabbinical Court must be afforded recognition under the law of England and of this Colony; in other words, whether the courts of England and of this Colony will recognise the jurisdiction of the Haifa Court.

As regards the first of Mr. Hancox's contentions, I think he submitted that as, at the date of the marriage between the intended wife and Smettem, Palestine was still subject to the British Mandate, and that, as they had married under the provisions of the Foreign Marriage Act, they were to all intents and purposes married according to English law, and any question of the validity of the marriage would have to be determined in accordance with that law. Hence, it was contended

that the jurisdiction of the Rabbinical Court of Haifa was ousted. The reasoning is, I think, unsound and is against the authority of Dicey's Conflict of Laws (6th Edn.), p. 774:

> "The Foreign Marriage Act, 1892, has no bearing upon the capacity of the parties to intermarry. A marriage solemnised under that Act, (*e.g.*, at a British consul's official residence) is 'as valid in law as if the same had been solemnised in the United Kingdom with a due observance of all forms required by law', but a marriage so solemnised in the United Kingdom may be invalid if the parties are incapable of intermarriage under the law of their domicile. Hence a marriage (*e.g.*, before a British consul) would also be invalid if the parties were under an incapacity to intermarry by the law of their domicile."

I think therefore it is clear that, provided the Israel court had jurisdiction in other respects to pronounce a decree of nullity, it had jurisdiction to declare the marriage invalid on the grounds of the incapacity of the parties under the law of Israel.

The principal issue before this court is whether the Rabbinical Court of Haifa had jurisdiction to pronounce a decree of nullity. If it had, then I think it follows that the decree of that court must be recognised by this court and the courts of England. For the intended wife and the man she now wishes to marry, it is contended that the courts of England and of this Colony will recognise the decree of nullity by the Haifa Court on the grounds that the latter had jurisdiction to grant that decree because (*a*) it was the forum of the lex domicilii, (*b*) it was the forum of the lex loci celebrationis; and (*c*) it was court of the country where at the time of the marriage the petitioner was resident.

Mr. Kean, who appeared for the intended wife, argued the first ground on the premises that at the time of the petition and of the grant of the decree of nullity, the intended wife, who was the petitioner, was domiciled in Palestine and that it should, therefore, be held that the Haifa court had jurisdiction. It is submitted both in Dicey's Conflict of Laws and by Cheshire on Private International Law, that a foreign decree of nullity granted in the case of a petitioner who is domiciled within the jurisdiction of the court which grants the decree should be recognised by the English courts. It is stated in Dicey, at p. 383:

> ". . . it is submitted that a decree pronounced by the court of the country in which one party is domiciled should be recognised in England if the English court is satisfied that the marriage is void in the sense that no decree of nullity would have been required, if the allegations upon which the decree was founded were proved."

Cheshire at p. 361 says:

> "The question that still lacks a judicial answer is whether, in the case of a void marriage, English law admits the international validity of a nullity decree granted by the court of the country in which the petitioner, but not the respondent, is domiciled."

and at p. 362 he goes on to say:

> "It is submitted that cogent reasons can be advanced in favour of conceding jurisdiction to the court of the domicil of the petitioner alone. In the first place, the English court assumes jurisdiction on this ground, and it seems a little incongruous, to say the least, that the equivalent right of foreign courts should be denied. Again, if a void marriage is a complete nullity and can be so treated by every court and every private person, what possible reason can there be for refusing recognition to a decree recording its non-existence

> and granted in the domicil of one of the parties? It smacks of pedantry to reject the declaration of an admitted truth. Further, on mere sociological grounds recognition of the foreign decree seems imperative, for its repudiation creates yet another instance of that lamentable situation in which the parties are regarded as married in one country but unmarried in another. Finally, it is not without significance that in a case where the facts were similar to those in *Chapelle v. Chapelle* a South African court had no hesitation in recognising the foreign decree."

Then, it is stated in 7 Halsbury, 3rd Edn., at p. 118:

> "It would not, however, appear to be necessary in the case of a marriage celebrated abroad, that both parties must be domiciled within the jurisdiction; and the validity of a marriage between a domiciled Englishman and a woman domiciled in a Foreign country is a matter properly cognisable by the courts of that country because in the case of a void marriage, if the wife has not acquired the domicile of the husband apart from the marriage itself, the wife and husband may never have the same domicile."

Mr. Hancox, however, relied strongly on *Salvesen v. The Administrator of Austrian Property* (1), [1927] A.C. 641 which he submits is authority for his contention that it is only the court of the intended matrimonial domicile or of the common domicile which has jurisdiction to grant a decree of annulment of a void marriage. In that case the House of Lords held that a foreign country has jurisdiction if the parties to a void marriage are both domiciled there at the time of the petition, but it did not declare or decide that the jurisdiction of the common domicile was exclusive. The case was discussed by Lord Greene, M.R. in *de Reneville v. de Reneville* (2), [1948] P. 100; [1948] 1 All E.R. 56 and at p. 109 he says:

> "In nullity cases the parties will have the same domicile at the date of the institution of the suit in one of two events, namely . . . (2) if the marriage is void but nevertheless the wife on the facts acquired a domicile of choice in the country contemplated as that of the matrimonial domicile and has not subsequently changed that domicile. This occurred in the Salvesen case, where the wife acquired in fact the husband's German domicile and therefore it was unnecessary to consider what the position would have been if the marriage had been a void marriage and the domiciles of the parties had been different. Throughout the opinions delivered in that case the word 'parties' in the plural is used, and it is right to point out that Lord Phillimore, said that as to matters of status 'the law which regulates or determines the personal status of the parties, if they are both subject to the same law, decides conclusively'. I do not, however, read this as an expression of opinion on a point which did not arise and was not for consideration, namely, has such a court jurisdiction where one only of the parties is subject to its law, that is, domiciled in its country."

The *Salvesen* case (1) is not therefore an authority that can be called in aid of the contention that the court of the common domicile is the only court of jurisdiction in nullity cases based on void marriages.

Mr. Hancox also relied on *Chapelle v. Chapelle* (3), [1950] P. 134, but the case is distinguishable. The facts were as follows:

> "A woman, admittedly domiciled in England, was married in 1931, at a register office in England, to a man domiciled in Malta. The parties, who were then living in Malta, came to England for the marriage because no civil decree of divorce is recognized by the law of Malta and the wife's previous husband, from whom she had been divorced, was still living at that time. After the ceremony the parties returned to Malta, where they lived

> together until 1941, when the husband was sent overseas on active service, and the wife returned to and thereafter remained in England. In 1943 the husband instituted proceedings for nullity of marriage in His Majesty's Civil Court in Malta, and in 1944 that court decreed the marriage in England to have been null and void ab initio on the ground that it had not been celebrated in accordance with the requirements of the cannon law. The wife was represented by curators acting on her behalf, but she was not present, nor was she in Malta. She did not appeal. The husband subsequently came to England and acquired an English domicile of choice, and in 1949 he presented a petition for divorce on the grounds of his wife's adultery and desertion. On her application an issue was directed to be tried as to the legal effect of the Maltese decree of nullity on the validity and subsistence of the English marriage."

It was held inter alia:

> "that unless the wife could be said to have acquired a Maltese domicile otherwise than through her marriage, the court could not accept the decree of nullity as binding (requiring as it did a common domicile of the parties in order to have that effect) for the court would not permit the wife to claim at one and the same time the necessary common domicile with her husband in Malta by virtue of her marriage, and also rely on the decree of the Maltese court annulling that marriage and destroying the foundation on which the claim to the necessary common domicile was based."

The contention for the wife in that case was that, although she was domiciled in England at the time of the marriage, on marriage she acquired under English law the domicile of her husband, which was that of Malta. Hence it was argued, on the authority of *Salvesen* (1), that as both parties were domiciled in Malta at the commencement of the proceedings for nullity, the Maltese court had jurisdiction to pronounce a decree of nullity. It will thus be seen that that case proceeded on the premises of the parties having a common domicile in Malta, and did not proceed on the alternative premises that the domicile of the husband, the petitioner, at the time of the Maltese suit was alone sufficient to found jurisdiction. That issue was neither argued before nor considered by the court and although Willmer, J. said at p. 144 that the possession by the parties of a common Maltese domicile was

> "the one and only ground on which the claim to exercise jurisdiction over the wife could be based",

that opinion must be regarded as obiter dictum.

Again, Mr. Hancox relied strongly on the *de Reneville* case (2), but I do not think that that is an authority in support of his contention. In that case the Court of Appeal was considering solely the question of the jurisdiction of an English court in nullity matters. It was not dealing with the question of recognition by English courts of foreign jurisdiction in nullity. The distinction is clear from Dicey. Rule 35 at p. 244 deals with the jurisdiction of the High Court of England in the matter of declaration of nullity of marriage, and under Note 69 the editors note that

> "The rule and comment have been entirely re-written in the light of the decision of the Court of Appeal in *de Reneville v. de Reneville . . .*"

On the other hand Rule 73 at p. 381 deals with the jurisdiction of foreign courts in the matter of declarations of nullity of marriage; and the only reference to *de Reneville* (2) under this rule is at p. 383 when it is said under para. (*d*):

> "If the marriage is voidable the woman acquires the domicile of the man by operation of law . . . "

The editors then later in the same paragraph go on to write a passage which I have already quoted:

> "There is, however, no authority covering the case where the parties have no common domicile; but it is submitted that a decree pronounced by the court of the country in which one party is domiciled should be recognised in England if the English court is satisfied that the marriage is void in the sense that no decree of nullity would have been required, if the allegations upon which the decree was founded were proved."

It is thus clear that *de Reneville* (2) is not an authority against Mr. Kean's first proposition or one in favour of Mr. Hancox's contention that the only court of jurisdiction is the court of the common domicile of the parties. Mr. Hancox cited other cases on which he relied, notably *Kenward v. Kenward* (4), [1951] P. 123; *Ponticelli v. Ponticelli* (5), [1958] P. 204; and *Casey v. Casey* (6), [1949] P. 420, but I do not think they take him any farther. In none of these cases is the question considered of the recognition which the courts of England will give to foreign jurisdiction in nullity cases. In the light of the opinions of such weighty authors as the editors of Dicey and Cheshire, even though their views have not as yet the support of any decided case (nor is there any authority against their views) I find it difficult to lend my support to Mr. Hancox's contention. It would seem to me that if the evidence establishes that the intended wife was domiciled in Israel at the time of the decree, the reasonable view to take is that the Rabbinical Court had jurisdiction to pronounce a decree of nullity.

However, it is urged by Mr. Hancox that there is insufficient evidence before the court to justify a finding that the intended wife had abandoned her domicile of choice in Kenya and had acquired a new domicile of choice in Israel. I do not think that Mr. Kean contested the facts that she had obtained a domicile of choice after her marriage firstly in England and later in Kenya, but he does submit that the evidence clearly establishes that on her return to Israel she had abandoned her former domicile in Kenya animo et facto. Given the fact of residence, it is essential in order to establish the acquisition of a new domicile, to prove the intention of the party permanently to remain in the place where he or she has taken up residence. What is the evidence before me? The intended wife was at the time of marriage to Smettem, domiciled in Israel (then Palestine). When her marriage broke up she left Kenya accompanied by her children, with the consent of Smettem, to return to Israel, her former home. And she said in evidence that it was her intention on leaving Kenya to make her permanent home in Israel. She was registered as an immigrant in Israel and her passport was endorsed to that effect on April 1, 1959. Although she did not say so in so many words, I think it reasonable to assume that at the time of her marriage, Palestine was her home and the only home she knew. What more natural thing to do, when her marriage proved a failure and she left her husband, than to return to her home. She had considered doing this in 1958 before she left England but, in an effort to save the marriage and out of consideration for her children, she followed her husband to Kenya, and it was only after further trial when the marriage proved insupportable that she decided to go back to Israel. It must be remembered that this evidence is not contested. While facts and circumstances may go towards negativing the expressed intention of a party, it is often that the best evidence of intention is that given by the party herself. There are circumstances in this case which, it is contended, should be held as negativing the expressed intention of the intended wife. Those circumstances are, it is suggested, to be found in the fact that she met

her intended husband in Kenya before going back to Israel, met him again in Israel, and later agreed to marry him and to return to live in Kenya. It is true that she arrived back in Israel in January, 1959, and that it was as early as August of the same year that she agreed to marry the intended husband and to return to Kenya. She had first met him in Kenya in September, 1958, but at that time she states she had no intention of marrying him. She saw him again for about a fortnight in June, 1959, in Israel but says that on his departure there was no agreement between them as to marriage, and that it was only as a result of subsequent correspondence that she agreed two months later to marry him.

As I have said, none of this evidence is contested, nor was it placed in doubt under cross-examination. There was no suggestion that her evidence was anything but the truth and there is thus no justification for its rejection. I accept what the intended wife says as true and in deciding the issue whether on her return to Israel she had abandoned her Kenya domicile animo et facto, I must not allow the fortuitous fact of her later deciding to marry a man who does not live in Israel and who happens, again fortuitously, to live in Kenya, to influence me on the question whether she had acquired a new domicile in Israel. I find as a fact that on her return to Israel she had formed the intention permanently to remain there and had abandoned her domicile of choice in Kenya. In view of the authorities to whom I have referred at the outset when considering the question of the jurisdiction of the Haifa Court, I think is not unreasonable, and it is certainly not contrary to any authority, to take the view that as the intended wife had acquired a new domicile in Israel, a court of that country had jurisdiction to entertain her petition for nullity and to grant her the decree which it did.

Mr. Kean's claim for recognition of the Haifa Court's jurisdiction is in my view strengthened by the fact that the intended wife and Smettem were married in Palestine (now Israel). There is considerable authority for the proposition that the court of the lex loci celebrationis has jurisdiction in nullity petitions based on void marriages. In Dicey, it is stated at p. 382:

> "It seems to follow that the decision in *Salvesen's* case is wide enough to cover foreign decrees annulling marriages celebrated abroad under the Foreign Marriage Act, 1892, but lacking formal validity by the lex loci celebrationis. Hence the decree which was not recognised in *Hay v. North-cote* would, it is submitted, be recognised today . . . If English courts recognise foreign decrees annulling marriages celebrated in England on the ground of lack of form, even though the marriage is formally valid by English law, they should, it is submitted, also recognise foreign decrees annulling marriages celebrated abroad under the Foreign Marriage Act 1892, even though the marriage is formally valid under that statute."

Cheshire at p. 363 says:

> "The mere fact that a marriage was celebrated in England confers jurisdiction upon the English court to annul a void marriage. It is, therefore, a little embarrassing to reject the equivalent right of the courts of a foreign locus celebrationis. There is, however, no clear authority to this effect, but in a modern case Somervell, L.J., admitted the convenience of conceding jurisdiction to the courts of the place of marriage where the validity of the marriage ceremony is in issue. Should the matter call for a decision, it is to be hoped that the court will be imbued with a spirit of reciprocity."

Schmitthoff on The English Conflict of Laws (3rd Edn.), at p. 358 agrees with Dicey and Cheshire when he says:

> "Nullity suits in respect of void marriages are further entertained in the courts of the country where the marriage was celebrated. Those courts

> are particularly fitted to adjudge on the question whether a marriage is formally valid or not, for that question is determined by the lex celebrationis which is administered by those courts as their municipal law. It is, however, noteworthy that the competence of the courts of the place of celebration of marriage is not confined to questions of form, but extends to all cases where the invalidity of a marriage is at issue."

The courts of England have exercised this jurisdiction in cases where, though the parties were domiciled abroad at the commencement of the suit, the marriage had been celebrated in England. See *Simonin v. Mallac* (7) (1860), 2 SW. & TR. 67 and *Sottomayer v. De Barros* (8), [1877] 3 P.D.1. In *Mitford v. Mitford* (9), [1923] P. 130, the nullity decree of a German court was recognised as binding on the English courts, the head note in that case reading:

> "The validity of a marriage between a domiciled Englishman and a woman domiciled in a foreign country, celebrated in that country is a matter properly cognizable by the courts of that country."

In *Ramsay-Fairfax v. Ramsay-Fairfax* (10), [1956] P. 115, Denning, L.J. expressed the opinion, obiter, that:

> "It may be in these nullity cases that the courts of the domicile also have jurisdiction: so may the courts of the place where the marriage was celebrated . . ."

Finally, in a more recent case where the facts were very similar to those in the proceedings now before me, *Corbett v. Corbett* (11), [1957] 1 All E.R. 621, Barnard, J. recognised the decree of annulment pronounced by the District Court of Jerusalem on the grounds that as the marriage had been celebrated in Israel, the Jerusalem court had jurisdiction to pronounce a decree of nullity. There is, therefore, weighty authority justifying the recognition by this court and the English courts of the decree of nullity pronounced by the Rabbinical Court of Haifa. That court was not only the forum domicilii of the petitioner but also the forum of the lex loci celebrationis.

Mr. Kean contends that a third ground, namely the fact of the residence in Israel of the petitioner at the time of the decree, is sufficient to found jurisdiction in the Haifa Court. There is little authority in support of this contention. Cheshire contends in favour of jurisdiction based on the residence of the petitioner alone in the case of a void marriage. There is some force in his argument but the Court of Appeal in the *de Reneville* case (2) refused to accept *Roberts v. Brennan* (12), [1902] P. 143 or *White v. White* (13), [1937] P. 111 as authority for the proposition that mere residence by a petitioning wife in England was sufficient to give the court jurisdiction. At p. 117 of the *de Reneville* (2) report Lord Greene, M.R. says:

> "In any case I am quite unable to accept *Roberts v. Brennan* as an authority for the proposition that the mere residence of a petitioning wife in England is sufficient to give the court jurisdiction to entertain a nullity suit when the respondent husband is not resident here. If it be thought that *Roberts v. Brennan* does so decide, I am unable to agree with it."

The court there was, of course, dealing with the question of jurisdiction in a voidable marriage but later on in his judgment Lord Greene says in reference to *White v. White* (13):

> "I cannot read this decision as meaning that residence of a petitioning wife alone is sufficient to found jurisdiction on the ground of residence even in the case of a void marriage."

However, I think it unnecessary to consider this aspect of the matter any further. I am satisfied that, on the grounds of the domicile of the wife at the time of the petition and on the grounds of the marriage having been celebrated in Israel, where the intended wife was at the time domiciled, the Rabbinical Court of Haifa had jurisdiction to pronounce the decree of nullity, and that this court is bound to recognise that decree.

In the result, therefore, I find that no cause has been shown against the intended marriage. I shall, therefore, cancel the word "forbidden" in the marriage notice book, and I order the issue by the Registrar of Marriages of the appropriate certificate under the Ordinance.

Order that the word "forbidden" in the marriage notice book be cancelled and the Registrar of Marriage issue the appropriate certificate under the Ordinance.

For the applicants:
Sirley & Kean, Nairobi
M. Kean

For the caveator:
The Attorney-General, Kenya
A. R. Hancox, (Crown Counsel, Kenya)

Mohamed Badrudin M Dhanji v Lulu & Co

[1960] 1 EA 541 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of ruling:	26 November 1959
Case Number:	15/1959
Before:	Crawshaw J
Sourced by:	LawAfrica

[1] Practice – Counter-claim – Defendant admitting claim but pleading counter-claim – Whether court should enter judgment on claim before hearing counter-claim – Civil Procedure Rules, O. 12, *r.* 6 (*T.*).

[2] Hire-purchase – Agreement by hirer to sell his interest in hired vehicle before aggregate of instalments paid – Whether such agreement void ab initio or executory pending consent of owner of vehicle – Indian Contract Act, 1872, *s.* 20, *s.* 56.

Editor's Summary

By a hire-purchase agreement for a car the appellant became, as he was therein described, "bailee" of the vehicle until he had paid all the instalments for the term of the agreement and other sums due thereunder.

The appellant was also indebted to the respondents on a running account and when sued for the balance due and interest he admitted in his defence and counter-claim that the entries in the respondents' account were correct but incomplete, since he alleged that they had previously agreed to buy his entire interest in the car for Shs. 9,000/- by paying to the owners thereof all the instalments still owing and amounting to Shs. 7,142/80 and crediting the running account with the balance. He also alleged that he had delivered the vehicle to the respondents who had retained it till it was re-possessed by the owners pursuant to the hire-purchase agreement. The respondents in their reply denied the alleged agreement and claimed that the arrangement was that they were to try to find a purchaser for the car and when they found and told the appellant that Shs. 6,000/- was the best offer obtainable which he refused, they asked the appellant to retake possession of the car which he failed to do. In a rejoinder the appellant virtually admitted the allegations in the reply. At the hearing of the action the magistrate on the

application of the respondents under O. 12, r. 6 despite the opposition of the appellant entered judgment for the balance claimed on the running account and then went on to try certain issues raised by the counter-claim including the nature of the arrangement between the parties. His judgment was that the agreement between the parties was impossible ab initio and void (and not merely voidable) since the respondents could not agree to buy the car because the appellant had no proprietory or assignable interest therein. On appeal it was submitted that the magistrate had erred in entering judgment for the sum claimed and in finding that the agreement between the parties was impossible and void.

Held –

(i) the magistrate was not correct in entering judgment on the claim before hearing the counter-claim; in effect the defence only admitted the entries in the account so far as they went and, unless the counter-claim was frivolous, to enter judgment for the amount claimed in effect took away the right to set up a counter-claim.

(ii) the agreement between the parties was not void but was executory pending the approval or otherwise of the owners and was terminated when the owners retook possession of the car.

Appeal dismissed but judgment of the magistrate varied.

Cases referred to in judgment:

(1) *Mersey Steamship Company v. Shuttleworth & Company* (1883), 11 Q.B.D. 531; (1883), 10 Q.B.D. 468.

(2) *Whitely Ltd. v. Hilt*, [1918] 2 K.B. 808.

(3) *United Dominions Trust* (*Commercial*) *Ltd. v. Parkway Motors Ltd.*, [1955] 2 All E.R. 557.

(4) *Rowland v. Divall*, [1923] 2 K.B. 500.

(5) *Central London Property Trust Ltd. v. High Trees House Ltd*., [1947] K.B. 130.

(6) *Combe v. Combe*, [1951] 1 All E.R. 767.

(7) *Lyle-Mellor v. A. Lewis & Company* (*Westminster*) *Ltd.*, [1956] 1 All E.R. 247.

Judgment

Crawshaw J: The respondent company sued the appellant for Shs. 3,871/70 cts., being the balance of a running account (the last entry which was April 2, 1958), and interest. In his written statement the appellant denied liability for interest, and as to the account itself said:

> "Save as hereinafter appearing the defendant admits that the entries in the statement of account annexed to the plaint and Marked A are correct but states that the said statement is incomplete and does not include the items hereinafter referred to."

The written statement under the heading "Set-off and Counter-claim" then alleged that by an agreement made in May, 1958 the respondents had agreed to buy from the appellant all the appellant's "right and interest in a motor vehicle" for Shs. 9,000/-. The vehicle was held by the appellant under a hire-purchase agreement, and the alleged terms of sale were that the respondents should pay to the owners

> "all the instalments due under the said hire-purchase agreement amounting to Shs. 7,142/80 cts.",

the balance of the Shs. 9,000/- amounting to Shs. 1,857/20 cts. to be credited to the appellant against the money due by him to the respondents. The written

statement says that in pursuance of the said agreement the appellant delivered the vehicle to the respondents in or about the month of May, 1958 and that the respondents retained it until about August, 1958 when the owners in pursuance of their rights under the hire-purchase agreement terminated the hiring and retook possession of the vehicle. The appellant claimed therefore that the respondents' claim should be dismissed and that judgment should be entered for the appellant for "Shs. 184/58". This, Mr. Kanji tells me, is the balance after adding the Shs. 1,857/20 to a sum of Shs. 2,198/80 which the appellant says he was required to pay to the owners after they retook possession and then deducting the amount of the respondents' claim of Shs. 3,871/70. This is not at all clear from the written statement, and Mr. Kanji says the claim for Shs. 2,198/80 was abandoned. In the alternative, Shs. 2,880/- was claimed for the respondents' use and enjoyment of the vehicle whilst in his possession, assessed at Shs. 30/- per day.

In their reply the respondents denied the agreement for sale, and alleged that, although the appellant had no right to sell the vehicle under the terms of the hire-purchase agreement, the arrangement was that the respondents should try and find a purchaser for it. The best offer they could get was Shs. 6,000/-, which was not acceptable to the appellant, and the appellant was then asked to retake possession of the vehicle which, however, he failed to do. The respondents deny that they used the vehicle except in connection with their endeavours to sell it. In rejoinder the appellant went so far as to admit that

> "initially the plaintiff brought the said vehicle to Dar-es-Salaam but at the request of the plaintiff for the purpose of selling the interest of the defendant in the said vehicle."

From the appellant's evidence it is clear that he asked the respondents to try and find a purchaser.

Before hearing evidence the learned magistrate, on the application of the respondents under O. 12, r. 6, and though it was opposed by the appellant, gave judgment for the respondents for the amount claimed by them with costs, and then proceeded to hear the following issues on the counter-claim:

> "1. Was there a contract or agreement between the parties that the plaintiff should buy the vehicle on terms alleged or at all?
>
> 2. What right, if any, was transferred?
>
> 3. Amount payable if it is held there was an agreement.
>
> 4. Is the plaintiff estopped in equity from denying the existence of a contract where the defendant has been prejudiced (if at all) by the plaintiff's acceptance of the vehicle?"

On the first issue the learned magistrate held for the appellant, and this has not been appealed against, but he came to the conclusion that

> "the agreement was impossible ab initio and consequently was void and not *not* voidable under s. 56 of the Indian Contract Act. The plaintiff firm could not agree to buy the vehicle as the defendant had no proprietary right or assignable interest to sell."

He held that the doctrine of estoppel did not apply, and that nothing was payable under the agreement. He further disallowed the claim for user.

The first part of ground 1 of the memorandum of appeal reads:

> "The learned magistrate erred in holding that the written statement of defence did not deny the plaintiff's claim and that the whole of the plaintiff's claim was admitted by the defendant."

With respect, I do not think that the learned magistrate was correct in first giving judgment on the respondents' claim before hearing the counter-claim. What the written statement in effect says, is that the items in the account attached to the plaint are correct so far as they go, but that the account fails to mention the "items" referred to in the set-off and counter-claim. One of these items is a straight credit for the Shs. 1,857/20 cts. It is, incidentally, admitted by the appellant that he himself made no entry in his books of the transaction, and the managing partner of the respondent firm (who of course denied the transaction) says that no entry was made or credit given in the firm's books. The case of the *Mersey Steamship Company v. Shuttleworth and Company* (1) (1883), 11 Q.B.D. 531, would appear to be relevant. It is cited in the text to O. 32, r. 6 (similar to our O. 12, r. 6) of the English Rules of the Supreme Court in the 1957 edition of the annual practice, and the headnote reads:

> "In an action for a liquidated demand the defendants pleaded admitting the claim, but setting up a counter-claim for unliquidated damages to a greater amount.
>
> "The court refused an application under O. XL, r. 11, for an order to sign judgment for the plaintiffs upon the claim, and for payment of the amount thereof by the defendants into court to abide the result of the action.
>
> "Judgment of the Queen's Bench Division (10 Q.B.D. 468) affirmed."

In the court of first instance (1883, 10 Q.B.D. 468), Watkin Williams, J., observed that if the right to judgment was applied in all cases where the claim is admitted but there is a counter-claim for damages of equal or superior amount, it would take away in effect the right to set up a counter-claim, but that if the counter-claim was apparently frivolous or unsubstantial, judgment on the claim might be justified. It has not been suggested that the counter-claim in the instant case was frivolous or unsubstantial nor have any special reasons been given by the learned magistrate for awarding judgment. Before deciding what order to make on this ground of appeal, it is necessary to consider the other grounds of appeal.

The second and third grounds of appeal read as follows:

> "2. The learned magistrate erred in holding that the defendant had no proprietary right or assignable interest which the plaintiff could agree to buy and that there was therefore no consideration for the plaintiff's promise. He further erred in holding that the agreement was a nudum pactum and impossible ab initio.
>
> "3. Without prejudice to the foregoing, the learned magistrate erred in holding that the principle of the *High Trees House* case did not apply, and should have held that the defendant having acted on the plaintiff's promise to his (the defendant's) detriment, the plaintiff was bound to act in accordance with the said promise".

Counsel agreed that the magistrate's reference to the agreement between the parties being a nudum pactum was technically inaccurate; there would have been novation had the owners been a party to the transaction and the position would then have been very different. The hire-purchase agreement described the appellant as a "bailee", and such in fact would appear to have been the nature of his relationship with the owners. The owners were not informed of the transaction, in respect of which there was no written document, transfer or other overt act apart from the giving of possession. The hire-purchase agreement provided for the payment of sums by way of "hire rental", and the owners agreed,

> "that if the hirer shall punctually pay the monthly hire rentals and all other sums due under this agreement and shall strictly observe and perform

all the terms, conditions and obligations on his part contained in this agreement, he shall have the option to purchase the vehicle for the sum of twenty shillings".

The appellant agreed under cl. 2:

"(*k*) Not to allow the vehicle to pass out of his custody or control, nor to part with possession nor to sell, let, charge or in any way deal with or dispose of or attempt to dispose of the vehicle, nor to represent himself to be nor to hold himself out as being nor to do or suffer any act or thing whereby he may be reputed to be the owner of the vehicle; nor to take or send the vehicle or permit the same to be taken or sent out of British East Africa.

(*l*) Not to assign, charge or otherwise dispose of any of his rights or interests under this agreement, including the option to purchase contained in cl. 3(*b*) hereof. This agreement is personal to the hirer."

On breach of these conditions, cl.4 provided that "the owners may immediately terminate the hiring". Under cl. 5 the agreement was declared to be determined absolutely on the happening of certain events, including the death of the hirer. Clause 7 reads:

"7. Unless and until the whole of the sums due under cl. 2 (*a*) and 2 (*b*) hereof shall have been paid to the owners, and the purchase of the vehicle shall have been made under cl. 3 (*b*) hereof, the vehicle shall remain the absolute property of the owners, and the hirer shall not have any right or interest in the same other than as a mere bailee thereof."

There is the question whether the actions of the appellant in regard to the vehicle did not of themselves terminate the agreement between him and the owners, in that they were inconsistent with the bailment, for the terms of hire were in the instant case very much more strict and personal than were those in the case of *Whiteley Ltd. v. Hilt* (2), [1918] 2 K.B. 808 where this point was considered. It is to be observed however that the terms of the hire-purchase agreement did not expressly terminate the agreement in the event of any of the breaches with which we are concerned, but provided that the owners may, on such breach, "immediately terminate the hiring". I am of opinion therefore that until expressly terminated, the hiring continued.

As to ground 2 of the appeal, the relevant part of s. 56 of the Indian Contract Act reads, "An agreement to do an act impossible in itself is void". The learned magistrate took the view that by virtue of the terms of the hire-purchase agreement the appellant had no disposable interest, and an assignment amounted therefore to an impossible act. To this Mr. Thornton for the appellant maintains that what the respondents got was, "a chance of being accepted by the owners as hirers", and that the parties could enter into such an agreement "in the hope that the owners would not object". Where a right to assign is not excluded by the hire-purchase agreement, the hirer has an assignable interest in the option to purchase (the *Whiteley* case) but in the instant agreement such right is expressly excluded. The circumstances of the instant case have certain things in common with those in *United Dominions Trust* (*Commercial*) *Ltd. v. Parkway Motors Ltd.* (3), [1955] 2 All E.R. 557. In that case also there were terms that the hirer could not sell the van or assign the benefit of the agreement, and that in breach thereof the owners would have the right to terminate it. The hirer purported to sell the vehicle, and on an action by the owners for recovery or damages against a subsequent purchaser (who seems to have known of the hire-purchase agreement at the time of sale) it was held by McNair, J. that the hirer "was unable to pass any rights in the van or any rights under the agreement" to a purchaser. Beyond this finding the case does not help us, for the court did

not then have to consider what was the resulting position between the parties to the purported sales, but only the rights of the owners against the eventual purchasers.

I think it would be convenient to consider with s. 65 s. 25 also, the material part of which reads "An agreement made without consideration is void". There follow certain exceptions which however are not relevant to this case. I have been referred under the English law to the case of *Rowland v. Divall* (4), [1923] 2 K.B. 500, to which the following is the headnote:

> "The plaintiff bought a motor car from the defendant and used it for several months. It then appeared that the defendant had had no title to it, and the plaintiff was compelled to surrender it to the true owner. The plaintiff sued the defendant to recover back the purchase money that he had paid, as on a total failure of consideration:
>
> "*Held*, that notwithstanding that he (the buyer) had had the use of the car the consideration had totally failed, and he was entitled to get the purchase money back. The use of the car that he had had was no part of the consideration that he had contracted for, which was the property in and lawful possession of the car, whereas what he got was an unlawful possession which exposed him to the risk of an action at the suit of the true owner."

In that case neither the seller nor the buyer knew at the time of sale that the seller had no right of sale (the vehicle had been stolen by the person from whom the seller had bought it), whereas in the instant case it appears that they did. Although the appellant said in evidence, "I had sold all my rights in the vehicle", and, "I sold my hire rights", he also said, "I knew I had no right to sell the vehicle", and, "I was prohibited from disposing of any of my rights under the agreement". He admitted he had read the agreement. The respondents have not denied that they knew of the hire-purchase agreement at the time the vehicle was first handed to them, and in the reply to the written statement they refer to it and say,

> "In fact the defendant had no right to sell the said vehicle or any interest whatsoever therein".

The agreement cannot therefore be said, I think, to be void under s. 20 of the Indian Contract Act on the ground of mistake of fact which was one of the submissions of the respondents. Reference was made in the *Rowland* case (4), to s. 12 of the Sale of Goods Act, which stipulates an implied condition that a seller has a right to sell. Such a condition would perhaps hardly apply in the circumstances of the instant case, but the *Rowland* case (4), was nevertheless based on the failure of consideration, which is very much a matter in issue here too.

What exactly the parties in the instant case thought a buyer would get is not clear from the pleadings or from their evidence. It seems obvious that they both had some advantage in mind, for the respondents, though denying the sale to them, admit that they endeavoured to sell the vehicle to someone else. It appears to me that all the appellant could possibly offer was his consent to surrender his rights under the hire-purchase agreement on the buyer entering into a new agreement with the owners, and that it was in fact this, and this only which the respondents obtained. This consent would appear to have been valued at nearly Shs. 2,000/-, being the balance of the purchase price after payment of the instalments. In view of the fact that both parties knew the appellant had no disposable interest, I think one must read into the agreement an implied condition that should the owners refuse to enter into a new agreement (which I suppose would be by no means unlikely if they thought it more to their advantage to terminate the existing one for breach, and so regain possession of the vehicle) the consideration would have failed and the agreement between the appellant

and the buyer would lapse. Although the transaction passed no rights to the respondents in the vehicles or under the hire-purchase agreement, I do not therefore think that in the circumstances this limited agreement between the appellant and the respondents can be said to have been initially impossible or without consideration, but merely conditional.

What then is the position? The appellant did not notify the owners of the proposed transaction and he did not enquire from them afterwards if they agreed to it. The respondents, of course, did nothing in pursuance of the agreement, because they deny that there ever was such an agreement. It seems to me that both parties were equally lax. One would have expected the appellant to have approached the owners for, unless and until the latter terminated the hiring, there was still privity of contract between them. At the same time, the buyers were in possession of the vehicle, had obtained the appellant's consent and were to pay the instalments if the owners were prepared to enter into an agreement with them, and one would certainly have expected them either to have approached the owners themselves or else to have seen that the appellant did.

The agreement between the appellant and the respondents would therefore appear to have been executory pending the approval or otherwise of the owners. It seems to me that both the appellant and the respondents were equally at fault in not approaching the owners, and that the termination of the hire-purchase agreement by the owners, by their unequivocal act in retaking possession of the vehicle, put an end to the agreement between the appellant and the respondents. The owners had of course been in a position to terminate the hiring and retake possession of the vehicle ever since the appellant first handed over the vehicle to the respondents to try and find a purchaser for him.

As to the third ground of appeal, Mr. Thornton has placed strong reliance on the principles enunciated in the *Central London Property Trust Ltd. v. High Trees House Ltd*. (5), [1947] K.B. 130, and in *Combe v. Combe* (6), [1951] 1 All E.R. 767, the former being considered and explained in the latter. The principle as expressed in the former is that a promise, or unequivocal acceptance of liability, intended to be binding, intended to be acted on, and in fact acted on, is binding. In the *Combe* case (6), Denning, L.J., who also gave judgment in the *High Trees* case (7), said

> "Thus a creditor is not allowed to enforce a debt which he has deliberately agreed to waive if the debtor has carried on business or in some other way changed his position in relation to the waiver".

Applying those principles to the instant case, Mr. Thornton's argument is, as I understand it, that even if it is held that the agreement between the appellant and the respondents is otherwise unenforceable, the respondents are estopped from enforcing their claim against the appellant to the extent that they have agreed to set it off against the purchase price of the vehicle. Apart from whether or not the appellant in fact did change his position, the instant case does not, in my opinion, come within the *High Trees* (5), or *Combe* (6), category of cases. It has been submitted by Mr. Thornton that the conduct of the respondents in retaining the vehicle and, I suppose, in the very fact that they entered into the agreement with the appellant, resulted in the appellant acting on it to his detriment in that he could and would otherwise have sold the vehicle to someone else, and that on the authority of *Lyle-Meller v. A. Lewis and Company* (*Westminster*) *Ltd*. (7), [1956] 1 All E.R. 247 the respondents are estopped from denying liability under the agreement. The circumstances in the instant case, are, however, of quite a different nature. The appellant agreed to sell something which in fact he had not and knew he had not got, and if as a result thereof he found his position changed, he has only himself to blame and cannot hold the buyer responsible therefor. He took a chance. He handed the vehicle to the respondents in the hope that the owners would

agree to the transaction, without first consulting them, and cannot now complain. The type of case with which the principles in the *Combe* case (6), are concerned is where the promise is unilateral, not as, here, a contract based on mutual promises. In that case, Denning, L.J. said

> "Unilateral promises of this kind have long been enforced so long as the act or forbearance is done on the faith of the promise and at the request of the promisor, express or implied. The act done is then in itself sufficient consideration for the promise, even though it arises ex post facto . . .".

There was nothing done ex post facto here.

The fourth ground of appeal reads,

> "The learned magistrate erred in finding that the vehicle was not used by the plaintiff firm".

I am not prepared to disagree with his finding on the mileage done whilst the vehicle was in the hands of the respondents or one of their partners, or that it was not used by the appellant in connection with their business. I do not think that the evidence justifies Mr. Remtulla being described as an "expert". He did not say what the nature of his "experience" was. To be in charge of a second-hand car department does not necessarily signify an expert mechanical knowledge; he may only be on the administrative side, leaving the mechanical to someone else. The appellant's claim, however, was not based on mileage but on "rent . . . for the use and enjoyment" of the vehicle at 30/- per day. This, of course, was not an agreed rent. In the *Rowlands* case (4), no claim for user was allowed, but the circumstances there were admittedly rather different. I do not, however, think that the appellant is entitled to anything. In the first instance, he handed the vehicle to the respondents for sale and thereafter allowed them to retain it on the chance of a new agreement with the owners. Had he wished, he could have made rent a term of his agreement with the respondents, pending the ascertainment of the approval or otherwise of the owners to the transaction. He perhaps thought (if he considered it at all) that this was hardly worthwhile as the owners' views could be obtained without any appreciable delay. In fact, he did nothing to ascertain them and in my view he cannot profit by his own laches. In any event, there is no evidence at all in support of this claim of 30/- per day.

For the above reasons I think the learned magistrate was right in disallowing the set-off and counter-claim, and that being so there would appear to be no purpose in setting aside his judgment on the respondents' claim, in so far anyway as it relates to the principal sum of Shs. 3,871/70 cts. In ground 1 of the memorandum of appeal, however, complaint is made that, "in the absence of any proof by the plaintiff of their claim in respect of interest", interest should have been disallowed. In giving judgment for the respondents, the magistrate did not specifically mention interest, and gave judgment "for the amount claimed with cost". This included Shs. 232/29 cts. interest. He appears to have overlooked the fact that liability for the payment of interest was an issue in the cause, for in cl. 2 of his written statement the appellant had said,

> "the defendant denies that any interest was payable by the defendant to the plaintiff as alleged in para. 2 of the plaint or at all".

The plaint describes the interest as "on the amount outstanding and overdue from time to time". In their reply to the written statement they say the appellant had agreed to pay it or, in the alternative, it was "customary interest". In rejoinder this was denied. No evidence was given on behalf of the respondents as to interest, but this is not surprising in view of the fact that they had already obtained judgment. In the circumstances I set aside that part of the judgment

which related to interest. If the respondents wish to pursue their claim for interest, then the record must be returned to the trial court for the hearing of evidence and argument and the coming to a finding thereon.

As to costs (after hearing argument) I allow costs of this appeal to the respondents, except on the issue of wrongful entry of judgment which shall be paid by them.

Costs in the court below to the respondents on the counter-claim, and to the appellant on the claim.

By consent, Shs. 100/- interest to be paid by the appellant to the respondents, and no order as to costs relating to interest in the lower court or on this appeal.

Appeal dismissed but judgment of the magistrate varied.

For the appellant:
Fraser Murray, Thornton & Co., Dar-es-Salaam
S. H. M. Kanji

For the respondents:
R. C. Kesaria, Dar-es-Salaam

Kiwege and Mgude Sisal Estates Ltd v The Commissioner of Income Tax
[1960] 1 EA 550 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	22 April 1960
Case Number:	44/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Windham JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Law, J.

[1] Income Tax – Agricultural land – Assessable income – Deductions from income for capital expenditure – Expenditure on clearing and planting sisal allowed – Claim for expenditure on maintaining planted land – Whether deduction allowable – The East African Income Tax (*Management*) *Act*, 1952, *s.* 14, *s.*77, *s.* 98; *The Second Schedule thereto, paras.* 22, 29, 30, 33 *and* 39; *The Fifth Schedule thereto – The Income Tax* (*Consolidation*) *Ordinance*, 1950, *s.* 13 *and the Second Schedule thereto, paras.* 29 *and* 30 (*T.*).

Editor's Summary

In 1950 and 1951 the appellant company purchased the Kiwege Mgude and the Ngerengere sisal estates and became thereby entitled under para. 33 of the Second Schedule to the East African Income Tax (Management) Act 1952, to certain deductions in respect of expenditure incurred by the vendors for the purpose of ascertaining the total income of the company for the year of income 1951. If those deductions resulted in a loss for 1951 the company was entitled, under s. 14 (1) (*j*) of the Act to carry forward the loss and deduct it in ascertaining its total income for the next year. The company elected under para. 29 of the Second Schedule to the Act to have the expenditure deducted in respect of the year in which it was incurred, namely 1951, when the estates were purchased. As regards Kiwege and Mgude, the expenditure of the vendors in clearing and planting sisal was £13,805, and since the vendors had elected under s. 13 (1) (*i*) (ii) of the Income Tax (Consolidation) Ordinance 1950 of Tanganyika to deduct the expenditure in the year in which it was incurred, a balancing charge of this amount was raised on the vendors on the sale of these two estates. Although in the assessment relating to these two estates the company was given a deduction of £13,805, the company estimated that £81,501 in all had been spent by the vendors for clearing, planting and maintaining sisal on those estates and claimed a deduction of that amount. As regards Ngerengere, the expenditure of the vendors in clearing and planting was £15,594, and as the vendors had elected under s. 13 (1)(*i*)(ii) of the Income Tax (Consolidation) Ordinance 1950 to deduct the expenditure by annual amounts, and as at the date of sale this sisal was immature, no deductions for such expenditure had been allowed to the vendors and, consequently, no balancing charge was raised, but the company, in accordance with its election as above, had been given a deduction of this amount. The full cost of development for clearing, planting and maintaining sisal on this estate was £44,462, and the company claimed a deduction of this sum. Owing to certain confusion in the proceedings before the High Court, the parties agreed a statement of the facts and issues which they obtained the leave of the appellate court to have admitted for the purposes of appeal and cross appeal. The main issues were whether expenditure incurred by a person in maintaining, as opposed to clearing and planting land with permanent or semi-permanent crops, is expenditure which such person is entitled to deduct under either para. 29 or para. 30 of the Second Schedule to the Act and whether the deductions of £13,805 and £15,594 were the correct deductions allowable to the company for 1951. The company contended that as regards Kiwege and Mgude maintenance expenditure must be taken into account for the purposes of para. 29 as well as of para. 30, and

that as regard Ngerengere estate the effect of sub-para. 2 of para. 30 of the Second Schedule to the Act is to include maintenance expenditure in capital expenditure, at least for the purposes of that paragraph.

Held –

(i) all that has to be determined under para. 29 of the Second Schedule to the East African Income Tax (Management) Act, 1952, is the amount of capital expenditure "on the clearing of agricultural land and the plating of that land with permanent or semi-permanent crops", but under para. 30 of the Second Schedule the annual deduction is a sum "equal to the amount considered by the Commissioner to be just and reasonable as representing the diminished value during that year of the asset represented by the (capital) expenditure"; sub-para. 2 of para. 30 is clearly explanatory of sub-para. 1 and accordingly in the case of capital deductions on an "as and when basis" under para. 29 no question of maintenance expenditure fell to be considered.

(ii) para. 30 of the Second Schedule to the Act draws a clear distinction between "capital expenditure" properly so called, and the measure by which the commissioner is to assess annual depreciation, and such measure is the difference in value of the asset at the beginning and end of the year on the basis of the age and condition of the crop; expenditure on maintenance is clearly a relevant factor in considering the condition of the crop, but whilst it would be reasonable to take into account expenditure on maintenance in calculating the annual depreciation, it does not follow that maintenance expenditure is to be reckoned as part of capital expenditure.

(iii) it seems contrary to the spirit and scheme of the Act that a tax payer should be allowed the same expenditure both as a revenue deduction and as a capital deduction, and the effect of sub-para. 2 of para. 30 of the Second Schedule to the Act is to ensure that the annual deductions in respect of capital expenditure are spread over the whole life of the asset, a result which seems to be generally in accord with other Parts of the Schedule.

(iv) the deduction of £13,805 allowed for Kiwege and Mgude and of £15,594 allowed for Ngerengere were the correct deductions allowable to the appellant company.

Appeal dismissed. Cross-appeal allowed.

Case referred to Judgment in:

(1) *Vallambrosa Rubber Co. Ltd. v. Farmer*, 5 T.C. 529.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal and cross-appeal from a judgment and decree of the High Court of Tanganyika dated April 2, 1959. The decision of the High Court related to appeals by the appellant company against two assessments to income tax raised in respect of the years of income 1951 and 1952, numbered respectively 29080 and T3180. The assessments had been confirmed by the Local Committee under s. 77 of the East African Income Tax (Management) Act, 1952 (hereinafter referred to as the Act). The appeals from the decision of the Local Committee, which were consolidated in the High Court, related to the amount of the deduction in respect of capital expenditure to which the appellant company was entitled in respect of certain agricultural land. The High Court confirmed assessment No.

29080, dismissing that appeal, but allowed the appeal in respect of assessment No. T3180 and ordered that a deduction of £44,462 should be allowed on that assessment in respect of capital expenditure. No order was made as

to costs. The appellant company's appeal to this court is expressed to be against the decision of the High Court affirming assessment No. 29080; and the respondent's cross-appeal is expressed to be against the variation ordered in assessment No. T3180. It was common ground, however, that the variation in assessment ordered by the High Court ought to have referred in the first instance to assessment No. 29080, and the cross-appeal in substance was an appeal against the variation of the assessment in relation to the particular estate whenever it might fall to be made.

The assessments in question relate to three sisal estates purchased by the appellant company. Two of these estates, namely Kiwege Sisal Estate and Mgude Sisal Estate, were purchased under an agreement of sale dated April 28, 1950. The third estate, Ngerengere Sisal Estate, was purchased under an agreement of sale dated April 30, 1951. In the case of Kiwege and Mgude estates, an amount of £13,805 had been expended by the vendors in clearing and planting the estates with semi-permanent corps, i.e. sisal; and the appellant company estimated that a total amount of £81,501 had been expended by the vendors in respect of the clearing, planting and maintenance of sisal on those estates. In the case of Ngerengere Estate, the amount which had been expended by the vendors in respect of clearing and planting sisal was £15,594; and the total cost of clearing, planting and maintenance was £44,462. The matter at issue is whether the lower or the higher figure should be allowed as a capital deduction in each case; that is to say, whether maintenance expenditure is to be taken into account as capital expenditure for the purposes of capital deduction.

The relevant provisions of the law are s. 14 of, and para. 29, para. 30 and para. 33 of the Second Schedule to, the Act, and s. 13 of, and para. 29 and para. 30 of the Second Schedule to, the Tanganyika Income Tax (Consolidation) Ordinance, 1950 (hereinafter referred to as the Tanganyika Ordinance). The Act came into operation on January 1, 1951, and replaced the then existing East African income tax legislation, including the Tanganyika Ordinance. By virtue of s. 98 of, and the Fifth Schedule to, the Act, the continuity of the operation of the law relating to income tax was preserved. At the hearing of the appeal it was common ground that the assessments in the instant case fell to be determined under the Act, and it is sufficient to note, in relation to the Tanganyika Ordinance, that the provisions of para. 29 and para. 30 of the Second Schedule to that Ordinance are substantially identical with the provisions of para. 29 and para. 30 of the Second Schedule to the Act. The relevant part of s. 14 of the Act reads as follows:

> "14(1) For the purpose of ascertaining the total income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year of income by such person in the production of the income, including –
>
>
>
> (*k*) such deductions as may be due under the provisions of the Second Schedule;".

Para. 29, para. 30 and para. 33 of the Second Schedule, omitting sub-para. (3) of para. 30 which is not relevant to this case, read as follows:

> "29(1) Subject to the provisions of this Schedule, where, on or after the 1st January, 1951:
>
> (*a*) a person incurs capital expenditure on the clearing of agricultural land, the expenditure so incurred shall be deducted in computing his total income of the year in which the expenditure was incurred; or

(*b*) a person incurs capital expenditure on the clearing of agricultural land and the planting of that land with permanent or semi permanent crops, the amount of the expenditure shall be deducted in computing his total income for the year in which the expenditure was incurred unless he elects that the provisions of the next following paragraph shall apply.

"(2) An election for the purposes of this paragraph shall be made in writing by the person, who incurred the expenditure, when rendering his first return of income after the 1st January, 1951, unless he has already made an election under the provisions of the repealed enactments, when that election shall be deemed to be an election for the purposes of this paragraph, and any such election shall be binding on him for all subsequent returns of income until for good and sufficient reasons the Commissioner permits such election to be revoked.

"(3) In this paragraph 'agricultural land' means any land occupied wholly or mainly for the purposes of a trade of husbandry.

"30(1) Subject to the provisions of this Schedule, where, during any year commencing on or after the 1st January, 1951, any land is used wholly or mainly for the purposes of permanent cultivation by a person who has incurred capital expenditure on clearing and planting that land, there shall, if that person so elects be made in computing his total income for that year, a deduction (in this Part of this Schedule referred to as an 'annual deduction') equal to the amount considered by the Commissioner to be just and reasonable as representing the diminished value during that year of the asset represented by the expenditure by reason of the age and condition of the permanent or semi-permanent crops planted on that land:

Provided that the amount of any deduction to be made for any year shall not exceed what, apart from any deduction which falls to be made for that year, would be the residue of the expenditure at the end of that year.

"(2) For the purposes of estimating the value of the asset represented by any capital expenditure there shall be taken into account any expenditure incurred in maintaining the land and the permanent or semi-permanent crops planted thereon.

.

"33. Where a person sells any asset representing expenditure to which this Part of this Schedule applies and the buyer of that asset buys it for the purposes of permanent cultivation, the buyer shall be deemed to have incurred on the asset at the time of the sale, expenditure to which this Part of this Schedule applies equal to the price paid for the asset or the expenditure to which this Part of this Schedule applies which the seller incurred on that asset, whichever is the less."

Prior to the sale the vendors of the estates had elected under the Tanganyika Ordinance to treat their capital expenditure in respect of Kiwege and Mgude estates under para. 29 of that Ordinance, that is, to have the capital deduction made on what is known as an "as and when" basis; and to treat their capital expenditure in respect of Ngerengere Estate under para. 30 of the Ordinance, that is, on the basis of annual deduction. In an agreed statement of facts, to which I will be referring, it is said that the election by the vendors was made under para. (i) (*i*) and para. (*i*) (ii) of sub-s. (1) of s. 13 of the Tanganyika Ordinance; and the decision in the High Court was based to a large extent on

that proposition. I have no means of checking the statement, but it seems unlikely to be correct. As I read s. 13, para. (*i*) of sub-s. (1) applies only in respect of assessments for the years preceding the year of assessment commencing on 1st January, 1946 (see sub-s.(3) of s. 13). The appropriate provisions under which the election should have been made would appear to be s. 13 (1) (*p*) of, and para. 29 of the Second Schedule to, the Ordinance. It is difficult to see how an election in relation to the expenditure to which this case relates could have been made under provisions of the Ordinance which ceased to apply after the year of assessment 1945. It is not, so far as I am aware, suggested that any of the expenditure was incurred prior to the year 1945. Paragraph 7 of the appellant's statement of facts in the High Court refers to the cost of planting and cultivation of Ngerengere Estate for the period June 30, 1945, to April 30, 1951. However, whatever provision the election purported to have been made under, the effect of the election must, I think, have been, as stated above, to treat the expenditure under the relevant provisions of paras. 29 and 30 of the Second Schedule to the Tanganyika Ordinance. The point, however, is not material as under para. 33 of the Second Schedule to the Act, which, as will appear, is the relevant provision, the expenditure to be taken into account is the expenditure to which Part IV of the Second Schedule to the Act applies, and not expenditure to which any earlier provision of the income tax law may have been applicable.

Paragraph 33 of the Second Schedule to the Act enters into the matter because, upon the purchase of the estates by the appellant company, the appellant company became entitled, by virtue of the provisions of that paragraph, to exercise a fresh election under para. 29 in respect of the capital expenditure of the vendors on the estates. The appellant company elected to treat the capital expenditure on all three estates on an "as and when" basis under para. 29 of the Second Schedule to the Act.

It was common ground at the hearing of the appeal before this court that considerable confusion had characterised the proceedings in the High Court, and both parties accepted blame for this confusion. In particular, it was common ground (*a*) that any allowance to be made in respect of capital expenditure on Ngerengere Estate would fall to be deducted in the assessment for the year of income 1951, and not, as ordered by the learned judge, in the assessment for the year of income 1952, the assessment for the year 1952 being only liable to be affected if the deductions in respect of the year 1951 resulted in loss; and (*b*) that all the facts necessary for a decision in the case had not been put before the High Court. Mr. Newbold, who appeared for the respondent, also contended that the election of the vendor under the Tanganyika Ordinance, upon which the learned judge based his decision, had nothing to do with the matter. Mr. O'Donovan, who appeared for the appellant company, did not, I think, contest this proposition in so far as the reasoning upon which the learned judge of the High Court proceeded was concerned, but he maintained that the vendor's election was material in determining the effect of the purchaser's election in pursuance of para. 33 of the Second Schedule to the Act.

In view of the unsatisfactory nature of the proceedings in the High Court, and to avoid the necessity for a re-trial which would otherwise, it was agreed, be inevitable, the parties concurred in an application to this court to admit an agreed statement of facts and issues, and to decide the matter on the basis of those facts and issues. This application was granted, and I will accordingly consider the matter on the basis of the agreed facts and issues, and will not refer in any detail to the judgment of the learned judge of the High Court, who was misled into dealing with the matter on a wrong basis.

The agreed statement of facts and issues which was put before this court reads as follows:

"Agreed Facts.

"1. The appellant company purchased Kiwege and Mgudi Estates and Ngerengere Estate and on the purchase of those estates became entitled under para. 33 of the Second Schedule to the East African Income Tax (Management) Act, 1952, to certain deductions, in respect of certain expenditure incurred by the vendors of the estates, for the purpose of ascertaining the total income of the appellant company for the year of income 1951.

"2. If those deductions resulted in a loss for the year of income 1951, the appellant company was entitled under s. 14 (1) (*j*) of the said Act to carry forward the loss and to deduct it in ascertaining the total income of the appellant company for the year of income 1952.

"3. The appellant company elected under para. 29 of the Second Schedule to the said Act that the expenditure referred to above which it was entitled to deduct should be deducted in the year in which it was incurred, that is the year of income 1951 in which the estates were purchased.

"4. As regards Kiwege and Mgudi Estates, the amounts expended by the vendors in clearing and planting the estates with semi-permanent crops was £13,805. As the vendors had elected under s. 13 (1)(*i*)(i) of the Tanganyika Ordinance 27 of 1950 to deduct the expenditure in the year in which it was incurred, a balancing charge of this amount was raised on the vendors on the sale of the estates. The appellant company in assessment No. 29080 for the year of income 1951 has, in accordance with its election referred to above, been given a deduction of this amount. The appellant company estimates that the full cost of development for the clearing, planting and maintenance of the sisal on these estates was £81,501. In accordance with exhibit F (p. 55 of the record) the amount of the sale price allocated to land and development was £127,705.

"5. As regards Ngerengere Estate, the amount expended by the vendors in clearing and planting the estate with semi-permanent crops was £15,594. As the vendors had elected under s. 13 (1)(*i*)(ii) of Tanganyika Ordinance 27 of 1950 to deduct the expenditure by annual amounts and as, at the date of the sale, the sisal was immature, no deductions in respect of such expenditure had been allowed to the vendors up to the date of the sale and consequently no balancing charge was made. The appellant company in assessment No. 29080 for the year of income 1951 has, in accordance with its election referred to above, been given a deduction of this amount. The full cost of development for the clearing, planting and maintenance of the sisal on this estate was £44,462.

"Issues For Decision.

"The questions for the decision of the court are as follows:

"1. Is expenditure incurred by a person in maintaining, as opposed to planting and clearing, land planted with permanent or semi-permanent crops expenditure which such person is entitled to deduct either under para. 29 or para. 30 of the said Second Schedule.

"2. Are the deductions of £13,805 in respect of Kiwege and Mgudi Estates and £15,594 in respect of Ngerengere Estate allowed in assessment No. 29080 for the year of income 1951 the correct deductions allowable to the appellant company.

"3. If the answer to 2 is in the negative, what deductions should be allowed in assessment No. 29080 for the year of income 1951 in respect of:

(*a*) Kiwege and Mgudi Estates,

(*b*) Ngerengere Estate.

"4. If the answer to 2 is in the negative and the deductions allowed in assessment No. 29080 for the year of income 1951 resulted in a loss, should assessment No. 3180 for the year of income 1952 be amended to take account of such loss."

It was also agreed that in the circumstances of this case no question of apportionment under para. 39 of the Second Schedule to the Act arose.

In regard to Kiwege and Mgude Estates, Mr. O'Donovan repeated the argument which had been put before the High Court, namely, that sub-para. (2) of para. 30 of the Second Schedule to the Act does not expressly state that it relates to para. 30 only; that it should accordingly be construed as if it were a separate paragraph; that under sub-para. (2) "expenditure incurred in maintaining the land and . . . crops planted thereon" is to be taken into account in estimating capital expenditure; and that accordingly expenditure on such maintenance must be taken into account for the purposes of para. 29 as well as of para. 30.

The learned judge of the High Court held, in relation to this argument, that sub-para. (2) of para. 30 was clearly explanatory of sub-para. (1) of that paragraph and that in the case of capital deductions on an "as and when" basis under para. 29 no question of maintenance expenditure falls to be considered. I see no reason whatever to differ from this conclusion. The provisions of sub-para. (2) of para. 30 are expressed to be for the purpose "of estimating the value of the asset represented by any capital expenditure". The "value of the asset represented by any capital expenditure" is not a matter which requires determination under para. 29. All that has to be determined under that paragraph is the amount of capital expenditure

> "on the clearing of agricultural land and the planting of that land with permanent or semi-permanent crops".

Under sub-para. (1) of para. 30, however, the annual deduction provided for is to be

> "equal to the amount considered by the Commissioner to be just and reasonable as representing the diminished value during that year of the asset represented by the (capital) expenditure".

It is clear that the "value of the asset represented by the capital expenditure" is a matter which arises under sub-para. (1) of para. 30 only, and that sub-para. (2) can only be applicable to that sub-paragraph. It follows that I think the deduction allowed in assessment No. 29080 in respect of capital expenditure on Kiwege and Mgude Estates, that is to say, £13,805, was correct, and that the appellant company's appeal must fail.

As regards Ngerengere Estate, somewhat different considerations have to be taken into account. As has been stated above, the vendors had, prior to the sale, elected that the capital expenditure should be treated on the basis of annual deductions. The relevant provision of the Tanganyika Ordinance relating to annual deductions is para. 30 of the Second Schedule, now replaced by para. 30 of the Second Schedule to the Act. At the date of sale the sisal in question was still immature, so no annual deduction had yet been made. Upon the sale, the appellant company elected to have the capital expenditure treated upon an "as and when" basis under para. 29 of the Second Schedule to the Act.

Mr. O'Donovan's arguments in relation to this estate may, I think, be summarised as follows: that the effect of sub-para. (2) of para. 30 of the Second Schedule to the Act is to include maintenance expenditure in capital expenditure, at least for the purposes of that paragraph; that while on general principles maintenance expenditure would normally fall into the category of revenue expenditure, yet here the Legislature has gone out of its way to create an artificial situation in which maintenance expenditure is to be reckoned as capital expenditure; that accordingly under para. 30 the amount of maintenance expenditure falls to be deducted in the course of annual deductions in addition to clearing and planting expenditure; that under para. 33 of the Second Schedule to the Act a buyer, for the purposes of that Part of the Schedule, is deemed to have incurred "expenditure to which this Part of this Schedule applies" equal to "the expenditure to which this Part of this Schedule applies" which the seller incurred on the asset; that in a case where the vendor has elected for deductions on an annual basis under para. 30 of the Second Schedule, the "expenditure which the seller has incurred on the asset" to which the Schedule applies includes maintenance expenditure as well as clearing and planting expenditure; and that therefore the purchaser is entitled to have deducted the whole of the cost of clearing, planting and maintenance although he may have elected to proceed on an "as and when" basis.

Mr. Newbold drew attention to the heading to Part IV of the Second Schedule which reads "Deductions in Respect of Capital Expenditure on Agricultural Land" and argued that this was the only expenditure to which that Part of the Schedule applied; that maintenance expenditure could not be capital expenditure and that sub-para. (2) of para. 30 did not make it so; that para. 30 had no application where an election was made in pursuance of para. 33 to treat the expenditure on an "as and when" basis under para. 29; and that in any case para. 30 did not constitute maintenance expenditure part of capital expenditure.

I confess to having had some difficulty in understanding just what sub-para. (2) of para. 30 is intended to accomplish.

Reference was made in the course of argument to the case of *Vallambrosa Rubber Co. Ltd. v. Farmer* (1), 5 T.C. 529, but I do not think that it is of much assistance. It draws the general distinction between capital and revenue expenditure, but the argument in the instant case is that the Legislature has by express provision included as capital expenditure for a certain purpose what would otherwise be revenue expenditure. Mr. O'Donovan conceded that on general principles maintenance expenditure is revenue expenditure. I think that, bearing in mind the general object and scope of the Act, there is a presumption that the Legislature would not intend to include what is normally revenue expenditure in capital expenditure, but such a presumption cannot prevail if the words of the relevant provision clearly have that effect. I think the matter rests on the construction of paragraph 30 itself, and, in particular, on the construction of the term "capital expenditure" in para. 30.

I think points to be noted are:

(*a*) that, as already remarked, Part IV of the Second Schedule to the Act is expressed to relate to "capital expenditure" on agricultural land;

(*b*) that para. 29 refers to "capital expenditure" on the clearing of agricultural land, and on the planting of agricultural land with permanent or semi-permanent crops, that is to say, to "capital expenditure" in its normal sense in relation to agricultural land;

(*c*) that para. 30 is alternative to para. 29 (1) (*b*); it would seem unlikely that the Legislature intended the difference between the two paragraphs to be more than procedural;

(*d*) that para. 30 is expressed to apply where a person "has incurred capital expenditure on clearing and planting" agricultural land only, and not where a person has incurred expenditure on maintenance;

(*e*) that the annual deduction to be made under para. 30 is what may be described as the reasonable depreciation in the "value during that year of the asset represented by the expenditure"; "the expenditure" obviously refers to the capital expenditure on clearing and planting mentioned earlier in the paragraph;

(*f*) that the diminution in value, i.e. the depreciation, is related to the age of the crops and their condition;

(*g*) that the proviso to sub-para. (1) of para. 30 (which was not referred to in argument) limits the amount of any annual deduction to an amount not exceeding "the residue of the expenditure at the end of that year"; "the expenditure" again in the context being the capital expenditure on clearing and planting; and the effect being to limit the total of deductions to the total of such capital expenditure;

(*h*) that sub-para. (2) of para. 30 does not say that the value of maintenance expenditure is to constitute part of the capital expenditure; it says that maintenance expenditure is to be taken into account for the purpose of "estimating the value of the asset represented by any capital expenditure".

It seems to me that para. 30 draws a clear distinction between the "capital expenditure" properly so called and the measure by which the Commissioner is to assess the annual depreciation. Such measure is the difference in value of the asset at the beginning and at the end of the year, on the basis of the age and condition of the crop. Expenditure on maintenance is clearly a relevant factor in considering the condition of the crop. It would be reasonable, therefore, to take into account any maintenance expenditure in calculating the annual depreciation, a calculation which requires the assessment of the value of the asset at the beginning of the year and again at the end of the year, the difference between the two being the depreciation. This is a very different matter from saying that maintenance expenditure is to be reckoned as part of capital expenditure. The object of the assessment of the "value of the asset" from year to year is to provide the yardstick by which the amount of each annual deduction is to be assessed by the Commissioner. But the total amount of the deductions to be made is limited by the proviso to sub-para. (1) to the amount of the capital expenditure, that is the expenditure on clearing and planting. It may be stressed that under sub-para. (2) expenditure on maintenance is to be taken into account for "the purposes of estimating the value of the asset", and that the only purpose for which the asset is to be valued under sub-para. (1) is the ascertainment of the annual diminution of value, that is to say, the yardstick by which the annual deduction is to be calculated. It is to be noted that the taxpayer is entitled to the expense of maintenance as a revenue deduction under s. 14 of the Act, and, if such deduction results in a loss during any year, is entitled to carry forward such loss under para. (*j*) of sub-s. (1) of s. 14 . It would seem contrary to the spirit and scheme of the Act that a taxpayer should be allowed the same expenditure both as a revenue deduction and as a capital deduction. In the view I take, the effect of sub-para. (2) of para. 30 is to ensure that the annual deductions in respect of capital expenditure are spread over the whole life of the asset, a result which seems generally in accord with the scheme of other Parts of the Schedule, e.g. para. 22 (2) (*b*).

For the reasons given I am of opinion that the annual deductions authorised by para. 30 of the Second Schedule to the Act are deductions in respect of "capital expenditure on clearing and planting" only, and that the total of such deductions is limited to the total of such capital expenditure.

In the view I have taken it is not necessary to consider whether the expression "expenditure to which this Part of this Schedule applies" in para. 33 of the Second Schedule to the Act includes maintenance expenditure in a case where a vendor has elected to be treated under para.30, and, if so, whether maintenance expenditure is to be taken into account in such a case under para. 29 if the purchaser has elected to be treated under that paragraph. I will only say that if the effect of para. 30 were to incorporate maintenance expenditure in capital expenditure, then it would seem that it would be "expenditure to which this Part of this Schedule applies" and that the result set out above would follow. Such a result would appear utterly illogical and I cannot suppose that it was ever intended by the Legislature. The fact that a different construction of the provisions of para. 30 might have such an effect strengthens me in the view I have taken of that paragraph.

In the result, I would dismiss the appeal, allow the cross-appeal, set aside the decree in relation to assessment No. T3180, and restore and confirm the original assessments made by the Commissioner of Income Tax. The respondent should, I think, have the costs of the appeal and cross-appeal.

As mentioned, no order was made as to costs in the High Court. Mr. Newbold did not ask for costs in the High Court as he felt the respondent was in some degree responsible for the confusion of the issues in that court. Accordingly, I would not vary the decision of the High Court as regards costs of the proceedings in that court.

Sir Kenneth O'Connor P: I agree. There will be an order in the terms proposed by the learned Vice-President.

Windham JA: I also agree.

Appeal dismissed. Cross-appeal allowed.

For the appellant:
H. Dharani & Co., Dar-es-Salaam
Bryan O'Donovan Q.C. and *H.K. Patel*

For the respondent:
The Legal Secretary, E.A. High Commission, Nairobi
C. D. Newbold, Q.C. and *B. A. K. Le Champion* (Legal Secretary and Senior Assistant Legal Secretary, East African High Commission)

Re Meghji Nathoo and another – Debtors
[1960] 1 EA 560 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	27 July 1960
Case Number:	24/1960
Before:	Farrell J
Sourced by:	LawAfrica

[1] Bankruptcy – Creditor's petition – Deed of arrangement executed by debtors and notice thereof given – Whether this is an assignment of property and notice of suspension of payment – Deeds of Arrangement Ordinance (*Cap.* 31), *s.* 3 *and s.* 26 (*K.*) – *Bankruptcy Ordinance* (*Cap.* 30), *s.* 3 *and s.* 6 (*K.*).

Editor's Summary

A creditor of the debtors petitioned for a receiving order founded on two alleged acts of bankruptcy, namely, the execution and registration of a deed of arrangement and an alleged notice to creditors that the debtors had suspended or were about to suspend payment. At the hearing, the petitioning creditor argued that the execution and registration of the deed of arrangement was an assignment of property within s. 3 (1)(*a*) of the Bankruptcy Ordinance. The notice relied upon as the second act of bankruptcy purported to follow Form 14 of the Deeds of Arrangement Ordinance.

Held –

(i) a deed of arrangement is in no sense a conveyance or assignment of the debtor's property to a trustee or trustees within the meaning of s. 3 (1)(*a*) of the Bankruptcy Ordinance, and could not be relied on as an act of bankruptcy under that paragraph or indeed under any of the succeeding paragraphs of s. 3 (1).

(ii) the notice purporting to be in Form 14 of the Deeds of Arrangement Ordinance was ineffective as not complying with the requirement of s. 26 ibid.

(iii) even if the notice were valid it could not operate as an act of bankruptcy since the deed of arrangement itself of which it was a notice was not an act of bankruptcy.

Petition dismissed.

Judgment

Farrell J: This is a creditor's petition for a receiving order founded on two alleged acts of bankruptcy:

(1) the execution and registration of a deed of arrangement on the 14th March, 1960: and

(2) an alleged notice to creditors that the debtors had suspended or were about to suspend payment of their debts.

The petition was filed in court on the 14th May, 1960, so that if the acts of bankruptcy relied on are sufficient, the petition has been presented in due time under s. 6(1) (*c*) of the Bankruptcy Ordinance.

It was suggested in argument that the first act of bankruptcy relied on fell within the description in s. 3(1) (*a*) of the Ordinance. The deed of arrangement, however, is not an assignment of property such as is referred to in s. 3(2) (*a*) of the Deeds of Arrangement Ordinance (Cap. 31) but a deed or agreement for a composition under para. (*b*) of the same sub-section. It is accordingly in no sense

> "a conveyance or assignment of (the debtor's) property to a trustee or trustees"

within the meaning of s. 3 (1) (*a*) of the Bankruptcy Ordinance, and cannot be relied on as an act of bankruptcy under that paragraph or indeed under any of the succeeding paragraphs of s. 3 (1).

The second act of bankruptcy relied upon is a notice purporting to be in Form 14 of the Deeds of Arrangement Ordinance. The Form, however, requires that the notice be over the signature of the trustee under the deed, and s. 26 requires that it be served by the trustee under the deed. In this case there is no trustee, and the notice is ineffective as not complying with the requirements of the section or of the rule. For the reasons I have already given, a deed of arrangement in this form cannot in any case be relied on as an act of bankruptcy under s. 3 (1) of the Bankruptcy Ordinance.

It remains to consider whether the notice, even though invalid for the purposes of s. 26 of the Deeds of Arrangement Ordinance, may nevertheless be construed as a notice that the debtors have suspended or are about to suspend payment of their debts, and as such falling within the description of para. (*h*) of s. 3 (1) of the Bankruptcy Ordinance.

My attention has been drawn to a long list of authorities in which the question has been considered what amounts to a notice of suspension under para. (*h*), and I have found no case in which a notice of this kind has been held to be such a notice. When the deed of arrangement is in the nature of an assignment to a trustee, it would, of course, be unnecessary to rely on the notice, as the assignment is itself an act of bankruptcy. Where, as here, there has been no assignment but the notice has nevertheless been issued as if there were, it would be strange if the notice could operate as an act of bankruptcy when the deed of arrangement of which it is a notice is not an act of bankruptcy.

In the circumstances I have come to the conclusion that the petitioning creditor cannot rely on either of the alleged acts of bankruptcy. There was in fact a clear notice of suspension under para. (*h*) with letter of January 13, 1960 which stated in clear terms that the debtors were unable to pay all their creditors in full. That could have been relied on as an act of bankruptcy, but as the period of three months has since elapsed, it is too late for the petitioning creditor to take any advantage of it.

For the reasons I have given the petition is dismissed.

Petition dismissed.

For the petitioning creditor:
Shapley, Barret, Enion and Marsh, Nairobi
Z. Ahmed

The debtor did not appear and was not represented.

Zaverchand Hemraj Shah v R
[1960] 1 EA 562 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	4 July 1960
Case Number:	448/1960

Before: Sir Ronald Sinclair CJ and Rudd J

Sourced by: LawAfrica

[1] Criminal law – Charge – Receiving or retaining stolen property – Whether necessary to state owner of stolen property in the charge – Penal Code, s. 317 (1) (*K.*) *– Criminal Procedure Code, s.* 137 (*c*) (i) (*K.*).

[2] Criminal law – Accomplice – Accused charged with receiving or retaining stolen property – Taxi-driver engaged to transport stolen property – Taxi-driver not aware that property stolen – Whether taxi-driver an accomplice – Penal Code, s. 317 (1) (*K.*).

Editor's Summary

The appellant was charged jointly with his brother on two counts of receiving or retaining stolen property. The principal witness for the prosecution was one Njenga, a taxi-driver, who said he was hired by the appellant to transport the stolen tyres. His evidence conflicted with that of the appellant who denied knowing the taxi-driver. The magistrate accepted Njenga's evidence and convicted the appellant on both counts. His brother was acquitted. On appeal against conviction it was argued that the magistrate (*a*) erred in finding that the property had been proved to have been stolen (*b*) failed to appreciate that the property was not that of the person named in the second count (*c*) misdirected himself by not regarding Njenga as an accomplice, and (*d*) failed to consider whether the explanation of the appellant could be true.

Held –

(i) the trial magistrate was fully justified in finding that the property found in the appellant's store and identified by the complainants was stolen from the complainants.

(ii) the person named in the second count as owner was a "special owner" of the car within the meaning of the definition of that term in s. 263 of the Penal Code; in any event, even if the ownership of the property were incorrectly laid, it would not be fatal to the conviction in the circumstances of the case, as it was not necessary to name the owner of the property in the charge.

(iii) the court could find no ground for differing from the magistrate's finding that Njenga was a truthful witness and not an accomplice.

(iv) as the magistrate believed the evidence of Njenga, it followed that the appellant's account was false and no question then arose as to whether it could reasonably be true.

Appeal dismissed.

Cases referred to in judgment:

(1) *Hibbert v. McKiernan* (1948), 64 T.L.R. 286; [1948] 1 All E.R. 860.

(2) *R. v. Abramovitch,* 11 Cr. App. R. 45.

(3) *R. v. Aves,* 34 Cr. App. R. 159; [1950] 2 All E.R. 330.

(4) *R. v. Booth* (1946), 175 L.T. 306.

Judgment

Sir Ronald Sinclair CJ, read the following judgment of the Court: The appellant was jointly charged with his brother, Ramji s/o Fulchand Shah, on two counts of receiving or retaining stolen property contrary

to s. 317 (1) of the Penal Code. The first count relates to two motor wheels the property of Mr. Laxmichand V. Shah and the second count to two motor wheels the property of Mr. Shantilal Devshi Shah. The appellant, who was the first accused at the trial, was convicted on both counts and sentenced to imprisonment for twelve months on each count, the sentences to be concurrent. Ramji s/o Fulchand Shah, who was the second accused, was acquitted. The appellant appeals against his conviction and sentence on each count.

The appellant and his brother the second accused are partners in a vegetable business in Ngara Road, Nairobi. The complaints live in neighbouring houses in 2nd Avenue, Parklands, Nairobi. Laxmichand Shah, the complaint in the first count, owns a Morris car and Shantilal Shah, the complainant in the second count, uses his brother's Vauxhall Victor saloon car. On the night of March 26, 1960 each parked his car in front of his house. The next morning each found two wheels of his car missing. They reported to the police. On the following day, March 28, they were called to Parklands Police Station where they were shown six car wheels with tyres. Each picked out two as his missing wheels and tyres.

A taxi-driver (P.W. 3) gave evidence which is summarised by the trial magistrate in his judgment as follows:

> "P.W. 3, Njenga s/o Juma, who lives in Pumwani and owns a Taxi, No. KBA 291, which he drives himself, states that on 27.3.60 at about 2.30 p.m., he was taking petrol at the Ozo Petrol Station in Ngara, when he was approached by a Mkamba who asked him if his taxi was free as there was an Asian who required transport for some tyres. On his answering in the affirmative the Mkamba took him to a vegetable shop nearby where they found Accused 1 who, after some bargaining, agreed to hire his taxi for Shs 5/-. There was a second Mkamba present and Accused 1 instructed him to go with the two Wakamba to fetch four small tyres from a place to be shown by them. They took him to the City Park and some distance inside they stopped at a barrier near a shed, and the two Wakamba went away, and returned each carrying two tyres, two of which were placed in the boot and two on the roof. Shortly before their return a constable passed and exchanged greetings with him, and after a short distance met the two Wakamba with the tyres and without speaking to them, stopped to watch them place the tyres in the taxi. He drove the two men, with the tyres, back to Ngara to the shop of Accused, where they carried them in, while he saw Accused 1, who paid him the fare and he went away. That evening he went to Reruta leaving his taxi with a friend and on his return the following day he was told that it had been detained at Parklands Police Station. He went there to make enquiries and was taken to a Chief Inspector who questioned him about the events of the previous day and he told him about the tyres. He then took the Chief Inspector to Ngara, to the shop of Accused where they found Accused 2. The Chief Inspector, showing his appointment card asked permission to search the premises and in the store he found the four tyres, which witness identified as those he had carried in his taxi the previous day. He did not see Accused 1 on that occasion and has not seen the two Wakamba since".

Constable William Waireka (P.W. 5), the passing constable mentioned by the taxi-driver, substantially corroborated the taxi-driver's evidence. He said that, seeing the two Africans each carrying two wheels with tyres to the taxi, his suspicions were aroused and, having taken the number of the taxi, KBA 291, he telephoned Parklands Police Station. He said the wheels were the same colour as the four produced at the trial (exhibits 1 and 2).

Chief Inspector Talbot (P.W. 4), referred to by the taxi-driver, Njenga, gave evidence that at 9.40 a.m. on March 28, he went to the shop in Ngara Road

belonging to the two accused which was pointed out to him by Njenga. There he found the second accused. He told the second accused he was a police officer and asked to search the premises. The second accused agreed. He first searched the shop, but finding nothing there, searched the store in the same compound. The second accused opened the door of the store with a key which he selected from a bunch of keys. In the store, concealed behind piles of empty boxes, he found six wheels with tyres. He arrested the second accused. Later the appellant arrived at the shop. The appellant said he was a partner of the second accused and, asked if he had any keys to the shop and store, he produced a bunch identical with that produced by the second accused. The appellant was arrested and was taken with the second accused and the six wheels to Parklands Police Station.

It was from the six wheels which Chief Inspector Talbot found in the appellant's store that the complainants picked out their missing wheels (exhibits 1 and 2).

The appellant gave evidence on oath, but called no witnesses. He said that at 4 p.m. on March 27, a Mkamba who supplied him with vegetables from Machakos came to his shop. He had known this man for the past six months and he used to keep his empty boxes and sacks in the store. On this occasion the man, who came in a car, asked him to open his store as he wished to place something there. He gave the man his bunch of keys to open the door of the backyard, and returned to the shop. He was working at the counter when he saw the man, with another, taking tyres from the car, which was brought behind the shop, and putting them in the store. They locked the store and returned his bunch of keys. The man said he would remove the things the next day if he could find transport to take them to Machakos. He denied having seen the taxi-driver, Njenga, before he saw him in court. He did not know that the tyres had been stolen, nor had he any reason to believe they had been stolen. He said his brother, the second accused, knew nothing about the tyres.

There was a direct conflict between the evidence given by Njenga and that given by the appellant. With regard to this conflict the trial magistrate said:

> "This (referring to the appellant's evidence), in my opinion is a most unconvincing story, entirely unworthy of credit in the face of the other evidence. Njenga (P.W. 3) strikes me as being a perfectly truthful witness and there appears to be no reason for disbelieving him. It is argued that he should be regarded as an accomplice, since he conveyed these tyres to the shop of accused, but in my opinion there is no substance in this contention. There is no evidence of any conspiracy with Njenga, who merely hired his taxi to accused 1 to go with two Wakamba and fetch the tyres to the Ngara shop and there was no valid reason, in my opinion, for his suspecting that this transaction was not above board".

He accordingly convicted the appellant on both counts as charged.

The first ground of appeal was not argued. The second ground is that the magistrate erred in finding that the property in question had been proved to have been stolen. It was submitted that the four wheels the subject of the charge were not positively identified by the complainants as those missing from their cars. Each of the complainants gave full particulars of the colour of his missing wheels and the size, make and type of the missing tyres which were exactly similar to those they identified (exhibits 1 and 2). There could be no doubt from the manner in which the wheels were hidden in the appellant's store and from all the circumstances that they were stolen property. In our opinion the trial magistrate was fully justified on the evidence in finding that the four wheels found in the appellant's store and identified by the complainants were those stolen from the complainants.

The third ground of appeal is that the trial magistrate failed to appreciate

that the property the subject of the second count was not the property of the person named therein. It is true that the Vauxhall Victor saloon car belonged to Shantilal Shah's brother. But Shantilal Shah had the use of the car at the time and it was lawfully in his possession. In our view Shantilal Shah was a "special owner" of the car within the meaning of the definition of that term in s. 263 of the Penal Code which reads:

> "The term 'special owner' includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question".

In any event, even if the ownership of the wheels were incorrectly laid, we do not think that would be fatal to the conviction in the circumstances of this case. It is not necessary to name the owner of the property in the charge though it is usual to do so. Section 137 (*c*) (i) of the Criminal Procedure Code provides:

> "The description of property in a charge or information shall be in ordinary language, and such as to indicate with reasonable clearness, the property referred to and, if the property is so described, it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;".

That provision is in similar terms to r. 6 (1) of the Rules contained in Sch. 1 to the Indictments Act, 1915. In *Hibbert v. McKiernan* (1) (1948), 64 T.L.R. 256, in which a divisional court was considering a charge of larceny, Humphrey, J. said:

> "In such a case as the present it is not necessary to allege or prove who is in law the owner of the goods; indeed, it is not essential to name any person as the owner of the goods in an indictment for larceny, though it is the practice to do so: see r. 6 (1) of the rules contained in the schedule to the Indictments Act, 1915."

In the same case Lord Goddard, C.J., observed:

> ". . . at the present day allegations concerning the ownership of stolen property are, except in a few exceptional cases, treated as immaterial."

In the present case it was proved that the two wheels the subject of the second count were stolen and it was immaterial who was in law the owner of them. It was not suggested that the appellant had any claim to the wheels as against Shantilal Shah or his brother.

The fourth ground of appeal is that the trial magistrate misdirected himself that Njenga s/o Juma (the third prosecution witness) was not an accomplice. In our view there is no substance in this ground. As a taxi-driver he was hired in the ordinary course of business by an Asian shopkeeper to collect and transport the wheels and we can see nothing in the circumstances which should have made him suspect that they had been stolen.

In his evidence he said:

> "I had no idea these tyres had been stolen; the two Wakamba carried them openly without any concealment."

He apparently felt no apprehension when he saw and greeted the passing constable. The trial magistrate had the advantage of seeing and hearing the witness and we can find no ground for differing from his finding that Njenga was a truthfull witness and not an accomplice.

The fifth ground of appeal, and the remaining ground to be argued, is that the trial magistrate failed to appreciate or consider if the explanation of the appellant was not such as could be true. This ground is on a misconception of *R. v. Abramovitch* (2), 11 Cr. App. R. 45. The magistrate believed the evidence of Njenga. Having believed that evidence, it followed that the appellant's account as to how he came into possession of the stolen property was false and no question then arose as to whether it could reasonably be true. In *R. v. Aves* (3), 34 Cr. App. R. 159, Lord Goddard, C.J., said at p. 160:

> "Where the only evidence is that an accused person is in possession of property recently stolen, a jury may infer guilty knowledge (*a*) if he offers no explanation to account for his possession, or (*b*) if the jury are satisfied that the explanation he does offer is untrue. If, however, the explanation offered is one which leaves the jury in doubt as to whether he knew the property was stolen, they should be told that the case has not been proved, and therefore the verdict should be not guilty."

In *R. v. Booth* (4) (1946), 175 L.T. 306, Lord Goddard explained the decision in *Abramovitch's* case in the following passage:

> "It is argued that the recorder did not give the direction which follows *Rex v. Abramovitch* (1914, 112 L.T. Rep. 480). That is a very hard-worked case, and, I think, very often misunderstood. It laid down no new rule of law. All that it said was this: The onus is always on the prosecution in a criminal case. In the case of receiving stolen goods, the prosecution may discharge the onus by showing that the prisoner was in possession of property recently stolen, and, in the absence of any explanation given by the prisoner, the jury are entitled, on that evidence alone, to convict. If, however, the prisoner gives in evidence a story which leaves the jury in doubt, that is to say, creates a doubt in their minds whether he received the goods feloniously, then they should acquit. The direction which I have often given to a jury with regard to evidence for the defence in a criminal case is that if witnesses whether the prisoner or others, are called to give evidence for the defence, their evidence becomes evidence like that of any other witnesses, and it may have one of three effects: it may convince the jury that the prisoner is completely innocent; it may cause such doubt in the jury's mind whether the man is guilty or innocent that it is their duty to acquit; and, thirdly, it may strengthen the evidence for the prosecution. *Rex v. Abramovitch* (*supra*) merely means that, if the story told by the prisoner has caused doubt in the jury's mind, they should acquit him".

All the grounds of appeal therefore fail, and the appeal is dismissed.

Appeal dismissed.

For the appellant:
S. R. Kapila & Kapila, Nairobi
A. R. Kapila

For the respondent:
The Attorney-General, Kenya
A. J. F. Simmance (Crown Counsel, Kenya)

Jean Charles Confiance v R
[1960] 1 EA 567 (CAN)

Division: Court of Appeal at Nairobi

Date of judgment:	29 July 1960
Case Number:	78/1960
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Connell J
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Seychelles – Taylor, Ag. C.J.

[1] Criminal law – Practice – Trial – Irregularity – No written judgment delivered containing points for determination, decision thereon, reasons or section of statute on which conviction founded – Conviction and sentence recorded by judge in trial record – Record also containing document headed "Grounds of judgment" – Whether irregularities fatal to conviction – Criminal Procedure Code, *s.* 2, *s.* 148, *s.* 149, *s.* 181, *s.* 304 (*S.*) – *Criminal Procedure Decree, s.* 101 (1) (Z.) – *Eastern African Court of Appeal Rules*, 1925 – *Eastern African Court of Appeal Rules*, 1954, *r.* 31, *r.* 39.

Editor's Summary

The appellant had been convicted of manslaughter and appealed on the grounds inter alia that the judge had not complied with s. 148 and s. 149 of the Criminal Procedure Code which require that judgment shall be pronounced in open court, that the judgment shall be written by the presiding officer of the court, shall contain the points for decision, the decision thereon and the reasons for the decision and shall be dated and signed by the presiding officer in open court at the time judgment is pronounced. The record of the appellant's trial showed that the judge had merely recorded the words "convicted of manslaughter" and, after considering the appellant's previous convictions, had written "nine months imprisonment" and had signed below. The record also contained a document headed "Grounds of Judgment" which set out in full the points for decision and the reasons for the conviction of the appellant.

Held –

(i) under r. 31 of the Court of Appeal Rules the court was entitled to look at the document headed "Grounds of Judgment".

(ii) in a criminal trial there must be a judgment and where the court decides the accused is guilty the basic elements of the judgment are the conviction and sentence.

(iii) in the instant case there was a judgment in existence and the failure to comply with the provisions of s. 149 of the Criminal Procedure Code was an irregularity which as the record showed had not occasioned a failure of justice.

Appeal dismissed.

Cases referred to in judgment:

(1) *Baland Singh v. R.* (1954), 21 E.A.C.A. 209.

(2) *R. v. Ali Abdulla Shirazi and Another* (1956), 23 E.A.C.A. 550.

(3) *Samwiri Senyange v. R.* (1953), 20 E.A.C.A. 277.

(4) *R. v. Hargobind Singh* (1892), 14 All. 242.

(5) *Rashid bin Salim v. R.*, [1942] 6 Z.L.R. 94.

(6) *Willy John v. R.* (1956), 23 E.A.C.A. 509.

Judgment

Gould Ag VP, read the following judgment of the court: This appeal was brought from the appellant's conviction on April 21, 1960, of the offence of manslaughter; the particulars set out in the information show that he was alleged to have killed Mrs. Cyril Port-Louis unlawfully on February 20,

1960, at Le Niol, Mahe. We dismissed the appeal and now give our reasons for doing so.

The appellant did not appear before this court and was not legally represented, but a statement of his case in writing was presented to the court under r. 39 of the Eastern African Court of Appeal Rules, 1954. Having considered the case, and the memorandum of appeal, we were of opinion that only one ground of appeal (No. 4 in the memorandum) merited discussion in detail. That ground involved an attack upon the procedure adopted by the learned Acting Chief Justice and his failure to conform to the requirements of s. 148 and s. 149 of the Criminal Procedure Code of the Seychelles. It will suffice here to set out the first sub-section of the former and the first three sub-sections of the latter section:

> "148 (1) The judgment in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, in open court, either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their pleaders, if any:
>
> "Provided that the whole judgment shall be read out by the presiding judge or magistrate if he is requested so to do either by the prosecution or the defence."
>
> "149 (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it.
>
> "(2) In the case of a conviction the judgment shall specify the offence of which, and the section of the Penal Code or other law under which the accused person is convicted, and the punishment to which he is sentenced.
>
> "(3) In the case of an acquittal the judgment shall state the offence of which the accused person is acquitted and shall direct that he be set at liberty."

At the conclusion of the trial the learned trial judge recorded merely the words – "convicted of manslaughter" and, after considering previous convictions of the appellant, he wrote – "nine months imprisonment". The record containing these passages, and indicating that they were pronounced in open court in the presence of the appellant and his counsel, was signed by the learned trial judge. The requirements of s. 149 (1) and s. 149 (2) were neglected, for the points for determination were not set out, neither were the decisions thereon nor the reasons therefor, the judgment (if it was a judgment) was not dated, and did not specify the section of the Penal Code under which the appellant was convicted. There is however, upon the file before this court, under the signature of the learned trial judge, a document headed "Grounds of Judgment" which sufficiently indicates the points for decision and sets out in full the reasons for the conviction of the appellant.

The question for this court was whether these procedural deficiencies were fatal to the conviction or were mere errors, omissions or irregularities which could be cured by the application of s. 304 of the Criminal Procedure Code which is as follows:

> "304. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account –

(*a*) of any error, omission or irregularity in the summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or

(*b*) of the omission to revise any list of assessors in accordance with cl. 23 to cl. 31 of the Seychelles Capital Offences Order-in-Council, 1903; or

(*c*) of any misdirection in any charge to assessors, unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

"Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

We observe in passing that the words

"unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:",

though printed as a portion of sub-paragraph (*c*) of that section, obviously relate to all three sub-paragraphs.

These three sections of the Criminal Procedure Code of the Seychelles have counterparts in the Criminal Procedure Codes of the East African Territories and this court has had to consider them on a number of occasions. The principles to be derived from the decisions can be gathered from passages in two cases, the first of which is *Baland Singh v. R.* (1) (1954), 21 E.A.C.A. 209; the judgment contains the following passage at p. 211:

"From this substantial volume of authority Mr. Stephen, for the appellant, sought to derive three general principles, as follows:

(1) The Court of Appeal will not necessarily allow an appeal merely because the trial judge has in greater or less degree failed to comply with s. 169.

(2) Any failure to comply with the provisions of s. 169 is an irregularity and, even though no certificate has been granted that the case is fit for appeal on grounds of fact or mixed law and fact, such irregularity will entitle, and indeed oblige, the Court of Appeal to examine the facts of the case with a view to determining whether there has been a 'failure of justice' within the meaning of s. 381.

(3) The need to determine this question on the facts is especially strong if either –

(*a*) the case depends on circumstantial evidence, or

(*b*) the trial judge has disagreed with the assessors, particularly if they have given good reasons for their opinions.

We think that this is a correct summary of the effect of the decisions and agree that it correctly sets out the principles on which we should act."

The second passage is from the judgment in *R. v. Ali Abdulla Shirazi and Another* (2) (1956), 23 E.A.C.A. 550 at 551:

"It is well settled now that the question whether a defective judgment is a curable or an incurable irregularity can only be answered after a consideration of the record and the circumstances of each case. The guilt of the

> accused may be so apparent that no other verdict than guilty is reasonably possible; *Lute*, 1 E.A.C.A. 106, *Derego*, 20 E.A.C.A. 266 at p. 268. On the other hand, if there has been no evaluation of conflicting evidence and necessary findings of fact do not appear on the record, the conviction will not stand: *Derego* (*supra*) *Samwiri*, (*supra*) *and Desiderio*, 20 E.A.C.A. 281. See also *Willy John*, E.A.C.A. C.A. 536 of 1955 (unreported)."

The principles then, are well settled, but before applying our minds to the question whether there had been a "failure of justice" in the present case, it was necessary for us to consider two questions. The first was whether, in examining the facts of the case in accordance with the decision in *Baland Singh v. R.* (1) we were entitled to have regard to the "Grounds of Judgment" under the hand of the learned trial judge, which did not form part of the judgment delivered at the close of the hearing and which, so far as the record shows, have never been delivered in court. It is apparent that the task of this court in assessing the effect of the recorded evidence is made infinitely easier if it has the benefit cf the opinion of the trial judge upon the credibility of witnesses and a statement of the reasoning by which he reached his conclusions.

The case of *Samwiri Senyange v. R.* (3) (1953), 20 E.A.C.A. 277 provides, on this procedural matter, an almost exact parallel with the present. The learned judge there recorded what he called a summary of his judgment as follows (p. 278):

> " 'Judgment (summary) I convict the accused of the offence charged being the murder of Anna Maria Naguja on or about September 30, 1952, (s. 183 Penal Code.)'
>
> (Signed and dated December 5, 1952.)"

Later a full reasoned judgment, signed and dated by the learned judge was put on the record but was never delivered in court. This court held that it could not look at reasons written by the presiding officer of a criminal court after the conclusion of a trial, being influenced apparently by a passage from the judgment in the Indian case *R. v. Hargobind Singh* (4) (1892), 14 All 242 at p. 272 of which we will set out a portion:

> "Any judge at the conclusion of the evidence in a case, some of which may be not quite distinct in his mind owing to the length of the trial, might pass sentence on a prisoner and find it impossible honestly afterwards to put on paper good reasons for having convicted him, or, on the other hand, might direct that the accused be set at liberty and find it impossible afterwards honestly to put on paper good reasons for the acquittal. The law wisely requires that the reasons for the decision shall accompany the decision, and shall not be left to be subsequently inserted or recorded. It is as much to the interest of the public that a guilty man should not be acquitted as it is that an innocent man should not be convicted."

We are not to be taken as dissenting in any way from this decision upon the law as it then was, but the case was decided in the year 1953, prior to the coming into force of the Eastern African Court of Appeal Rules, 1954. The 1925 Rules which, as amended, were in operation in 1953, contained no counterpart to r. 31 of the 1954 Rules, which is in the following terms:

> "31. If in any case the trial judge considers that additional grounds or explanation of his decision would be of assistance to the court, or if the court shall so direct, such additional grounds or explanation shall be furnished and shall form part of the record of the proceedings in addition to the charge or summing-up and judgment."

Obviously this rule is intended to enable a judge to supplement a judgment

should circumstances require that course; it is not designed to encourage the neglect of the requirements of the provisions of the various Codes of Criminal Procedure relating to the mode of delivery and the contents of judgments, and we would deprecate resort to it except sparingly and in unusual circumstances. Nevertheless, in our opinion, when the rule has been invoked this court has jurisdiction to take into consideration such "additional grounds or explanation" for all purposes, including the consideration of the question of whether an irregularity has occasioned a failure of justice. We accordingly did so in the present case.

The second question for our consideration was brought to our attention by the following passage from the judgment in *Ali Abdulla Shirazi and Another* (2) at p. 552:

> "The only point on which we respectfully differ from the learned Chief Justice is his finding that the defect in the magistrate's judgment made the trial of the respondents a nullity. It is quite clear that in none of the cases cited so far in this judgment did this court take that view. The only authorities to the contrary of which we are aware are *Rashid bin Salim*, 6 Z.L.R. 94, a decision of the High Court of Zanzibar in 1942; and *Mohamedali Juma Sumar*, 17 E.A.C.A. 154, a decision of this court in 1950. It is not very clear from the report of *Rashid's* case what the sub-ordinate court actually did but in the judgment of Lucie-Smith, C.J., it is said: 'There has been a verdict and sentence but no judgment. . .a complete omission of a judgment. The accused have not been tried according to law. Each of the four trials is, therefore, a nullity'. We respectfully agree that if there was a complete omission of any judgment, the proceedings would be a nullity, just as surely as if the tribunal purporting to give judgment were not the tribunal established by law to do so: *Joseph v. The King*, (1948) A.C. 215; *Loizeau and Gobin*, E.A.C.A. Cr. A. 348 of 1955 (unreported). But where there is a judgment, though a defective one, the same consequence does not follow."

It is not quite clear what happened in *Rashid bin Salim v. R.* (5) (1942), Z.L.R. 94, referred to in that passage – the headnote states that the accused were convicted and sentenced but that no judgment was written or pronounced. In the judgment Lucie-Smith, Ag. C.J., said there had been a verdict and sentence but no judgment. It may be that the reference to the absence of a judgment was related to the absence of any statement of the points for determination and the reasons for the decision, which were requirements of s. 160(1) of the Zanzibar Criminal Procedure Decree; in his judgment Lucie-Smith, Ag. C.J., referred to that section as containing a "semi-definition" of the word judgment.

In our opinion the sections of the various codes now under consideration are intended to lay down what shall be incorporated into a judgment in a criminal case. But it follows from many decisions of this court, some of which are referred to above, that the interpretation placed on the sections is such that non-compliance with at least some of the requirements of the sections is to be regarded as mere irregularity. As, however, it is axiomatic that there must be a judgment in a criminal trial, it also follows that certain requirements must be regarded as basic, as non-compliance with them would result in there being no judgment at all. To ascertain what these essential requirement are we think it right to refer to the meaning of "judgment" in the English criminal law which is the basis of the various Codes. The Seychelles Penal Code, for example, provides for its interpretation in accordance with the principles of legal interpretation obtaining in England, and while that provision does not appear in the Criminal Procedure Code, with which we are primarily concerned, s. 2(3) provides for the use of the procedure of the High Court of England in

respect of any matter or thing to which the procedure prescribed by the Code is inapplicable.

The term "judgment" is used in different senses in different contexts but the first and the most basic definition given in Stroud's Judicial Dictionary (3rd Edn.) p. 1537 is as follows:

> "A 'judgment' is the sentence of the law pronounced by the court upon the matter contained in the record (see hereon Co. Litt. 39a, 168a);"

Wharton's Law Lexicon (14th Edn.) p. 545 gives: "Judicial determination; decision of a court" and later adds:

> "The word 'judgment' is also used to denote the reasons given by the court for its decision."

With regard to the last, it is obvious that the "reasons", under the Seychelles Code are directed to be included in the judgment, but, as has been seen, they have not been regarded by this court as a basic part of it so that their absence would be incurable. In Archbold's Criminal Pleading Evidence and Practice (34th Edn.) p. 216 are paragraphs dealing with the allocutus and arrest of judgment. In para. 612 it is stated:

> "The prisoner may at any time between the conviction and the sentence, but not afterwards, move the court in arrest of judgment."

If the motion is successful all proceedings are set aside and judgment of acquittal is given. In treason or felony the prisoner is asked if he has anything to say why the court should not proceed to judgment against him – see para. 611. The words used include – "you stand convicted". At p. 222 of the same work it is stated in para. 631 –

> "The judgment or sentence of the court is given orally by the presiding judge".

Similar phraseology is used in Halsbury's Laws of England (3rd Edn.) Vol. 10 at p. 433 and p. 434 and at p. 491 there is reference to "judgment of death".

The word "judgment" there, is used to mean the pronouncing of sentence on a prisoner but we think that it may also include the formal conviction by the court which would follow upon a verdict of guilty by a jury, or would be entered by a court in cases tried without a jury. If a successful motion in arrest of judgment results in a judgment of acquittal it would appear that the motion should precede the formal entry of a conviction; when Archbold speaks of the motion being made between conviction and sentence, the word "conviction" may be intended to be understood as meaning a verdict of guilty. The inclusion of both conviction and sentence in the meaning of the word "judgment" is supported by Wharton's definition quoted above. We do not need to examine that question further, for it is clear that under s. 149 of the Seychelles Code of Criminal Procedure the judgment must contain the decision of the points for determination, the most important of which is whether the accused shall be convicted or not; that being so and conviction being a pre-requisite to sentence, it follows that the conviction is a basic element of the judgment.

Having regard to the use of the word in English criminal law and to the sections of the code now being considered we are of opinion that, in a case where a court has decided that an accused person is guilty, the basic elements of the judgment are the conviction and sentence. These elements were present in the instant case and we therefore considered that there was a judgment in existence and that its other deficiencies could be regarded as irregularities.

In the case of *Willy John v. R.* (6) (1956), 23 E.A.C.A. 509 this court had before it a judgment equally limited and considered it as a valid judgment-in that case, however, the point which has been under discussion was not taken.

Upon this approach we considered whether any of the irregularities in the judgment had occasioned a failure of justice. In the absence of special circumstances failure to date and sign a judgment is immaterial when the date is indicated by the judge's record and the record itself is signed. The fact that the conviction is recorded as one of manslaughter without specifying the section of the Penal Code under which the charge was laid, cannot have caused prejudice. Examination of the recorded evidence together with the "Grounds of Judgment" on the file indicated that there had been no material misdirection and that the evidence was sufficient to support the conviction. We were therefore of opinion that the irregularities mentioned had occasioned no failure of justice.

We would mention only one other matter. It was made a ground of appeal and argued in the written case that the trial was a nullity because the plea of not guilty by the appellant had been taken and recorded by Bonnetard, C.J., whereas the trial took place before Taylor, Ag. C.J. Section 181 of the Criminal Procedure Code was relied upon – sub-s. (1) thereof requires the charge to be stated to an accused person by "the court" and the accused is to plead thereto; sub-s.(3) states that if the truth of the charge is not admitted "the court" shall proceed to hear the case. In our opinion there was no merit in this ground. The plea was taken and the case was heard by the same court; the fact that there was a different presiding judge in the two phases is immaterial.

For these reasons we dismissed the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Seychelles
D. S. Mangat (Crown Counsel, Kenya)

M N Tejani and others v The Official Receiver
[1960] 1 EA 574 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	27 July 1960
Case Number:	36/1960
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Windham JA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Uganda – Sheridan, J.

[1] Company – Winding – up – Public examination of officers – Fraudulent trading affecting creditors – Whether fraud upon creditors is a fraud "in relation to the company" – Companies Ordinance (*Cap.* 212), *s.* 182, *s.* 214, *s.* 215, *s.* 271, *s.* 273, *s.* 356 (*U.*) – *Companies* (*Winding – up*) *Rules*, 1929, *r.* 8 (*2*), *r.* 59, *r.* 207, *and r.* 223(1) – *Companies* (*Winding – up*) *Act*, 1890, *s.*8.

Editor's Summary

Pursuant to s. 182(2) of the Companies Ordinance the Official Receiver made a further report to the court expressing the opinion that on grounds set out in the report a fraud had been committed by certain directors of the company through fraudulent trading and knowledge of the company's insolvency. The court after considering the report made an order requiring the directors to attend for public examination regarding the conduct of the business and their conduct as directors. Five of the directors then applied for the discharge of this order. When the application was being argued counsel for the Official Receiver conceded that there was not enough to connect one of the directors with the alleged fraud and he did not intend to examine him. The application was dismissed whereupon four of the directors appealed on the grounds that there had been procedural errors and also that the fraud alleged was upon the creditors as distinct from the members of the company and such a fraud was outside the purview of s. 182(2) of the Companies Ordinance.

Held –

(i) the procedural irregularities were formal and since they did not affect the jurisdiction of the court they were curable under r. 223 (1) of the Companies (Winding-up) Rules, 1929 and s. 356(1) of the Companies Ordinance.

(ii) the terms of s. 182(2) are not limited to allegations of fraud upon share-holders or persons who become shareholders by reason of the fraud and a fraud is not the less a fraud "in relation to the company" if it is practised in the company's dealings with others. (*Re Medical Battery Co. Ltd.*, (1894) 1 Ch. 444 distinguished).

(iii) to make an order for public examination of a director would be oppressive if the "further report" does not contain allegations which amount to a "prima facie" case against that director; in the instant case the "further report" showed a sufficient prima facie case against three of the four appellants.

Appeals of the first, second and fourth appellants dismissed.

Appeal of the third appellant allowed.

Cases referred to in judgment:

(1) *In re Trust & Investment Corporation of South Africa*, [1892] 3 Ch. 332.

(2) *In re Great Kruger Gold Mining Co.*, [1892] 3 Ch.307.

(3) *In re Medical Battery Co.*, [1894] 1 Ch.444; 69 (1894) L.T. 799.

(4) *In re Barnes*, [1896] A.C. 146.

(5) *In re Civil, Naval and Military Outfitters, Ltd.*, [1899] 1 Ch. 215.

The following judgments were read by direction of the court:

Judgment

Gould Ag VP: By virtue of s. 182(2) of the Companies Ordinance (Cap. 212) of Uganda the Official Receiver in a company winding-up is empowered to make a further report to the court –

> "stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation, or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the court."

On October 22, 1959, the Official Receiver, in exercise of that power made a further report in Companies Cause No. 11 of 1959, which, the court was informed from the bar, embodies liquidation proceedings in respect of Industrial Oil Products Corporation Ltd., at the instance of creditors. It is not necessary to set out the report in full, but, after incorporating details of the persons comprising the directorate of the company since its incorporation and the periods during which they respectively held office, and setting out a number of facts in support of allegations of (1) knowledge of insolvency (2) fraudulent trading and (3) the making of illegal payments, it concluded with the following passage:

> "Wherefore in view of the facts hereinbefore recorded the Official Receiver is of the opinion that a fraud has been committed by the undermentioned directors since the formation of the company and accordingly requests that this Honourable Court shall direct the undermentioned directors of Industrial Oil Products Corporation Ltd. to attend before the court at a date to be appointed for the purpose and be publicly examined as to the conduct of the business of the company and as to each of their conduct and dealings as a director thereof –
>
> (*c*) Musabhai Noormohamed Tajani, P.O. Box 1371, Kampala.
>
> (*d*) Hussenali Jetha Esmail, P.O. Box 690, Kampala.
>
> (*e*) Ebrahim Noormohamed Tajani, P.O. Box 1371, Kampala.
>
> (*g*) Allibhai Suleman Kaba, P.O. Box 1559, Kampala.

When such a report has been made to the court the ensuing proceedings are governed by s. 214 of the Ordinance, sub.-s. (1) of which reads as follows:

> "214 (1) Where an order has been made for winding-up a company by the court, and the Official Receiver has made a further report under this Ordinance stating that in his opinion a fraud has been committed by any person in the promotion or formation of the company, or by any director or other officer of the company in relation to the company since its formation, the court may, after consideration of the report, direct that that person, director, or officer shall attend before the court on a day appointed by the court for that purpose, and be publicly examined as to the promotion or formation or the conduct of the business of the company, or as to his conduct and dealings as director or officer thereof."

In the record of the proceedings in Companies Cause No. 11 of 1959 there is the following record of an order made by Bennett, J, on January 25, 1960:

> "25.1.60.
>
> On considering the further report of the Official Receiver dated October 22, 1959 –
>
> Order

It is ordered that the persons whose names appear at the foot of the

> report attend before the court to be publicly examined as to the conduct of the business of the Company and as to their conduct and dealings as directors.
>
> (sgd) K. D. Bennett
>
> Judge
>
> 25.1.60."

An application to the court was made by five directors for the discharge of the foregoing order, and in the course of argument counsel for the Official Receiver said that there was not enough to connect one of the directors (Kassamali Suleman Kaba) with the fraud and that he did not propose to examine him. That would appear to be a concession that the order was wrongly made against that particular director (though it does not appear that it has been discharged in relation to him) and examination of the report in fact indicates that he became a director for the first time at a date subsequent to the allegedly fraudulent dealings specified. On March 11, 1960, Sheridan, J., dismissed the application to discharge the order of Bennett, J., and from that order of dismissal the present appeal has been brought (by leave) by four of the directors.

The first ground of appeal relates to two deficiencies in the procedure adopted prior to the making of the order of bennett, j., of January 25, 1960. By virtue of s. 356 (1) of the Ordinance, the English Companies (Winding-up) Rules of 1929 are in force in Uganda. Rule 8 (2) reads:

> "Every application in chambers shall be by summons which, unless otherwise ordered, shall be served on every person against whom an order is sought and shall require the person or persons to whom the summons is addressed to attend at the time and place named in the summons."

Rule 59 is as follows:

> "The consideration of a report made by the Official Receiver pursuant to sub-s.(2) of s. 182 of the Act (s. 214(1) of the Ordinance corresponds) shall be before the judge of the court personally in Chambers and the Official Receiver shall personally or by counsel or solicitor attend the consideration of the report and give the court any further information or explanation with reference to the matter stated in the report which the court may require."

It is common ground that no summons was taken out before Bennett, J., and that the Official Receiver did not attend the consideration of the report personally or by advocate. Sheridan, J., in his order, held that there ought to have been a summons to move the court, but as it was conceded that the summons would have been ex parte, no substantial injustice had been caused. The formal defect was therefore cured by r. 223(1), which reads:

> "223 (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of that court."

As to r. 59, the learned judge upheld a submission that the court had power to dispense with the Official Receiver's presence – it is not clear whether he considered it necessary to invoke r. 223(1), but it can safely be assumed that he did not consider that any substantial injustice had been caused.

I am in agreement with the learned judge that neither of these defects in procedure caused any substantial injustice, and it follows that, provided that they are properly to be regarded as falling within the category of formal defects or irregularities, and do not go to the root of the jurisdiction of the judge to make

the order, they must be regarded as cured by r. 223(1). As to the requirement of r. 59 that the Official Receiver shall be present in chambers when the report is considered I think there can be little doubt. His presence is for the benefit of the judge, in case he may require further explanation or information, and there would be little point in his being present if the judge did not require such assistance. The Official Receiver is an officer of the court (see r. 207) and the judge could direct his attendance at any time if he so desired. I think these considerations are sufficient to indicate that r. 59 is properly construable as directory only and non-compliance with it would not go to jurisdiction. Nevertheless non-compliance is an irregularity and, as pointed out in footnote (*t*) at p. 952 of Stiebel's Company Law and Precedents (3rd Edn., Vol. 2) in England the practice is that the Official Receiver invariably attends in person.

Whether the absence of a summons is a matter which goes to the jurisdiction is not an easy question. It is normal English practice to issue an ex parte summons. That is so stated in Stiebel (supra) at p. 952, and in Palmer's Company Precedents (16th Edn. pt. 2) at p. 563; both text books rely upon *In re Trust & Investment Corporation of South Africa* (1), [1892] 3 Ch. 332, as authority. If an application is necessary it should have been by summons in order to comply with r. 8(2), but if the court chose to treat the report itself as an ex parte application I think that that amounted to no more than an irregularity in procedure, and not to a fundamental and incurable error. That is one way of looking at the question. There is another approach. The wording of s. 214(1) of the Ordinance, when compared with a number of other sections, is significant. It states categorically that the court may direct the examination of the person concerned when three things have happened: when an order has been made for winding-up by the court, when the Official Receiver has made a further report to the court and when the court has considered that further report. There is nothing about an application in the sub-section. In s. 273(1) relating to misfeasance by directors, there is a specific provision that the court's powers are exercisable on the application of the Official Receiver, the liquidator or a creditor or contributory; in s. 271, relating to the responsibility of directors for fraudulent trading, it is also specified that the application is to be made by one of the same category of persons. More significant is s. 215 which provides that the court, after the Official Receiver has made a further report, may, "on the application of the Official Receiver" restrain certain persons from taking part in the management of a company. It must be remembered, that though normally the jurisdiction of a court is invoked by some form of application (I use the word in its widest sense) there is, under s. 182(2) no necessity for any application to place the further report before the court. It is put before the court, by one of its officers, pursuant to a statutory right or duty. The court is therefore seised of the basic document upon which its jurisdiction under s. 214 (1) is founded, and I think it must be within the court's own discretion to act upon that document or otherwise. No application is prescribed (r. 60 of the Rules of 1909, which provided that the Official Receiver "may" apply to fix a date for the consideration of his report, is absent from the Rules of 1929) and the practice which may be adopted by the court for its convenience, does not, in my view, in any way alter the fact that the court is already seised of the further report and is authorised by law to act upon it. I think that my opinion receives some support from the following words of Vaughan Williams, J., in *In re Great Kruger Gold Mining Co.* (2), [1892] 3 Ch. D. 307 at pp. 313-4:

> "Neither section gives any right to anybody to abtain an order for this examination. The real fact of the matter is, that the making of the order is wholly and entirely the act of the court. The examination, when it takes place, is the examination of the court. Nobody has a right to call upon the court to exercise its discretion;".

I think, therefore, that upon either of the two approaches, what took place did not go beyond a mere irregularity.

The next main ground of appeal is that the type of fraud alleged in the further report in the present case does not fall within the purview of s. 182 (2) of the Ordinance. It was submitted that the fraud relied upon, was a fraud against outside creditors and that, on the authority of *In re Medical Battery Co*. (3), [1894] 1 Ch. 444, such fraud was not the type contemplated by the section. In that case Vaughan Williams, J., did not have before him a further report, but was considering whether he should order a winding-up by the court or permit a voluntary liquidation to continue. One of the submissions made in favour of a winding-up by the court was that, if it were not ordered, the creditors would be prejudiced by not getting the benefit of a public examination under s. 8 of the Companies (Winding-up) Act, 1890. Sub-section 2 of that section corresponds, with immaterial differences, with s. 182(2) of the Ordinance, while sub-s. 3 is, in essence, the same as s. 214(1) of the Ordinance.

In the course of his judgment Vaughan Williams, J., said, at pp. 447-8 of the report:

> "In my judgment, I should be acting very wrongly if I held that s. 8 was intended to apply to a case where the charges made were brought against the company of having committed frauds in the course of its business with the outside world, and not connected in any way with the promotion or formation of the company – that is to say, of its conduct towards persons dealing with it other than shareholders as regards their membership in the company."

The equivalent passage in the report in (1894) 69 L.T. 799 at p. 800 reads:

> "I will deal with the last suggestion first, and I say that in my opinion I should be acting wrongly if I were to hold that the section was intended to apply to a case where charges are made against a company of having committed frauds in the course of its business upon members of the outside public, and not connected in any way with the promotion or formation of the company – that is, upon persons who have simply dealt with the company and not upon shareholders as regards their membership in the company."

With the greatest respect to the learned judge, he does not appear to have given detailed consideration to the whole of the section, and I think that the limited construction which he has put upon it can only be justified by reading into it words which are not there. The essential words in sub-s. 2 of s. 8 of the Act of 1890 are:

> ". . . by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof . . ."

The learned judge appears to have placed weight upon the opening words of that passage, but they certainly do not state in terms, that the fraud in relation to promotion or formation must be a fraud upon shareholders or upon those who became shareholders by reason of the fraud. Unless it is impossible (and I do not think it is) to visualize fraud in the promotion or formation of the company, upon a person who never became a shareholder, the construction placed upon the words appears to be a very narrow one. That, however, is rather a nice distinction, and one which it was unnecessary for Vaughan Williams, J., to consider; the broad distinction he drew was between those outside persons dealing with the company as such, and the members or shareholders of the company themselves. As to this it is my respectful suggestion that the words

> "or by any director or other officer of the company in relation to the company since the formation thereof",

are not, in their ordinary meaning, to be understood as limited to frauds practised directly upon the shareholders, as, say, by misappropriation by fraudulent means of the company's funds. Surely it is a fraud "in relation to the company" if fraud is practised in the company's business dealings with others – that is something which may render the company itself liable to damages and penalties. If the section was intended to bear the narrower meaning attached to it in *Re Medical Battery Co. Ltd*. (3), I would have expected to find somewhere in it, some such phrase as "fraud . . . upon the members or shareholders". It is to be observed that once the public examination has been ordered, the persons concerned may be examined inter alia as to the conduct of the business of the company: see s. 8(3) of the Act, s. 214(1) of the Ordinance. That appears to me to favour the wider construction.

Some support for the view I have taken is to be found in the text books. In Stiebel (supra) at pp. 854-5 is the following:

> "The fraud which must be alleged in such report must, it has been said, be fraud in some way connected with the company or its contributories, and not merely fraud committed by the company in dealings with the outside world or persons who are not contributories. This view seems inconsistent with the clear words of the section, and it is thought that frauds which would come within s. 275 of the Act will be matter for a further report."

In Palmer's Company Precedents (supra) p. 562 it is stated:

> "The section was not 'intended to apply to a case where the charges (are) brought against the company of having committed frauds in the course of its business with the outside world, and not connected in any way with the promotion or formation of the company – that is to say, of its conduct towards persons dealing with it other than shareholders as regards their membership in the company'. But query whether this view is quite correct, for the section contemplates two classes of cases – (*a*) fraud in the promotion or formation of the company; (*b*) fraud committed 'by any director or other officer of the company in relation to the company since its formation'. The latter is not confined to fraud in the promotion or formation."

I am, with respect, unable to accept what was said in *Re Medical Battery Co. Ltd.* (3), as a full exposition of the meaning of the section under consideration then and here, and I think that the further report alleges fraud of a type covered by the section and that this ground of appeal must consequently fail.

The last ground is that the further report does not contain a prima facie case of fraud against each of the appellants. Sheridan, J., took the view that he could not discharge the order of Bennett, J., who was satisfied that the report warranted the public examination of the appellants. He did not think that the matter could be argued as a question of jurisdiction. With respect I do not think this is quite the right approach. In *In re Great Kruger Gold Mining Co*. (2), at p. 314 Vaughan Williams, J., pointed out that the order for examination would be discharged if it was made without jurisdiction, or if it was oppressive or an abuse of the court's powers. It would I think be clearly oppressive if the order were made upon a report which did not, as required by *In re Barnes* (4), [1896] A.C. 146, contain allegations which would amount to a prima facie case against the individual to be examined. The order for examination is normally made ex parte and, in my opinion, upon an application for its discharge the judge hearing the application must be satisfied upon this question. In the case

of *In re Civil, Naval and Military Outfitters, Ltd*. (5), [1899] 1 Ch. 215, Wright, J., was the judge who heard the application for discharge. On appeal from his order Lindley, M.R., at pp. 232-3, said

> "Now, putting these facts together, is there not some basis for the opinion of the Official Receiver 'that fraud has been committed by Mr. Long in the promotion or formation of this company'? I do not say that this charge is proved in such a way as would authorise a court of civil jurisdiction to compel Mr. Long to make good the profits which he has made; still less do I say that there is such a charge as Mr. Long should be called upon to meet in a court of criminal jurisdiction. The question we have to consider is whether this report is so flimsy, so sketchy, so unfair that Wright, J., exceeded his jurisdiction, or exercised his discretion wrongly, in saying that Mr. Long ought to be publicly examined under the provisions of the Act. In my judgment, although the report might have been plainer (and I hope that on any future similar occasion the report will be plainer, so that we shall not have to waste a day in discussing the matter), this report gave Wright, J., ample jurisdiction to make the order, and that he exercised his discretion in the way in which I myself should have exercised it."

In that case both Wright, J., and on appeal from him, the Court of Appeal, considered whether the further report sufficiently supported the opinion of the Official Receiver. That would appear to be the approach which ought to have been adopted in the present case in the Supreme Court.

I have considered the further report in the present case and, without going into detail, am of the opinion that it clearly supports the opinion of the Official Receiver, in the cases of the appellants Musabhai Noormohamed Tejani, Ebrahim Noormohamed Tejani and Allibhai S. Kaba. As to the appellant H. J. Ismail, it is alleged that he was a director from the 1st May, 1952, to December 28, 1954. The further report alleges that the directors had been aware of the company's insolvency since the end of 1955, and that fraudulent trading had taken place in 1955 and 1956. The only matter challenged in the report which might be said to have commenced prior to December 28, 1954, was the treatment of the sum of £6,583, allegedly a company asset, which was divided among a number of shareholder-directors, not including H.J. Ismail. The actual division by book entry did not take place until September, 1955. In these circumstances I am of the opinion that the further report did not show a sufficient prima facie case against this appellant.

For these reasons I would dismiss the appeals of Musabhai Noormohamed Tejani, Ebrahim Noormohamed Tejani and Allibhai S. Kaba and order them to pay the costs of the Official Receiver in this court. As, however, a great deal of the time in both courts has been taken up in argument upon the question whether irregularities upon the part of the Official Receiver were curable under r. 223(1), I would make no order for the Official Receiver's costs in the court below. Although in my opinion the irregularities are curable, they ought not to have occurred. I would allow the appeal of the appellant H. J. Ismail and order the discharge of the order of Bennett, J., so far as it relates to him; his costs in both courts to be paid by the Official Receiver. The liquidator was served with the proceedings in the court below and on appeal. The court agreed that he had a sufficient interest to warrant his appearance and I would order his costs in both courts to be paid by the three unsuccessful appellants.

Sir Kenneth O'Connor P: I agree. The appeals of Musabhai Noormohamed Tejani, Ebrahim Noormohamed Tejani and Allibhai S. Kaba are dismissed; the appeal of H. J. Ismail is allowed, and, so far as it relates to him,

the order of Bennett, J., is discharged. The orders for costs will be as proposed in the judgment of the learned acting Vice-President.

Windham JA: I also agree.

Appeals of the first, second and fourth appellants dismissed.

Appeal of the third appellant allowed.

For the appellants:
Wilkinson & Hunt, Kampala
B. E. D'Silva

For the liquidators:
Hunter & Greig, Kampala
H. G. Sparrow

For the respondent:
The Official Receiver, Uganda
P. M. Hitchin

The Official Receiver v V N Chande and others
[1960] 1 EA 581 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	23 July 1960
Case Number:	38/1960
Before:	Sir Kenneth O'Connor, P Gould Ag VP and Crawshaw J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Simmons, J.

[1] Bankruptcy – Debts provable – Costs and interest – Whether decree holder can prove for costs incurred in obtaining decree after date of receiving order and for interest on decretal amount – Bankruptcy Ordinance (*Cap.* 25), *s.* 35, *s.* 38 (8), *s.* 70 *and Second Schedule thereto* (*T.*) – *Bankruptcy Act*, 1883, *s.* 37 – *Bankruptcy Act*, 1914, *s.* 30 (3), *s.* 68.

Editor's Summary

On March 13, 1959, a receiving order was made against the partners of a trading firm. On August 4, 1959, the respondents filed a proof of debt for the principal sums with interest and costs due under seven

decrees against the bankrupt firm. Six of these decrees were dated 21 and one was dated March 24, 1959, and all were in respect of promissory notes signed by or on behalf of the bankrupt firm. All these actions had been instituted before the receiving order but the judgments and decrees were obtained after the receiving order. The Official Receiver rejected the respondents' proof to the extent of the costs of each suit and interest. An application by the respondents to the court to vary the rejection of this proof was successful except for a small sum paid to obtain certified copies of the decrees. The Official Receiver then appealed.

Held –

(i) the respondents were entitled to prove for the costs since the debts in respect of which the costs were incurred were themselves provable and the costs were appurtenant or incident thereto.

(ii) interest at the court rate is only provable to the date of the receiving order.

Appeal dismissed. Order of the High Court for interest varied allowing interest only to the date of the receiving order.

Cases referred to in judgment:

(1) *Re Duffield ex parte Peacock* (1873), 8 Ch. App. 682.

(2) *Re British Goldfields of W. Africa Ltd.*, [1899] 2 Ch. 7.

(3) *Re Cable ex parte Poucher* (1824), 1 Gl. & J. 385.

(4) *Ex parte Hill* (1804), 11 Ves. 652; 32 E.R. 1239.

(5) *In re Newman*, (1876) 3 Ch. D. 494.

(6) *Re Bluck* (1887), 57 L.T. 419.

(7) *Emma Silver Mining Co. v. Grant* (1880), 17 Ch. D. 122.

(8) *Vint v. Hudspith* (1885), 30 Ch. D. 24.

(9) *In re Pitchford*, [1924] 2 Ch. 260.

(10) *In re a Debtor*, [1911] 2 K.B. 652.

(11) *Re van Laun ex parte Patullo*, [1907] 1 K.B. 155.

The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and order of a judge of the High Court of Tanganyika dated March 28, 1960, in Tanganyika Bankruptcy Cause No. 3 of 1959. It poses the question whether a successful plaintiff in a suit sounding in contract who has obtained judgment against a debtor subsequently to the date of the receiving order, in a suit commenced before the date of the receiving order, may prove for the amount of his costs of the suit as well as for the amount claimed in the suit for which judgment was obtained. The matter arose in this way:

On March 13, 1959, a receiving order was made against three individuals trading together as Thakkar Medical Stores, and the Official Receiver was constituted receiver of the estate.

On August 4, 1959, a proof of debt was filed with the Official Receiver by one of the respondents, V. N. Chande, for the sum of Shs. 62,749/44 said to be owing to Chande's firm, Maswa Trading Company, by Thakkar Medical Stores. This amount was subsequently increased to Shs. 63,222/94 and comprised: (*a*) the principal sums due on seven decrees recovered in favour of the Maswa Trading Co. against Thakkar Medical Stores together with court fees and advocate fees in the various suits; (*b*) Shs. 379/- interest and costs of obtaining the decrees; and (*c*) Shs. 94/50 cost of certified copies of the decrees. The Official Receiver had, on August 20, 1959, requested the Maswa Trading Company to produce certified copies of the decrees in support of their claim.

Six of the decrees were dated March 21, 1959, and one was dated March 24, 1959. The decrees were all in respect of promissory notes signed by or on behalf of the Thakkar Medical Stores. All the suits had been instituted before the date of the receiving order; but the judgments and decrees had not been obtained till after the date of the receiving order.

By a notice dated December 10, 1959, the Official Receiver formally rejected Maswa Trading Company's claim to the extent of Shs. 2,449/50. The grounds for the rejection were:

> "That at the date of the receiving order, viz. March 13, 1959, you had not obtained judgment, and were not in a position to have obtained judgment as of right, consequently interest from February 27, 1959, costs and costs of decree in Mwanza Civil Cases Nos. 211 to 217 of 1959 totalling Shs. 2,355/00 are not provable in this bankruptcy. Furthermore, costs of Shs. 94/50 incurred in proving your claim are not admissible."

The Official Receiver's insistence that in order to enable the creditor to prove for his costs the creditor must either have obtained judgment or have been in a position to obtain judgment as a right, seems to have been based on a passage in Halsbury's Laws of England (3rd Edn.) Vol. 2, p. 470, para. 925 which reads:

"925. *Costs of legal proceedings*. A plaintiff's costs in an action to recover a sum, such as unliquidated damages for tort, not giving rise to a

> provable debt, are not themselves provable unless judgment has been entered before the receiving order. If, however, the action is in respect of a claim which is provable, such as one founded on contract, it would seem that provided the plaintiff has obtained judgment prior to the receiving order or is in a position to enter judgment as of right as a result of the defendant having failed to appear or to deliver a defence or having admitted liability by paying money into court, then the plaintiff's costs are provable.
>
> "Where an action is brought by a person who afterwards becomes bankrupt and is unsuccessful, but neither verdict nor judgment for costs is given against him till after the receiving order, the defendant's costs are not provable. If, however, in such action there has been a verdict or judgment or order for costs before the receiving order, such costs, though not taxed and though judgment has not been entered would be provable."

The authorities cited for the above proposition are *Re Duffield ex parte Peacock* (1) (1873), 8 Ch. App. 682; and *Re British Goldfields of W. Africa Ltd*. (2), [1899] 2 Ch. 7. In *Peacock's* case (1) a verdict was obtained before the liquidation proceedings commenced. Sir G. Mellish, L.J., said at p. 686

> ". . . and I am of opinion that when a verdict has been obtained as here before the liquidation proceedings are commenced, so that nothing remains except for the costs to be taxed and the judgment to be signed, there is either a debt or 'a liability to which the debtor is subject incurred previously to the date of the order of adjudication' and that it is a claim provable in the bankruptcy . . ."

But the learned Lord Justice did not say that costs cannot be provable in bankruptcy except when nothing remains to be done but to sign judgments and to tax them, which is the way in which the Official Receiver seems to have read the passage in Halsbury. Neither *Peacock's case* (1) nor *Re British Goldfields of W. Africa Ltd*. (2) is an authority for that proposition. The *British Goldfields* case (2) will be referred to later.

The proof of the Maswa Trading Company was admitted at Shs. 60,773/44 only, representing the total of the principal amounts claimed in the seven suits, without costs or interest.

Thakkar Medical Stores applied to the judge in the bankruptcy to vary the rejection by the Official Receiver of the creditor's proof in respect of the sums due by the debtor for the costs and interest. The learned judge upheld the contention of the applicants and held that the sums due for costs and interest were provable. He, however, disallowed the amounts expended on obtaining certified copies of the decrees, holding that these were covered by r. 6 of the Second Schedule to the Bankruptcy Ordinance. The Official Receiver appealed to this court against the order of the learned judge varying his disallowance of the proof in regard to costs and interest. There is no cross-appeal in respect of the expenses of obtaining certified copies of the decrees and we are not asked to review that part of the learned judge's order.

The relevant section of the Bankruptcy Ordinance (Cap. 25) is s. 35 which, so far as material, reads as under:

> "*Description of debts provable in bankruptcy.*
>
> 35(1) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust shall not be provable in bankruptcy.
>
> "*Creditor with notice of act of bankruptcy.*
>
> (2) a person having notice of any act of bankruptcy available against

the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

"*What may be proved.*

(3) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

.

"*Meaning of 'liability'.*

(8) 'Liability' shall, for the purposes of this Ordinance, include:

(*a*)

(*b*) any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring, before the discharge of the debtor.

(*c*) generally, any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of, money or money's worth; whether the payment is, as respects amount, fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation, capable of being ascertained by fixed rules or as matter of opinion."

It will be convenient to deal first with the subject of costs leaving the question of interest to be dealt with later. The Official Receiver does not suggest that the debts due on the Promissory Notes by Thakkar Medical Stores did not fall within sub-s. (3) of s. 35 of the Bankruptcy Ordinance. He does, however, contend that as the judgments were subsequent in date to the date of the receiving order, the costs of the suits to enforce the obligations on the promissory notes were not debts or liabilities . . . to which the debtor was "subject at the date of the receiving order"; neither, he submits, were they future or contingent debts or liabilities to which the debtor might

"become subject before his discharge by reason of any obligation incurred before the date of the receiving order."

The short point, therefore, as regards costs, is whether the costs in this case are or are not a liability to which the debtor might become subject before his discharge "by reason of an obligation incurred before the date of the receiving order". Prima facie the words of the section in their ordinary meaning would seem to be wide enough to include a liability to pay the creditor's costs of obtaining judgment against the debtor to enforce liabilities to pay obligations on promissory notes incurred before the date of the receiving order. Mr. Caldwell, however, for the Official Receiver, argued that these costs were not provable. He relied in the first place on *Re Cable, ex parte Poucher* (3) (1824), 1 Gl. & J. 385, a case decided in 1824, when the law of bankruptcy was not what it later became. In that case in an action of contract there was a verdict against a bankrupt before his bankruptcy, but judgment was not entered till after the bankruptcy. Leech, V.-C., said

"I come to the same conclusion as LORD ELDON has come to in *Ex parte Hill* (4) (1804), 11 Ves. 652; 32 E.R. 1239 that, even in an action of

> contract, if the verdict be not before bankruptcy, the costs are not provable."

If the issue of a Commission of Bankruptcy under the Bankruptcy Law in force in 1824 and 1804 was equivalent to the making of a receiving order (and not an adjudication order) under the Bankruptcy Ordinance (upon which point no authority was cited to us), then *Ex parte Poucher* (3) and *Ex parte Hill* (4) appear to support Mr. Caldwell's contention. The books available in Dar-es-Salaam, however, do not enable me to trace what was the law of bankruptcy in 1804 and 1824. Fortunately there is later authority. The leading case is *In re British Goldfields of West Africa* (2). In that case a shareholder in a limited company having applied, before its winding-up, for rectification of the register and repayment of the sum paid for his shares, obtained, after the winding-up, an order for rectification and repayment, and was admitted by the Official Receiver who was also the liquidator, to prove for the sum ordered to be re-paid, but not for the costs of the application. It was held by the Court of Appeal that, the application not being a claim for unliquidated damages and the register having been rectified, the sum sought to be repaid was clearly a provable debt, and accordingly that, under s. 37 of the Bankruptcy Act, 1883, made applicable to companies by s. 10 of the Judicature Act, 1875, the costs should be added to the provable debt. The relevant sub-sections of s. 37 of the Bankruptcy Act, 1883 seem to be identical with the relevant sub-sections of s. 35 of the Bankruptcy Ordinance now under consideration. Lindley, L.J. (as he then was), at [1899] 2 Ch. p. 11 said:

> "The decisions on this section (s. 37) have established the following rules, which are consistent and reasonable and quite in accordance with the language of the section.
>
> "If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise.
>
> "If, therefore, what is recovered is unliquidated damages 'arising otherwise than by reason of a contract, promise, or breach of trust', that sum is not recoverable unless judgment, or at least a verdict for it, has been obtained before adjudication, or now the receiving order; and if the sum recovered is not provable, neither are the costs of recovering it: *In re Newman* (5), (1876) 3 Ch. D. 494; *Re Bluck* (6), 57 L.T. 419. On the other hand, if what is recoverable is provable, so are the costs of recovering it: see *Emma Silver Mining Co. v. Grant* (7) (1880), 17 Ch. D. 122.
>
> "If the action against a person who becomes bankrupt is unsuccessful, no costs become payable by him or out of his estate, and no question as to them can arise. But if an unsuccessful action is brought by a man who becomes bankrupt, then, if he is ordered to pay the costs, or if a verdict is given against him before he becomes bankrupt, they are provable: *Ex parte Peacock* (1). On the other hand, if no verdict is given against him and no order is made for payment of costs until after he becomes bankrupt, they are not provable. In such a case there is no provable debt to which the costs are incident, and there is no liability to pay them by reason of any obligation incurred by the bankrupt before bankruptcy; nor are they a contingent liability to which he can be said to be subject at the date of his bankruptcy. This was the case of *Vint v. Hudspith* (8) (1885), 30 Ch. D. 24.
>
> "An application under s. 35 of the Companies Act, 1862, to rectify the register, and for a return of money paid is not a claim for unliquidated damages. It is a claim for two things, namely, first, for the removal of an

> impediment which prevents the demand for a return of the money from being successful; and, secondly it is a demand for the repayment of a liquidated sum, and not for unliquidated damages. The register having been rectified, the sums paid by the applicants are clearly provable debts, and the costs of rectifying the register are costs of obtaining an order without which these debts cannot be recovered or admitted to proof. The costs are therefore properly added to the debts provable."

It will be noted that there are four rules here covering four different sets of circumstances, that is to say:

(i) a *successful* action for a *sum of money* after the filing of which the defendant becomes bankrupt. In such a case the costs are regarded as an addition to the sum recovered and are provable if that is provable. That was the *British Goldfields*' case (2) and is the present case.

(ii) A *successful* action for *unliquidated* damages arising otherwise than by reason of a contract, promise, or breach of trust, where the defendant becomes bankrupt. In such a case if the damages are not provable, neither are the costs. (The damages will not be provable unless the judgment had been signed, or a verdict given, at the date of the receiving order).

(iii) An *unsuccessful* action against a *defendant* who becomes bankrupt. There is no judgment against him and no costs.

(iv) An *unsuccessful* action by a *plaintiff* who becomes bankrupt and against whom costs are awarded. The costs are not provable against him unless the judgment (or at least a verdict) was given against him before the date of the receiving order.

The *British Goldfields*' case (2) was the case mainly relied upon by the learned judge. It seems to me to be clear authority for the proposition that if an action is brought against a person who afterwards becomes bankrupt, for the recovery of a sum of money and the action is successful the costs are regarded as an addition to the sum recovered and are provable, if that is provable, but not otherwise. And that applies whether the judgment had been signed (or a verdict given) at the date of the receiving order or not. This is because the costs are (in the case of a successful plaintiff suing the debtor in contract) "a mere addition or appurtenance" to the sum recovered, and "must follow the same rule as that to which they are attached": *In re Newman* (5). For the same reason there could be no proof for damages in an action of tort unless judgment has been signed before the receiving order: *In re Newman* (5) and r. (ii) of Lord Justice Lindley's rules.

Mr. Caldwell did not (as indeed he could not) challenge the authority of *Re British Goldfields of West Africa* (2); but he said that it was a case on very special facts, that is to say a claim for rectification of the register, and that it should not be applied to a claim for the recovery of sums due on promissory notes. As pointed out by Lindley, L.J., however, the claim for rectification of the register was only a claim for the removal of an impediment to the success of the claim which was a demand for the repayment of a liquidated sum. I cannot see how this differs in any material respect from a demand for repayment by the debtor of liquidated sums due on promissory notes. It seems to me that such a claim (no less than the claim in the *British Goldfields*' case (2)) falls clearly within the first rule enunciated by Lindley, L.J., in that case.

Mr. Caldwell further contended that the *British Goldfields*' case (2) must be read in the light of the explanation of it given in *In re Pitchford* (9), [1924] 2 Ch. 260; and he complained that the learned trial judge had omitted to do this.

In *Pitchford's* case (9) a mortgage broker had issued a writ against the debtor for commission earned. The writ was issued in October, 1920. In July, 1921

a receiving order was made against the debtor. In February, 1922, on the application of the plaintiff, the action was stayed with liberty to the appellant to restore. In March, 1922, instead of restoring his action, the plaintiff lodged his proof in bankruptcy for £650. The Official Receiver rejected his proof, but the country court judge reversed the decision of the Official Receiver and admitted it. In September, 1923, the plaintiff lodged a further proof for his untaxed costs of the action incurred before the date of the receiving order. The Official Receiver rejected the proof; but again the county court judge reversed him and admitted it. On appeal by the Official Receiver, it was held by Astbury and Lawrence, J.J., that as the plaintiff had obtained no judgment dealing either with his claim in the action or the costs thereof, but had elected to stay his action and prove in the bankruptcy for the amount claimed in the action, he was not entitled to prove for his untaxed costs of the action. And it was held by Astbury, J., that the sum for which the plaintiff sought to prove in respect of his costs was not a debt or liability certain or contingent to which the debtor was subject at the date of the receiving order or to which he might become subject before his discharge by reason of any obligation incurred before that date, within the meaning of s. 30, sub-s. (3) of the Bankruptcy Act, 1914, and, therefore, was not provable.

Section 30 (3) of the Bankruptcy Act, 1914, corresponds to s. 35 (3) of the Bankruptcy Ordinance.

It is plain that the facts of *Re Pitchford* (9) differ widely from the facts of the present case. In *Re Pitchford* (9) the plaintiff obtained no judgment either for his claim or costs, but elected to prove in bankruptcy. This circumstance was the *ratio decidendi* of both the learned judges who heard that case. I do not think that *Pitchford's case* (9), decided on such widely different facts, is really of any assistance, but I have carefully examined it because its importance was stressed by Mr. Caldwell, in order to see whether, as contended by Mr. Caldwell, it contains any explanation of the judgment of the *British Goldfields*' case (2) which should modify the impression that I have formed of that case. In *Pitchford's* case (9) at p. 264 Astbury, J., said:

> "This is an appeal from an order of the county court judge sitting at Shrewsbury in which, reversing an order by the Official Receiver who had rejected the proof, he allowed the proof in question to be admitted. The matter perhaps in some ways is a curious one. (His lordship then stated the facts and proceeded:) Now, it is to be observed that, however right Mr. Hall may have been in his action, he never got judgment for anything. The only order that was ever made in that action was an order staying proceedings with liberty to apply to restore, which Mr. Hall never availed himself of. The short point on which I think this appeal can be decided is that this is a demand to prove for a debt which, as a matter of fact, has no existence at all and never had any existence. It may very well be that, if an application had been made in the King's Bench action under certain circumstances an order for costs might have been obtained. But in fact no such application was made and no such order was ever pronounced."

Obviously the learned judge is here drawing a distinction between *Pitchford's* case (9) and a case (such as the present case) where a judgment and an order for costs had been obtained.

His lordship then held that the debt was not a debt for costs certain or contingent and was never incurred by reason of any obligation within the meaning of the section. It is to be observed that these were untaxed costs and there was no judgment to which they could be "appurtenant".

Lawrence, J., said at p. 269:

> "Speaking for myself, I do not propose to determine whether, generally

> speaking, costs of an action on a contract are a contingent liability within the meaning of s. 30, sub-s. 3, or are only a possible liability not giving rise to any provable debt; nor do I propose to express an opinion on the question whether, if the respondent had prosecuted his action after the date of the receiving order and had then obtained an order for the payment of his costs, he could have proved for these costs in the present bankruptcy. In my judgment this case falls to be determined on the particular facts and on the course which the respondent himself has chosen to adopt, a course which, in my opinion, precludes him from now seeking to prove for these costs. He voluntarily applied to the court in which his action was pending for the stay of that action without asking for or obtaining any order for the payment or taxation of his costs. He then lodged a proof in the bankruptcy for the amount of his claim, which was ultimately admitted. By adopting this course, he seems to me to have deliberately abandoned any claim to the costs of the action. The county court, admittedly, has no jurisdiction to make an order for the payment or for the taxation of these costs. The costs were entirely in the discretion of the High Court, and neither the Official Receiver nor the county court can determine whether the High Court would have awarded costs to the respondent had he asked for them. Moreover, the High Court could hardly have made an order for the payment of the costs of the action without first hearing the action, a proceeding which the respondent for divers reasons desired to avoid. In these circumstances I find a difficulty in seeing how the respondent can possibly be admitted to prove in the bankruptcy for these costs."

Mr. Caldwell argued that there was no difference in principle between the facts of *Pitchford's* case (9) and the present case. I cannot agree. He contended that it was implicit in the judgment of both Astbury, J., and Lawrence, J., that the crucial date is the date of the receiving order. If this means that there is a necessary implication that a successful plaintiff's costs in an action in contract for which he has obtained judgment and which have been taxed after the date of the receiving order are not provable, I cannot find this in either of the judgments referred to. It was not so held in *Pitchford's* case (9) and the learned judges who decided that case were not dealing with such a set of circumstances.

But *Pitchford's* case (9) is said to "explain" the *British Goldfields*' case (2) in some way favourable to the contention of the Official Receiver. Astbury, J., commenting on the *British Goldfields*' case (2) at p. 265 on *Pitchford's* case (9), said:

> "The judgment of the Court of Appeal seems to be perfectly plain on the point. Lindley, M.R., who gave judgment, dealt with the case of an action being brought against a man who becomes bankrupt and also with the case of an action being brought by a man who himself becomes bankrupt subsequently. With regard to the first he says this: 'If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise'. I read that as meaning the costs which the successful litigant has obtained an order for. Then he says on the other hand: 'If, therefore, what is recovered is unliquidated damages "arising otherwise than by reason of a contract, promise or breach of trust", that sum is not recoverable unless judgment or at least a verdict for it, has been obtained before adjudication, or now the receiving order'. In the first case it is apparently of no consequence if the order is obtained under liberty to continue the action, after the receiving order, whereas in the second case that procedure is not available. Then he says: 'An

> application under s. 35 of the Companies Act, 1862, to rectify the register and for a return of money paid is not a claim for unliquidated damages'. In other words, he treated the case as coming within the first heading he mentioned. 'It is,' he said, 'a claim for two things, namely, first for the removal of an impediment which prevents the demand for a return of the money from being successful; and secondly, it is a demand for the repayment of a liquidated sum, and not for unliquidated damages. The register having been rectified, the sums paid by the applicants are clearly provable debts, and the costs of rectifying the register' – which he treats as having been properly ordered by Wright, J., to be paid – 'are costs of obtaining an order without which these debts cannot be recovered or admitted to proof'."

I respectively agree. Lawrence, J., said at p. 269.

> "Mr. Tindale Davis relied upon the case of *In re British Goldfields of West Africa* ([1899] 2 Ch. 7, 11) and more especially on the following general proposition there laid down by the Master of the Rolls: 'If an action is brought against a person, who afterwards becomes bankrupt, for the recovery of a sum of money, and the action is successful, the costs are regarded as an addition to the sum recovered and to be provable if that is provable, but not otherwise'. When the learned judge there speaks of the action being successful, I think he must mean that judgment is pronounced in the action in favour of the plaintiff for the sum claimed and for the costs of the action. This proposition has, in my opinion, no application to the facts of the present case, as the action has never been tried and no judgment has ever been pronounced in it, therefore it cannot be said that it has been successful. Moreover the actual decision in *In re British Goldfields of West Africa* ([1899] 2 Ch. 7) has no application at all to the present case. What was decided there was that the applicants ought to be allowed to prove for the costs incurred by them in obtaining an order in the winding-up for the rectification of the register of the company, as, without such an order, their proofs could not have been admitted; consequently the costs were necessarily incurred in removing an impediment to the admission of their proofs."

It is this last passage which was principally relied upon by Mr. Caldwell in contending that the *British Goldfields*' case (2) was a special case depending upon its own facts, the principle of which should not be followed in other cases. It is true that in the *British Goldfields*' case (2) there was a claim to rectify the register in order to remove an impediment to claiming a liquidated sum. But as pointed out by Astbury, J., in the above-quoted passage, the impediment having been removed, Lindley, L.J., "treated the case as coming within the first heading he mentioned". In my view *Pitchford's* case (9), to the extent that it is material at all, reinforces, and does not explain away the rules enunciated by Lindley, L.J., in the *British Goldfields'* case (2) which are rules of general application, and the present case falls within the first of those rules.

Other cases referred to for the Official Receiver were *Re Bluck* (6) and *In re a Debto*r (10), [1911] 2 K.B. 652. *Bluck's* case (6) was a case of an unsuccessful plaintiff against whom a receiving order was made. It was held that a claim by the successful defendant for his untaxed costs made after the date of the receiving order was not provable, Cave, J., observing that if a plaintiff brings an action, he does not place on himself an obligation to pay the costs. *In re a Debtor* (10) was also a case of costs awarded against an unsuccessful plaintiff who became bankrupt before the judgment. The judgment had not been given against him at the date of the receiving order. Each of these cases falls within r. (iv) of Lord Justice Lindley's rules and neither has any application

to the present case. *Vint v. Hudspith* (8) was also a case of an unsuccessful plaintiff and is of no assistance.

The position is clearly stated in Williams on Bankruptcy (17th Edn.) p. 157 where he contrasts a defendant's and a plaintiff's right to prove for his costs and (as regards plaintiffs only) contrasts suits in contract and in tort:

> "It is immaterial whether the action was founded in contract or tort, because a defendant's right to costs does not depend upon the nature of the action brought against him, or, as Mellish, L.J., said in *Ex p. Newman*, [1876] 3 Ch. 494 the costs are not attached to anything else, whereas a successful plaintiff's costs can only be proved in the bankruptcy of the defendant where the debt or claim in respect of which the costs are recoverable is itself provable, because a plaintiff's right to costs is a mere addition or appurtenance to the claim or cause of action, and must follow the same rule as that to which they are attached. Thus in the case of a verdict for damages in an action of tort, neither damages nor costs are provable unless judgment has been signed before the receiving order."

In the present case the plaintiff's right to costs was appurtenant or incident to claims which were themselves provable. I think, therefore, that the decision of the learned judge is to be supported as regards costs of the suits. I turn now to the question of interest.

As I understood his argument, Mr. Caldwell did not challenge the items in the decrees "interest at 9 per cent. per annum from February 27, 1959 to March 21, 1959". February 27, 1959, was the date of filling the suits, and March 21, 1959, was the date on which summary judgments were obtained. Presumably the promissory notes (which were not included in the record of the appeal) carried interest at 9 per cent. The receiving order was dated March 13. As I have said, I did not understand Mr. Caldwell to object to the inclusion of interest at 9 per cent. from March 13 to March 21. He did, however, object to the words

> "with interest on the decretal amount at the rate of 6 per cent. per annum from this day [i.e. March 21, 1959] till the day of payment";

and he objected to the statement in the judgment of the learned trial judge that

> "the Official Receiver must accept or reject the decree as a whole: he cannot accept principal amounts and reject costs and interest."

Mr. Caldwell argued that the Official Receiver as trustee for the general creditors is under a duty and has a right, when examining a proof for the purpose of admitting or rejecting it, to require some satisfactory evidence that the debt on which the proof is founded is a real debt; and that no judgment recovered against the bankrupt could deprive the Official Receiver of that right. I am of opinion that that is correct: *Re van Laun ex parte Patullo* (11), [1907] 1 K.B. 155, 162, 163. But I do not understand the Official Receiver in the present case to be challenging the reality of the debts on the promissory notes. He merely challenges the addition of the costs and the inclusion of interest at 6 per cent. after the date of the decree. With the costs I have already dealt. As to interest, I should have appreciated it if the attention of the court had been drawn by counsel for the Official Receiver (who must be familiar with them) to the provisions of the local Bankruptcy Ordinance and Rules dealing with interest. These appear to be s. 38 (8) and s. 70 of the Ordinance and item 20 of the Second Schedule but, as the Bankruptcy Ordinance and Rules occupy two hundred and thirty-eight closely printed pages in the Revised Laws of Tanganyika, it is possible that I may have overlooked something. Section 38(8) implies that interest in the ordinary way is to be calculated to the date of the receiving order

only, as is specifically stated in the case of interest provable under item 20 of the Second Schedule. That is how the position is put in Ringwood's Bankruptcy Law (17th Edn.), p. 196 where it is stated:

> "Interest on a debt, other than a future debt, is only capable of proof in so far as it arose prior to the date of the R.O. After the R.O. all debts rank equally well in respect of interest. No interest is added to any of them unless there is an ultimate surplus after payment of provable debts, and then they all receive interest at the same rate, but not more than 4 per cent., as from the date of the R.O."

Section 70 (corresponding to s. 68 of the Bankruptcy Act, 1914) restricts the rights as to dividend, but not as to the amount of proof: Williams on Bankruptcy (17th Edn.) p. 429. On general principles, therefore, I incline to the view that the Official Receiver can go behind the decrees in so far as they comprise interest and limit the proof to interest accrued at the higher rate up to the date of the receiving order, thereafter the matter of dividend on that interest would be regulated by s. 70 and that of interest subsequent to the receiving order, by s. 38 (8).

I would, therefore, maintain the order of the High Court directing the Official Receiver to admit the subsequent claim for costs and court fees, but vary it to direct that the claim for interest be admitted up to the date of the receiving order only. The respondents should have the costs of the appeal.

Gould Ag VP: I agree and have nothing to add.

Crawshaw J: I also agree.

Appeal dismissed. Order of the High Court for interest varied allowing interest only to the date of the receiving order.

For the appellant:
The Attorney-General, Tanganyika
R. A. Caldwell (Crown Counsel, Tanganyika)

For the respondents:
Laxman & Co, Mwanza

The respondents did not appear and were not represented.

Jupiter General Insurance Co Ltd v Rajabali Hasham and Sons
[1960] 1 EA 592 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	15 July 1960
Case Number:	21/1960
Before:	Gould Ag VP, Windham CJ and Crawshaw CJ
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Law, J.

[1] Insurance – Motor insurance – Validity of indemnity – Warranty excluding liability if driver not sober – Driver of insured using car without authority when drunk – Vehicle damaged beyond repair – Whether insurers liable – Penal Code, s. 284 (*T*.).

[2] Pleading – Amendment – Appeal – Omission to plead warranty in defence – Application made to amend defence at hearing of appeal – Omission due to inadvertence – Circumstances in which amendment allowed.

Editor's Summary

A motor insurance policy indemnified the insured against loss or damage to his vehicle occasioned inter alia by accidental collision, theft or malicious act but had a clause excluding loss or damage occurring whilst the vehicle was being driven by any person other than the insured or someone authorised by him. There was also an endorsement on the back of the policy warranting that the insurers should not be liable if the vehicle at the time of an accident was being driven by a person who was not sober. The insured instructed his driver to take the car to a garage and leave it there for the night but the driver ignoring this order took the car for a private frolic, became drunk and had an accident which damaged the car beyond repair. In an action by the insured for the value of the vehicle the defence of the insurance company pleaded that the driver was not at the material time an authorised driver but omitted to plead the endorsed warranty. The trial judge found for the plaintiffs whereupon the insurance company appealed and at the opening of the appeal moved for leave to amend the defence by pleading the warranty. Since the omission to plead the warranty was shown to be due to inadvertence and, had the warranty been pleaded originally, no further evidence would have been needed nor would the course of the trial have been altered the amendment was allowed. Counsel for the appellant insurers then abandoned all grounds of appeal save that related to the warranty. The respondents' main contention was that the driver had converted the car to his own use when he took the car on a private frolic, that this was a malicious act and that the drunkennes of the driver at the time of the accident was immaterial.

Held – (Windham C.J., dissenting) by taking the vehicle unlawfully the driver had committed an act of conversion contrary to s. 284 of the Penal Code which was a malicious act; the malicious act was an insured risk materialising at the time of conversion when neither the warranty nor any other exception applied; it was also a continuing act and included the acts of the driver in pursuance thereof and the respondents who had lost the vehicle were entitled to recover under the policy.

Appeal dismissed.

Cases referred to in judgment:

(1) *Marsden v. City & County Insurance Co*. (1865), L.R.1 C.P. 232.

(2) *Becker, Gray & Co. v. London Assurance Corporation*, [1918] A.C. 101.

(3) *Leyland Shipping Co. Ltd. v. Norwich Union*, [1918] A.C. 350.

(4) *Samuel & Co.* (*P.*) *v. Dumas*, [1924] A.C. 431.

(5) *Bromage v. Prosser* (1825), 4 B. & C. 255.

The following judgments were read:

Judgment

Gould Ag VP: This is an appeal from a judgment and decree of the High Court of Tanganyika at Tanga allowing a claim by the respondent firm against the appellant company upon a motor vehicle insurance policy. The claim was for the total loss of the respondent firm's Chevrolet Saloon Car No. KAN 401.

The proceedings before this court opened, most unusually, with a motion to amend the Written Statement of Defence by adding a new para. 4 (*d*). Before setting it out I will, for the sake of easy reference, set out para. 4 and para. 5 of the plaint to which the proposed new para. 4 (*d*) is directed:

> "4. On the said 11th day of August, 1958 and at all material times the plaintiff was interested in the said vehicle to the extent of Shs. 28,500/- being the insured value thereof.
>
> "5. On the 15th day of August, 1958 during the currency of the said policy the plaintiff's driver one Saidi bin Mzuri wrongfully and maliciously drove away the said vehicle without the consent of the plaintiff or of any other person on behalf of the plaintiff and drove the said vehicle for some 122 miles from Tanga and, when drunk, met with an accident near the District Commissioner's Office in Tanga Township on Tanga – Korogwe Road by which the said vehicle became a total wreck and beyond economic repair."

The new proposed paragraph in the Written Statement of Defence was:

> "4. As regards para. 4 and para. 5 of the plaint, but subject to the non-admission as to the Policy of Insurance pleaded in the preceding paragraph, the Defendant Company admits the facts therein alleged save that:
>
>
>
> (*d*) states further that the fact that plaintiffs' said driver was drunk when he met with the accident pleaded in para. 5 of the plaint, constituted a breach of the Warranty printed on the back of the Policy of Insurance as follows: 'It is hereby understood and agreed that the Company will not be responsible for the accident and/or any damage and/or claims of any nature when the vehicle is driven by a person who is not sober and/or under the influence of alcoholic drink, liquor or drugs'."

The remarkable circumstance that the appellant company did not, notwithstanding the plea in para. 5 of the plaint that the driver of the vehicle was drunk at the time of the accident, avail itself of this warranty in its pleading and case in the court below, is accounted for in an affidavit filed by the advocate who appeared for the company in the court below and in this court, para. 2 to para. 7 of which are in the following terms:

> "2. In the first place I was sent by the appellant a copy of the relevant Policy, together with copies of certain correspondence between the parties, and a copy of an opinion by an advocate in Kampala expressing the view that the appellants had good grounds for resisting the respondent's (the original plaintiff's) claim, and asked whether I concurred with the said

opinion.

"3. I read the said Policy, correspondence, and opinion, and informed the appellant that I did so concur, but I failed to observe the 'Warranty' printed on the back cover of the Policy, of which no mention was made in the said correspondence and opinion.

"4. Certain interlocutory matters were then conducted on my behalf in Tanga by Mr. B. R. Patel, advocate, who appeared with me as my junior at the trial. He also failed to observe the said Warranty.

"5. In the result, the said Warranty was not pleaded in the appellant's Written Statement of Defence.

"6. The said Policy (as continued) was put in as evidence by the respondent at the trial, was referred to in argument, and considered at length by the learned trial judge in his judgment, but at no stage of the trial was the said Warranty referred to, as I was still unaware of it, and did not direct the learned judge's attention to it.

"7. It was not until after the judgment of the High Court herein had been pronounced that the appellant first referred me to the said Warranty."

In augmentation of this affidavit the advocate for the company stated to this court that the policy had been annexed to a file cover which tended to obscure the back.

There was no challenge to the power of this court to allow the amendment to be made, and the explanation of inadvertence put forward in the affidavit above quoted was fully accepted by counsel for the respondent firm. Indeed it is obvious that having regard to the contents of the plaint the advocate for the company could not have failed to avail himself of the warranty had he been aware of its existence. The only question was whether the interests of justice required that the amendment should be allowed.

It did not appear to this court to be a case in which, had the warranty been pleaded originally, further evidence might have been necessitated. The drunkenness of the driver at the time of the accident was common ground. Nor did it seem that the course of the trial would have been altered in any way. It was not a matter which had been deliberately omitted from pleading or argument in the court below. The advocate for the respondent firm did not submit that the case fell under any of these heads.

In the circumstances, the omission being due to inadvertence, however regrettable, the court felt that the case had been decided in the court below on the basis of a purported contract which was not the complete contract between the parties and that, subject to a suitable order as to costs, if necessary, the amendment ought to be allowed: it was not considered that a new trial should be ordered as all necessary material was available to this court. The amendment was accordingly ordered and the advocate for the company thereupon abandoned all grounds of appeal save that related to the warranty.

There is no dispute as to the facts. The driver of the motor car in question, Saidi bin Mzuri, had been ordered to take the car to a garage in Tanga and leave it there for the night. Instead of doing so and in breach of his orders he went on a long trip in the course of which he became intoxicated and had an accident, whereby the car was damaged beyond the possibility of economic repair. It is stated in the judgment of the learned trial judge and was accepted by the advocates before this court that the driver was not committing theft as he had "taken the car for a frolic of his own". He committed the offence of "conversion not amounting to theft" by converting the car to his use unlawfully and without colour of right. It is agreed that he was not drunk when he embarked upon this enterprise, but had become so by the time the accident occurred.

The operative portion of the policy so far as it is relevant reads:

"Now this Policy witnesseth:

That subject to the terms, exceptions and conditions contained herein or endorsed or otherwise expressed hereon

SECTION 1 – Loss or Damage.

1. The Company will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon

(*a*) by accidental collision or overturning or collision or overturning consequent upon mechanical breakdown or consequent upon wear and tear

(*b*) by fire, external explosion, self-ignition or lightning or burglary, housebreaking or theft

(*c*) by malicious act".

Among the "General Exceptions" is the following:

"The Company shall not be liable in respect of (1) any accident, loss, damage or liability caused, sustained or incurred (*b*) whilst any Motor Vehicle in respect of which indemnity is provided by this Policy is (ii) being driven by or is for the purpose of being driven by him in the charge of any person other than an Authorised Driver".

The expression "Authorised Driver" is defined as meaning:

"(*a*) The insured

(*b*) any person driving on the insured's order or with his permission",

subject to the proviso that the person driving is duly licensed to drive the vehicle. It was agreed between counsel that the "Warranty" above quoted was incorporated in the policy by the words "endorsed or otherwise expressed hereon" and that it operated as a condition.

It was the submission of the advocate for the company that the endorsed condition concluded the matter; that it was in the widest terms. The vehicle was being driven at the time of the accident by a person who was not sober and therefore the company was not liable. The advocate for the respondent on the other hand contended that one of the risks insured against was loss or damage by malicious act, that the driver committed a malicious act when he converted the car to his own use, and at that time he was sober. The loss of the car was consequent upon the malicious act and it was immaterial that the driver was drunk when the accident happened.

In his judgment the learned trial judge devoted some time to considering whether the driver of the car was an authorised driver at the time of the accident and concluded that he was not, as he was not then driving with the permission of the insured. I do not think that the court is concerned with that question. There is no doubt that up to the moment of the conversion the driver was "authorised"; if the matter is to be looked at as at the moment of the collision and the risk insured against as being "accidental collision or overturning" then the company would be protected under the general exception to the policy if the driver were "unauthorised", and on the other hand if he were "authorised", protection would be afforded by the warranty, in view of his state of insobriety. If, on the other hand, it is right to regard the loss as accruing from a malicious act, taking place when the car was in charge of a sober and "authorised" driver, then I do not think that the question of the identity or condition of the driver at the time of the collision really arises.

At the first glance it would appear that the argument for the appellant is meritorious. The indemnity against all the insured risks afforded by the policy is plainly stated to be subject to the conditions, etc.,

endorsed on the policy. The accident took place while the driver was drunk, a state of affairs covered

by one such condition. That might be said to be an end of the matter and the company to be exempt from liability. But I think there is more to be said and all of the insured risks of the policy must be taken into consideration. The one particularly in point is loss of or damage to the vehicle by malicious act. These words have to be interpreted as they stand and it is patent in my opinion that they are capable of a wider meaning than what is commonly thought of as "malicious damage". That phrase brings to mind such things as tyres slashed and windows broken with deliberate and wicked intent. These things are undoubtedly covered by the policy but there are other malicious acts. In his judgment the learned trial judge said:

> "As regards the first issue, I am of opinion that the words 'malicious act' in para. 1 (*c*) of the policy should be interpreted in accordance with the classic definitions of 'malice' given by Lord Campbell and Bayley J., and referred to in Byrne's Law Dictionary, under the heading 'malice', as follows:
>
> > 'malice . . . consists in a conscious violation of the law to the prejudice of another', and
> >
> > 'malice . . . in its legal sense, means a wrongful act done intentionally without just cause or excuse.'
>
> In taking the car for a frolic of his own, the driver Saidi was not committing theft, because his intention was to return the car. Had he intended to steal, the insurance company would have been liable under para. 1 (*b*) of the policy. The offence committed by Saidi was what is known in this Territory as 'conversion not amounting to theft', see s. 284 of the Penal Code; he took the car unlawfully and temporarily converted it to his use; and in so doing I have no doubt at all that he committed a conscious violation of the law to the prejudice of the plaintiff firm, and that he intentionally did a wrongful act without just cause or excuse, and I answer the first issue in that sense."

I respectfully agree that the act of conversion in this case, a criminal act contrary to s. 284 of the Penal Code, was a malicious act. It would be easier to visualise as such if the car had been driven away by some person other than the usual driver, while the latter had temporarily left it unguarded; but the nature of the act is the same in either case. The malicious act was an insured risk and one which materialised at the time of the conversion, at which time neither the warranty nor any exception applied.

The case of theft, another insured risk, has been instanced by way of parallel. Had the driver taken the car away with the intention of keeping it and depriving the owners permanently of it he would have committed the crime of theft. That is one of the insured risks and if the car was not recovered, or was recovered in a damaged state, the company would have been responsible. It could not be heard to say that the thief or someone to whom the thief had sold or delivered the car had wrecked the car while driving it in a state of insobriety, or was not an authorised driver, and that therefore the company was protected by the warranty or the exception. That in my opinion, is not what the policy means. The insured risk, theft, is one which would materialise when the car was stolen, and if at that time none of the exceptions were applicable the company would become liable to indemnify the insured for whatever loss ensured.

The next question is whether there was "loss" by the malicious act. In other words was the loss proximately caused by the insured risk? I think that this is really the crux of the case.

The doctrine of proximate cause has its origin mainly in cases decided in relation to policies of marine insurance, but it is stated in the Law of Insurance by Preston and Colinvaux (1950) at p. 84, to apply generally. It was accepted

as a general rule of insurance law by Erle, C.J., in *Marsden v. City and County Insurance Co.* (1) (1865), L.R. 1 C.P. 232 at 239. In the marine cases it has been held that the proximate cause is not the latest cause but is what has been variously described as the "direct", "dominant" or "operative and efficient" cause. (*Becker, Gray & Co. v. London Assurance Corporation* (2), [1918] A.C. 101; *Leyland Shipping Co. Ltd. v. Norwich Union* (3), [1918] A.C. 350; *Samuel & Co.* (*P.*) *v. Dumas* (4), [1924] A.C. 431).

In the present case there are two possible causes for consideration. The malicious act itself – the conversion of the motor car – was undoubtedly a causa sine qua non and at the present day it cannot be said to be an unlikely or unexpected result of the conversion of a motor vehicle for the purposes of what the learned judge called "a frolic of his own", that the venture will result in the vehicle being wrecked. The other cause was the negligence of the driver in driving the vehicle while drunk. This is a circumstance which, regarded alone, falls within the warranty, and if that negligence is to be regarded as a more proximate cause of the loss the respondent firm cannot recover.

This question I find to be a difficult one. The negligence of the driver was the latest cause, but, as has been said above, that is not material. Taken alone the negligence could be said to be a direct cause of the loss, but I do not think the matter should be so regarded. As I see it the negligence of the driver ought to be regarded as part and parcel of the malicious act, the conversion of the car. The malicious act was a continuing one and included the acts of the driver in pursuance of it. In that sense the malicious act, which was the insured risk, was the dominant cause of the loss. I think something can be drawn from the law of marine insurance in which the negligence of master and crew does not absolve the insurer if the loss is proximately caused by a peril insured against. It will suffice on this topic to quote two passages from Halsbury's Laws of England (3rd Edn.) Vol. 22. Firstly at p. 92:

> "The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but unless the policy otherwise provides he is liable for any loss proximately caused by a peril insured against, and is liable even though the loss would not have occurred but for the misconduct or negligence of the master or crew. The same result follows when the negligence of any other person (including the assured himself) contributes to the loss."

Secondly at p. 93:

> "With regard to the misconduct of persons other than the assured, the insurer is liable for a loss which would not have occurred but for the misconduct (wilful or otherwise) of the master or crew (or any other person), provided the loss was proximately caused by a peril insured against."

In my opinion therefore the driver in the present case by taking the car for his own purposes committed a malicious act at a time when the exceptions and warranty did not apply. That act was an insured risk and the car was, by reason of it, never returned to the owners and was lost to them. They are in my opinion entitled to recover upon the policy. If I am wrong in this it would seem that if the car had been stolen and subsequently wrecked by an unauthorised or drunken driver, the company would equally be able to avoid liability.

For these reasons I would dismiss the appeal with costs.

Windham C J (T): I have the advantage of reading the judgment of my brother, Gould, Ag. V.-P., and I have carefully considered the process of reasoning by which he has reached the conclusion that the appellant company is liable in respect of the total loss of the respondents' car, and that the appeal should accordingly be dismissed. But, with the greatest respect, I find myself

unable to agree with his conclusion.

The question seems to me to be somewhat simpler of solution than he would envisage it. What must be done, as I see it, is to construe the insurance policy in relation to the facts of the present case, not in relation to any hypothetical case (as for instance, the theft of a car by its driver who thereafter gets drunk and wrecks it), and in doing so to apply the established cannon of construction, expressed in the question – what is the intention of the parties as expressed in the words they have used and set their hands to? Construing the policy in this way, we find that it contains two clauses which, subject to the introductory words that precede the first of them, might seem irreconcilable. The first is the cl. 1 (*c*) in which the appellant company undertakes to

> "indemnify the insured against loss of or damage to the motor vehicle . . . (*c*) by malicious act."

The second is the endorsed "warranty" (rightly conceded before us as operating as a condition negativing liability) under which it is agreed that the company

> "will not be responsible for the accident and/or for any damage and/or claims of any nature when the vehicle is driven by a person who is not sober . . ."

Assuming for the moment (though I will deal with the point later) that the loss of the car in the present case was "by" the malicious act of its driver in taking it for a frolic, in the sense of being caused by that act, then we are confronted with unarguable liability under cl. 1 (*c*), and unarguable exemption from liability under the "warranty", the driver having been admittedly drunk at the moment of the accident. How are we to reconcile these two clauses? The policy itself immediately supplies the answer. It lies in the introductory and qualifying words which precede cl. 1, and which read:

> "subject to the terms, exceptions and conditions contained herein or endorsed or otherwise expressed hereon."

The "warranty" is a condition so endorsed thereon. Clause 1 (*c*) must therefore be subject to the "warranty" or, in other words, in case of conflict the "warranty" must prevail.

The objection has been advanced that this interpretation would lead to the conclusion that if the driver decided to steal the car and, with that object, drove it away, got drunk, and then wrecked it, the company would be exempt from their liability for the loss through theft – a liability undertaken in cl. 1 (*b*) – because the thief happened at the time of the accident to be drunk. This, it is suggested, and I think rightly suggested, could hardly be the intention of the policy. But it seems to me that there are two answers to the objection. First, we are not concerned with how the policy should be construed in such an event, but only with its construction in respect of the facts before us. Secondly, it by no means follows that the construction which I would adopt and apply to the circumstances of this case, as representing the intention of the parties as expressed in the words they have used, would necessarily have to be applied in the hypothetical case of theft followed by intoxication which has been instanced. The wording of the policy, whereby the liability under cl. 1 (*b*) or cl. 1 (*c*) is subordinated to the exemption in the "warranty", is so clear that, in accordance with accepted canons of construction, the policy must be construed in accordance with that wording unless this would lead to such a manifestly absurd or illogical or improbable a result that it cannot conceivably be deemed to represent the parties' intentions, in which case the policy should be construed otherwise. Now it might well be argued that the result, as applied to the hypothetical case of theft and drunkenness would be just such an absurd or illogical one; and that argument if such a case should fall to be

decided, might prevail. Such, however, is not the position in the present case, as I see it. It cannot here be contended, in my view, that, notwithstanding the existence of the (on the face of it) overriding exemption clause in respect of an accident occurring while the driver is drunk, the parties must have intended that the company should nevertheless be held liable merely because this driver, who was the respondent's own employee and was "authorized" at least when he began his journey, went off on a frolic of his own before getting drunk or incurring the accident. The parties may have intended that in such a case the liability for damage by "malicious act" should prevail; or they may have intended that the exemption in the case of drunken driving should prevail. Neither intention is inconceivable or even manifestly improbable. That being so, their intention must be inferred from the words that they used, which provided that the liability for damage by malicious act shall be subject to the exemption in the case of drunken driving.

That brings me to the second and alternative ground on which I think this appeal should be allowed. For, even if I am wrong in my view that the exemption clause should prevail over cl. 1 (*c*) in the case of this accident, assuming both clauses to apply and the two being in conflict, the present case is one in which, with the greatest respect to the reasoning of my learned brother, who has carefully considered the point, I do not think that any liability would arise under cl. 1 (*c*) at all. 1 refer to the question whether the "malicious act" of the driver in taking the car for a frolic of his own was a proximate cause of the total loss of the car; and I would here agree that a "proximate" cause is not necessarily the latest cause. A causa sine qua non the act certainly was, as my learned brother has observed. But it seems to me that this is all that it was. The accident occurred *while* the driver was doing a malicious act, no doubt, but not wholly or even partly *because* he was doing one. It occurred because he was drunk. Had he remained sober, there is no reason to suppose that he was more likely to meet with an accident when driving on road X while not on his master's business than if he had been driving on road Y while upon his master's business. Conversely, he might as easily have wrecked the car while drunk, even if he had been about his master's business at the time. Accordingly, to my mind, the fact of the frolic, although that particular accident would not have taken place without it, was not a predisposing or proximate cause of the accident. Secondly, had the driver returned safe and sound from his frolic, no claim would have accrued, notwithstanding he had been committing a malicious act, since no loss or damage would have been occasioned by that act. The damage occurred at the moment of the accident, and not before. There can therefore be no question of the company's liability under cl. 1 (*c*) enuring or crystallizing before the driver became drunk or the accident occurred, and thus before the exemption under the "warranty" could come into operation; for the company was not liable for the malicious act, but only for loss or damage caused by the malicious act. In this respect also, although it does not fall to this court to decide the point, the position might well be different if the driver had set out on his journey with the intention of stealing the car. For in such a case the car might be held to have been lost through theft, a theft which occurred at the inception of the journey, since ex hypothesi there would never have been any intention to return it; and the company's liability might, though I do not say it would, be held to have crystallized at that moment, to the exclusion of the as yet inoperative exemption clause under the warranty.

But that is academic. To return to the facts of this case, the company ought in my view to be held not liable, and the appeal ought accordingly to be allowed, on either of two grounds. First, on the ground that the "warranty" alone applies, cl. 1 (*c*) being inapplicable because the driver's "malicious act" was not a proximate cause of the accident. Secondly, on the ground that, even if cl. 1 (*c*) does apply, then the "warranty" prevails over it.

For these reasons, and with the greatest deference to my learned brother, from whose views I differ only after the most careful consideration, I would hold that the judgment of the court below should be set aside, the respondent's claim dismissed, and this appeal be allowed with costs. Since the "warranty", on the strength of which the appellant ought in my view to have succeeded below if he had discovered it in time, was overlooked by him through no fault of the respondent, I would make no order for costs in the court below.

Crawshaw C J: I have had the advantage of reading the judgments of my brother judges and, in agreeing with the arguments of Gould, Ag. V.-P., I have reluctantly come to a conclusion different from that of Windham, J.A. The relevant facts are not in dispute. They are that the insured had directed his driver to take his car to a garage and leave it there, but that the driver failed to comply with this direction and without authority drove the vehicle a long distance, during the course of which he became intoxicated and met with an accident which caused very extensive damage to the car. He was subsequently charged with and convicted of conversion not amounting to theft under s. 284 of the Penal Code.

One of the grounds of appeal was based on whether the driver was a person authorised to drive the car within the meaning of the policy. This ground was abandoned (although for purposes of argument I shall consider it later) and the only question now for decision is whether the insobriety of the driver is a defence to the claim. Endorsed on the policy is a so-called "Warranty" which reads as follows:

> "It is hereby understood and agreed that the company will not be responsible for the accident and/or any damage and/or claims of any nature when the vehicle is driven by a person who is not sober and/or under the influence of alcoholic drinks, liquor, or drugs".

This exception was not referred to in the written statement of defence and had not apparently been noticed by counsel for the appellant at the trial, and judgment was given for the insured on the basis of damage resulting from a "malicious act", which was one of the perils contained in the indemnity clause (cl. 1 (*c*)). The defence of insobriety has however been allowed to be added on appeal. There is no doubt I think that conversion constitutes legal malice and would be a malicious act within the meaning of cl. 1 (*c*). In *Bromage v. Prosser* (5) (1825), 4 B. & C. 255, which was a case of malicious slander, Bayley, J., (to whose judgment the learned trial judge referred) held that there were two sorts of malice, malice in fact and malice in law, and said,

> "Malice in common acception means ill will against a person but in its legal sense means a wrongful act, done intentionally, without just cause or excuse."

I had at first formed the view that "malicious act" meant some act the motive of which was to cause, or be likely to cause, loss of or damage to the car, such as throwing stones, releasing the brake on a hill, or theft, but on reflection I think it is not necessary to place so limited a construction on the expression, which is in unqualified terms.

So far as it is not clearly inconsistent with the intention of the parties, each of the paragraphs in cl. 1 must be read as being subject to the exceptions and conditions. The question is whether the wrongful conversion governs the liability of the insured in the event of subsequent loss or damage, or whether one must look only to the position at the time of that loss or damage. If the latter, two considerations would arise, firstly, was the driver authorised, and secondly was he sober. The learned trial judge held that although the driver was necessarily unauthorised at the time, the insurers could not call that in aid. To do so in

the case of theft would certainly be entirely inconsistent with the peril insured against, and also I think in the case of wrongful conversion, for both perils have it in common that the car is taken out of the possession and control of the insured and without his knowledge or consent.

Much the same argument can be offered I think to the other exception, insobriety. The exception incidentally does not stipulate that the insobriety must be the cause of the accident, although in this case it probably was; it is in absolute terms no doubt because of the difficulty of proof which would otherwise be likely to arise. To say that insobriety was the proximate cause may therefore be the wrong approach; it was not however considered necessary to make it an issue, and it seems tacitly to have been assumed that it was the immediate cause. To bring in this exception the driver must to my mind be in some relation to the insured. If a person steals a car and loss or damage ensues, it would in my view be absurd and outside the intention of the parties that some other factor should be allowed to account for such loss or damage. I can see no real difference in principle in the case of wrongful conversion. Here again I had at one time thought the two could be distinguished on the basis that theft creates an immediate loss, although the loss might subsequently be recovered. I think however that this is the wrong view whatever the intent of the thief and the criminal aspect, and that from the practical point of view of an insurance policy, which is only interested in material loss or damage, there is really no difference between theft and wrongful conversion. In each the peril is the malicious act of wrongfully dispossessing the insured of his car and in each the loss or damage, if any, is necessarily subsequent to the wrongful act; a stolen car might be stopped and recovered after it has been taken only a few yards. The fact that theft is specifically named in cl. 1 (*b*), whilst conversion is included in the general para. 1 (*c*), makes no difference. The parties could not I think have intended the insobriety exception to apply in such circumstances, for the exception is in my opinion incompatible with these particular perils insured against and could not reasonably be applied.

I have considered the fact that the driver was the paid employee of the insurer and at the inception of the journey had authority to drive the car away. I do not however think that this affects the matter, for there is no doubt that at the time of the accident there was wrongful conversion. One can envisage difficult cases of fact involving the questions of when the conversion actually took place, or whether there had been a malicious act at all, such as where the driver had merely driven to his proper destination by a less direct route than the normal; but, as I say, no such difficulty arises here.

Assuming the insobriety of the driver to have been the immediate cause of the accident then I would say that, for the reasons I have given, the dominant and operative cause was the wrongful taking of the car, as it would be in theft, even though the subsequent insobriety was more proximate in time. As is said in Preston and Colinvaux on The Law of Insurance at p. 85,

> "common sense is the final arbiter in determining what is the proximate cause of a loss".

To my mind it cannot have been contemplated by the parties to a comprehensive motor car insurance policy that if the insured was wrongfully dispossessed of his car his indemnity for subsequent loss or damage might be prejudiced by some further and additional wrongful act of the wrongdoer.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

For the appellant:
W. J. Lockhart-Smith, Dar-es-Salaam

For the respondent:
Donaldson & Wood, Tanga
R. N. Donaldson

S R D'Souza and others v C C Ferrao and others
[1960] 1 EA 602 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	21 July 1960
Case Number:	57/1959
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Windham JA
Sourced by:	LawAfrica

(Reference on taxation under Rule 6 (2) of the Eastern African Court of Appeal Rules, 1954.)

[1] Costs – Taxation – Reference – Practice – Error in principle in assessing instruction fee – Fee reduced by judge on reference – Whether judge should assess fee or remit to taxing officer for fresh taxation – Eastern African Court of Appeal Rules, r. 6 (2), *r.* 19 (6) *and Third Schedule r.* 24 *– Eastern African Court of Appeal Order-in-Council,* 1950, *art.* 14 (*b*).

Editor's Summary

On taxation of the respondents' bill of costs following the dismissal of an appeal from an interlocutory order of the Supreme Court of Kenya the appellants submitted that the appeal involved a very minor procedural point of no importance and that an adequate instruction fee would not exceed Shs. 100/-. The respondents claimed that counsel for the appellants in opening the appeal had himself said that a great question of principle was involved and had also asked for costs for two counsel. When the taxing officer allowed a fee of Shs. 2,000/- the appellants applied for a reference to a judge of the appellate court who ruled that the fee allowed was so manifestly excessive that the taxing officer must have erred in principle and he reduced the fee to Shs. 1,000/-. Counsel for the appellants then applied to the full court to vary discharge or reverse this ruling.

Held –

(i) the general practice in England, where there has been an error in principle on taxation, is to remit the question of quantum for decision by the same or another taxing master in the light of the decision of the judge on the point of principle.

(ii) in the instant case counsel for the appellants appeared virtually to have suggested that the judge should deal with the matter himself rather than that he should follow the general rule and remit the question to the taxing officer to exercise his discretion ab initio.

Order that taxation of the instruction fee be remitted to the taxing officer for exercise of his discretion ab initio and to make any consequential variation of his certificate.

Cases referred to in judgment:

(1) *Turnbull v. Janson* (1878), 3 C.P.D. 264.

(2) *In the Estate of Ogilvie: Ogilvie v. Massey*, [1910] P. 243.

(3) *British United Shoe Manufacturing Co. Ltd. v. Holdfast Boots Ltd*., [1936] 3 All E.R. 717.

(4) *Theocharides v. Joannou*, [1955] 1 All E.R. 615.

(5) *Puran Singh v. Bishen Singh Chadah*, [1957] E.A. 610 (C.A.).

Judgment

Gould Ag VP, read the following ruling of the court: Certain matters arising out of the taxation of the costs ordered by this court upon the dismissal of an appeal from an interlocutory order made by the Supreme Court of Kenya were the subject of a ruling by the Taxing Officer. It is

necessary only to set out that portion of the ruling which relates to the instructions fee which is designated as item 1:

> "As regards item 1 Mr. Khanna submitted that the appeal involved a very minor procedural point. He submitted that provisions of Order X, r. 1 of the Civil Procedure (Revised) Rules 1948 were mandatory and it was a matter of every day occurrence and of no importance. He said that the appeal which was an interlocutory one, became necessary because the matter was dealt with by the Supreme Court in a sort of summary fashion. The matter arose from a chamber summons for which in the Supreme Court one was entitled to a fee of Shs. 30/-. Mr. Khanna suggested that the adequate instructions fee for the appeal would be Shs. 75/- or Shs. 100/-. Mr. Malik in supporting the instructions fee claimed by him said that the appeal involved an important procedural point of law of complexity and of public importance. The appellants, to support their appeal, found it necessary to engage a senior and eminent counsel and a junior one. While opening the appeal, the appellant's leading counsel himself submitted to the court, 'a great question of principle is involved as to the grounds on which court should act' and 'in view of importance of principle, ask for costs of two counsel'. He further submitted that about six English authorities were cited by the counsel for the appellants and the court took time to consider their judgment. If the court were of the view that the question involved was of no public importance, the court would have dealt with the matter without taking any time for consideration and without dealing with the matter as exhaustively as they did in their judgment. The fact that two counsel were briefed by the appellants and a certificate for two counsel was asked for by the counsel for the appellants justified the presumption that considerable legal industry was involved in the appeal.
>
> "Having considered the submissions of both counsel and having read the judgment of the court and the proceedings before the Supreme Court I have no hesitation in concluding that the matter involved was not as simple as Mr. Khanna tried to make me think. The point involved, admittedly of common occurrence, called for a definite judicial interpretation by this court. I therefore think that an instructions fee of Shs. 2,000/- would, in all the circumstances of the case, be adequate. I therefore tax off Shs. 2,000/- from item 1."

The matter was, on the application of the appellant, against whom the order for payment of costs had been made, referred to a judge of this court under r. 6 (2) of the Eastern African Court of Appeal Rules, 1954 (hereinafter called "the Rules"). The learned Vice-President made the following ruling:

> "I am of opinion that the instruction fee allowed is so manifestly excessive that the Registrar must have erred in principle and taken into account some matter which was not relevant. I accordingly reduce the instruction fee to Shs. 1,000/-.
>
> "I am of opinion that a substantial factor in the Registrar's decision was the statement by Counsel for the applicant at the hearing to the effect that a great question of principle was involved and that such question merited the allowance of costs of two Counsel. I consider that statement grossly misleading, and, in view of it, I will not award any costs of this application."

Under art. 14 (*b*) of the Eastern African Court of Appeal Order-in-Council, 1950, and r. 19 (6) of the Rules, application is now made to the full court to vary discharge or reverse the ruling of the learned Vice-President.

The first and main submission of counsel for the appellant was that the learned Vice-President, having concluded that the taxing officer had fallen

into an error of principle in relation to the instructions fee, was wrong in reassessing that fee himself, instead of remitting the matter to another taxing officer. We take this submission as meaning that the learned Vice-President had erred in a matter of practice and not that he had acted without jurisdiction; there can be no doubt that there was jurisdiction, for by r. 6 (2) it is provided that where a matter decided by the Registrar is referred to a judge, the latter "may make such order thereon as the justice of the case may require".

The English practice with regard to this question is clear. Perusal of the many cases cited in the Annual Practice (1959) at p. 1949 under the heading "Cases where review directed – Discretion of Taxing Master", indicates that where on review it is found that a taxing master has acted on some mistaken principle, the matter is usually remitted to the same or another taxing master. An example can be taken from the judgment of Lindley, J., in *Turnbull v. Janson* (1) (1878), 3 C.P.D. 264 at p. 270. He said:

> "That leaves only two points to be considered, viz. the allowance for the witnesses' attendance at the trial, and the charge for correcting and revising the proofs of the evidence. As to the former of these, the master admits that he did not exercise any discretion, but that he taxed the charges upon the notion that he was bound by the scale of allowances of 1853, and allowed the scientific witnesses at the rate of 1 guinea per day only. I think that is matter of principle. To hold that the scale allowance of 1 guinea is to be adhered to, is to ignore the 8th rule of the 'Special Allowance, 1875,' altogether. The bill must go back to the master to exercise his discretion in that respect. If, having done so, he thinks 1 guinea per day enough, he will say so. If he thinks the witnesses were entitled to a larger allowance as between party and party, he will increase the sum."

The general principles acted upon are concisely expressed in the judgment of Buckley, L.J., in *In the Estate of Ogilvie: Ogilvie v. Massey* (2), [1910] P. 243 at p. 245:

> "On questions of quantum the decision of the taxing master is generally speaking final. It must be a very exceptional case in which the court will even listen to an application to review his decision. In questions of quantum the judge is not nearly as competent as the taxing master to say what is the proper amount to be allowed; the court will not interfere unless the taxing master is shewn to have gone wholly wrong. If a question of principle is involved it is different; on a mere question of quantum in the absence of particular circumstances the decision of the taxing master is conclusive. I think that the learned judge ought not to have interfered."

We were referred to British *United Shoe Manufacturing Co. Ltd. v. Holdfast Boots Ltd*. (3), [1936] 3 All E.R. 717 where, at p. 727, Bennett, J. said:

> "I have already said that there must be, in my judgment, a review of the taxation of the plaintiffs' bill. I am not able to form any estimate of what it would have been proper to allow the plaintiffs' solicitors for the work they did in connection with the preparation of these two affidavits of documents. I have no more, in my judgment, than the master had, the necessary materials. So the matter must go back for review, and the question is who is to be the person to review? It is conceded that if I make an order for review I have jurisdiction to say by whom the review should take place, and the question between the parties in this matter is whether the bill should be reconsidered by the master who taxed it or by a new one. It is always desirable, I think, when you are dealing with matters about which there is a real conflict between the parties, that there should not be the smallest doubt about the impartiality and freedom from prejudice of the mind of the person who has to decide between them."

Though the general practice is as indicated in the foregoing passages the reviewing judge can and sometimes does, deal with the matter himself. Thus, in *Theocharides v. Joannou* (4), [1955] 1 All E.R. 615 at 620, Harman J., said:

> "The result of that will be that I allow certain of the objections and reject the rest. I think that an order in that form will be satisfactory and I do not think that I need send the case back to the taxing office. I shall order that the items comprised in objections Nos. 1, 2, 3, 4, 5 and 8 be allowed at the amounts appearing in the bill and that No. 27 be allowed at twenty-five guineas."

In general therefore, where there has been an error in principle, the practice has been to remit the question of quantum to be decided by the same or another taxing master, in the light of the decision of the judge on the point of principle. So far as this court is concerned the proviso to r. 6 (2) lays it down that no reference to a judge from a taxing officer shall be made on any question of quantum only; something in the nature of an exception to this is created by r. 24 of the rules contained in the Third Schedule to the Rules, which reads:

> "24. Notwithstanding anything in this Schedule contained, if the taxing officer or a judge is of opinion that, having regard to all the circumstances, the amount of a bill of costs after taxation is excessive, the taxing officer at any time before signing his allocatur, or a judge on reference to him, may make such deduction from the total sum allowed or to be allowed as will in his opinion render the total sum reasonable. A reference to a judge for this purpose shall be deemed to be on a point of principle and not of quantum. A judge may similarly cancel or reduce any deduction made by a taxing officer under this rule."

An indication that the general practice in England in this matter ought normally to be followed here is contained in the ruling of Briggs, Ag. V.-P. of this court in *Puran Singh v. Bishen Singh Chadah* (5), [1957] E.A. 610 (C.A.), where he said:

> "As the learned taxing master had acted on a wrong principle, counsel were agreed that his assessment of quantum could not be relied upon. In the ordinary way this would have involved remitting the matter for re-assessment *ab initio* by another taxing master, but the parties were agreed in requesting me to act as taxing master for this purpose and make my own assessment."

In the present case the learned Vice-President considered that the taxing officer must have erred in principle, and although it is not specifically stated in the ruling, it appears to us that the error he had in mind was that undue weight had been given by the taxing officer to the statements by counsel for the appellant in opening the appeal, and in asking for costs for two counsel. We think this does amount to an error in principle for, though statements of that nature made in the course of an argument need not necessarily be disregarded, the task of a taxing officer is rather to decide for himself, in the light of the material before him at the time of taxation, the importance or difficulty of the issues involved in the appeal or action. Counsel's view of the matter, expressed in the course of the appeal, may be mistaken.

It cannot be known with certainty why the learned Vice-President took the course of re-assessing the instructions fee himself instead of remitting the matter. Perusal of his notes, however, indicates that counsel for the appellant made no submission that he should remit it – he concluded his argument by submitting that the case called for drastic review both under r. 6 and under r. 24 of the Third Schedule; the total fee he suggested, should not exceed Shs. 500/-. This amounted virtually to a suggestion that the learned Vice- President

should deal with the matter himself, and the argument that the matter should be remitted to another taxing officer was relied upon for the first time before the full court.

We are now called upon to exercise our own discretion in the matter and, after mature consideration, we are of opinion that it is a case in which the general rule should be followed and that the matter should be remitted to the Registrar as taxing officer to exercise his descretion ab initio.

It is not a case in which the quantum of the variation of the bill of costs is, as sometimes happens, decided almost automatically by the resolution of the question of principle, but rather one which ought to be resolved by the superior experience of the taxing officer. The learned Vice-President, had he considered making such an order, would have been faced with the difficulty that only one taxing officer was available; that difficulty no longer obtains.

As to costs, we think, with respect, that the reason assigned by the learned Vice-President for depriving the appellant of the costs of that reference was not in accordance with principle and should not be supported. The appellant should have his costs of the reference to the judge. But, as the learned Vice-President was never invited to send the matter back to the taxing officer and appears to have been impliedly invited by counsel to tax the instructions fee himself, and as the matter was presented in argument to the full court on a different basis, we make no order as to the costs of the reference to the full court.

For these reasons the order of the learned Vice-President is discharged and we order that the matter be remitted to the Registrar to exercise his discretion ab initio as to the instructions fee and to make any variation in his certificate which may be consequential. The appellant will have the costs of the reference to the judge.

Order accordingly.

For the appellants:
Mota Singh, Nairobi
D. N. Khanna

For the respondents:
A. H. Malik & Co., Nairobi
M. Z. A. Malik

Rosemary Leslie Johnston v Alexander Johnston
[1960] 1 EA 607 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	13 August 1960
Case Number:	5/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Costs – Security – Petition for restitution of conjugal rights by wife – Application for security for wife's costs – Whether court empowered to order security for costs – Divorce Ordinance (*Cap.* 112), *s.* 4 (2) *and s.* 31 (*U.*).

Editor's Summary

A wife petitioner for restitution of conjugal rights applied for an order that the husband be required to give security for her costs. For the husband it was objected that the court had no jurisdiction to order a respondent to a petition to give security for the petitioner's costs because the Civil Procedure Ordinance makes no provision for such an order and an order for security as a procedural matter is governed by s. 31 of the Divorce Ordinance and not by the second paragraph of s. 4 (2) of the Ordinance.

Held – both s. 4 (2) and s. 31 of the Divorce Ordinance are interdependent and what is unprovided for in the one can be supplied by the other; accordingly in matters whether procedural or substantive, which are not provided for in the Divorce Ordinance itself or the Civil Procedure Ordinance or rules thereunder, the court is thrown back upon "the law applied in matrimonial proceedings in the High Court of Justice in England".

Order accordingly.

Judgment

Sir Audley McKisack CJ: This is an application by a wife, who has petitioned for restitution of conjugal rights, asking that the husband be required to give security for the wife's costs.

Mr. Troughton, for the husband, takes the point that this court has no jurisdiction to order a respondent to a petition to give security for the petitioner's costs. Such an order, he says, is a procedural matter and is therefore governed by s. 31 of the Divorce Ordinance (Cap. 112), which is as follows:

> "31. Subject to the provisions herein contained, all proceedings under this Ordinance shall be regulated by the Civil Procedure Ordinance."

He says that, by reason of that section, procedural matters do not come within the ambit of the second paragraph of s. 4 (2) of the Divorce Ordinance; that sub-section is as follows:

> "(2) In all other cases jurisdiction shall only be exercised by the High Court.
>
> "Such jurisdiction shall, subject to the provisions of this Ordinance, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England."

Consequently, it is said, an order for security for costs can only be made if the Civil Procedure Ordinance, or the rules thereunder, provide for such an order. Order 23 of those rules deals with security for costs, but only for the giving of such security by a plaintiff in respect of the defendant's costs. Here

it is the petitioner who is seeking an order against the respondent to the petition, and there is nothing in the Civil Procedure Rules to authorise such an order.

I do not think that Mr. Troughton's view is the correct one. Both s. 4 (2) and s. 31 of the Divorce Ordinance are expressed to be subject to the provisions of that Ordinance. They are thus interdependent, and what is unprovided for in the one can be supplied by the other. Consequently, in matters, whether procedural or substantive, which are not provided for in the Divorce Ordinance itself or in the Civil Procedure Ordinance or rules thereunder, I think the court is thrown back upon

> "the law applied in matrimonial proceedings in the High Court of Justice in England".

This appears to me to be the effect of those two sections, and I am not persuaded that the omission of any provision in the Civil Procedure Rules for an order of the kind which is sought in the instant case is sufficient to preclude this court from exercising the same powers in relation to security for costs as is exercised by the High Court in England.

Order accordingly.

For the applicant:
Wilkinson & Hunt, Kampala
R. E. Hunt

For the respondent:
Hunter & Greig, Kampala
J. F. G. Troughton

Salau Din s/o Chanan Din v R
[1960] 1 EA 608 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	23 September 1960
Case Number:	824/1960
Before:	MacDuff and Murphy JJ
Sourced by:	LawAfrica

[1] Bankruptcy – Offences – Undertaking by bankrupt to pay part of salary monthly for benefit of creditors – Failure to pay – Whether offence committed under s. 137 (1) (*q*) *of the Bankruptcy Ordinance – Bankruptcy Ordinance* (*Cap.* 30), *s.* 54 (2), (3), (4) *and s.* 137 (1) (*q*) (*K.*).

Editor's Summary

Following a receiving order against the appellant he was publicly examined and an order was made

concluding that examination which was followed by a note reading:

> "By consent the debtor has agreed to pay Shs. 600/- to the Official Receiver not later than 5th August and Shs. 250/- thereafter per month not later than the 5th of each month".

When the appellant failed to pay the instalments he was charged and convicted of contravening s. 137 (1) (*q*) of the Bankruptcy Ordinance. On appeal it was argued for the appellant that no order to pay had been made or served on the appellant and therefore, no offence had been committed.

Held –

(i) the words in question could not be construed as an order and were merely a memorandum of the appellant's agreement to make the payments.

(ii) an order under s. 54 of the Bankruptcy Ordinance for payments out of salary or wages should state the name of the person paying the salary or wages.

(iii) in view of the terms of s. 54 (4) of the Bankruptcy Ordinance it is mandatory to serve the order on the bankrupt and the order is inoperative qua the bankrupt until it has been served upon him and accordingly a bankrupt cannot

be convicted of contravening s. 137 (1) (*q*) of the Bankruptcy Ordinance until the order has been served upon him.

Appeal allowed. Conviction quashed and sentence set aside.

Judgment

MacDuff J, read the following judgment of the court: The appellant was convicted by one of the resident magistrates, Nairobi, on ten counts of which the first was:

"Statement of Offence.

"Bankruptcy offence: failing to pay instalments ordered by the court, contrary to s. 137 (1) (*q*) of the Bankruptcy Ordinance (Cap. 30, Laws of Kenya, 1948).

"Particulars of Offence.

"That Salau Din s/o Chanan Din, against whom a receiving order was made by Her Majesty's Supreme Court of Kenya at Nairobi in Bankruptcy Cause No. 12 of 1956 on 5th June, 1956, having been ordered by the said court on 26th July, 1957, to pay to the Official Receiver for the benefit of his creditors Shs. 600/- not later than 5th August, 1957, and thereafter Shs. 250/- by the 5th day of each successive month, did default in making such payment as the said court ordered in that he failed to pay to the Official Receiver for the benefit of his creditors Shs. 250/- by the 5th day of December, 1957."

The remaining nine counts charged similar offences relating to the appellant's failure to pay instalments in subsequent months.

The relevant part of s. 137 (1) reads as follows:

"Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made shall in each of the cases following be guilty of an offence:

(*q*) If he makes default in payment for the benefit of creditors of any portion of a salary or other income in respect of the payment of which the court is authorised to make an order."

It is common ground that a receiving order was made against the appellant on June 5, 1956.

It is perhaps rather strange that para. (*q*) of s. 137 (1) does not in terms require that an order for payment should have been made but we are of opinion that the paragraph must be construed as if the words "and has made" were inserted before the words "an order".

It was conceded that the appellant had not paid the ten instalments as alleged but, although it would appear that in the court below it was conceded that the order of July 26, 1957, had been made, counsel for the appellant argued before us that in fact no order had been made and therefore, in failing to pay the instalments, no offence had been committed by the appellant.

Sub-section (2), sub-s. (3) and sub-s. (4) of s. 54 of the Bankruptcy Ordinance are in the following terms:

"(2) Where a bankrupt is in receipt of a salary or income other than as aforesaid, the court, on the application of the trustee, shall from time to time make such order as it thinks just for the payment of the salary or income, or of any part thereof, to the trustee, to be applied by him in such manner as the court may direct.

> "(3) Where a bankrupt is an employee and earning wages, whether or not payment of such wages is made by the day or by any other period of time, the court, on the application of the trustee, shall, from time to time, make such order as it thinks just, for the payment of any part of such wages to the trustee, to be applied by him in such manner as the court may direct.
>
> "(4) Every order made under sub-s. (1) of this section shall be served upon the bankrupt and upon the head of department, and every order made under sub-s. (2) or sub-s. (3) of this section shall be served upon the bankrupt and may, at any time after the making thereof, be served upon the person by whom such salary or income of the bankrupt is paid or upon the bankrupt's employer, as the case may be; and if any such order as aforesaid is served upon the head of department, the person paying such salary or income or the employer, the amounts of pay, salary, income or wages specified in such order shall thereafter be paid to the trustee in conformity with the terms thereof."

On July 26, 1957, the Supreme Court made an order in these terms:

> "Order of the Court that Examination is Concluded.
>
> In Bankruptcy Cause No. 12 of 1956.
>
> Re: Salau Din s/o Chanan Din Debtor.
>
> "Whereas the above-named debtor Salau Din s/o Chanan Din has duly attended before the court, and has been publicly examined as to his conduct, dealing and property:
>
> "And whereas the court is of the opinion that the affairs of the said debtor have been sufficiently investigated, it is hereby ordered that the examination of the said debtor is concluded.
>
> "By consent the debtor has agreed to pay 600/- to the Official Receiver not later than 5th August and 250/- thereafter per month not later than the 5th of each month."

Counsel for the respondent says that the words:

> "By consent the debtor has agreed to pay 600/- to the Official Receiver not later than 5th August and 250/- thereafter per month not later than the 5th of each month"

constitutes an order made under s. 54. He concedes that reference should have been made in the order to salary or income or wages but argues that the omission to do so was a technically curable under s. 132 of the Ordinance.

We are of opinion that the words in question cannot be said to constitute an order. The order made by the court was that the examination of the debtor was concluded. We have been told from the bar that on the day when that order was made the debtor agreed to pay the sum of Shs. 600/- and future monthly instalments of Shs. 250/- each and that he did so after he had disclosed the salary which he was earning. But those facts do not alter our view which is that the words in question amount merely to a memorandum by the judge of the debtor's agreement to make the payments. Further, we do not think that the failure to refer to the payments being made out of salary or income is a technicality. The essence of an order made under sub-s. (2) or sub-s. (3) of s. 54 is that the payments are to be so made. Moreover, we think that in an order made under the section where payment is to be made out of salary or wages, the name of the person paying the salary or wages should be stated. We also think that such an order should refer in terms of s. 54. However, we do not base our opinion on these omissions but upon the fact that the words

in question cannot be construed as an order and we do not think that the maxim omnia praesumuntur has any application to the facts on this case.

For the reasons we have given, this appeal must be allowed, the conviction on each of the ten counts quashed and the sentences set aside. We so order.

We think it desirable to record our opinion on the other ground urged on behalf of the appellant. It is common ground that the "order" of July 26, 1957, was not served on the appellant. Counsel for the respondent argued that service of such an order was unnecessary. We were unable to understand his submissions on this matter. In view of the terms of sub-s. (4) of s. 54, it is, in our opinion, mandatory to serve the order on the bankrupt and the order is inoperative qua the bankrupt until it has been served upon him. We think that it follows from this that a bankrupt who fails to pay the portion of salary which he has been ordered to pay to the trustee cannot be convicted of an offence under s. 137 (1) (*q*) until the order has been served upon him.

Appeal allowed. Conviction quashed and sentence set aside.

For the appellant:
Johar & Winayak, Nairobi
B. O' Donovan, Q.C., and *J. K. Winayak*

For the respondent:
The Attorney-General, Kenya
V. B. L. Sharma (Legal Assistant, Kenya)

Re an Application by the Revenue Authority
[1960] 1 EA 611 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of ruling:	2 August 1960
Case Number:	111/1960
Before:	Lyon J
Sourced by:	LawAfrica

[1] Stamp duty – Adjudication – Transfer of property – Inadequate sum paid as consideration – Whether transfer of property can be classified as a voluntary disposition – Stamps (*Amendment*) *Ordinance*, 1956, *s*. 31*C* (1), (2) *and* (4) (*U*.).

Editor's Summary

A property which was later valued by the Government valuer at Shs. 125,000/- was sold for Shs.

66,000/-. The Revenue Authority classified the transfer as a voluntary disposition under s. 31C(4) of the Stamps (Amendment) Ordinance, 1956, and accepting the valuation of Shs. 125,000/- adjudicated the stamp duty accordingly. On a case stated by the Revenue Authority for the opinion of the court,

Held –

(i) since the purchaser had received a "substantial benefit" having obtained property worth Shs. 125,000/- for Shs. 66,000/-, the Revenue Authority was right in classifying the transfer as a voluntary disposition under s. 31C (4) of the Stamps (Amendment) Ordinance, 1956.

(ii) the Revenue Authority was correct in accepting the valuation of Shs. 125,000/- and adjudicating the stamp duty accordingly.

Declaration accordingly.

Case referred to:

Baker v. Inland Revenue Commissioners, [1923] 1 K.B. 323.

Judgment

Lyon J: This is an unusual matter.

The opinion of this court is sought upon the construction of s. 31C (1), (2) and (4) of the Stamps (Amendment) Ordinance, 1956. There is no conflict upon the facts. Mr. Wither, for the Revenue Authority, called Mr. Rhys-Jones, who had also written a report, which he confirmed in the witness-box.

A property was sold at Masaka in July, 1959, for Shs. 66,000/-. Mr. Rhys-Jones, who is a Government valuer, testified that its value at the time was Shs. 125,000/-. He further testified that he took into account the boycott which was then active in and around Masaka.

I am asked to say whether the Revenue Authority was right in classifying the transfer as a voluntary disposition under s. 31C (4) of the Stamps (Amendment) Ordinance, 1956, and secondly, whether the Revenue Authority in those circumstances was correct in accepting the valuation of Shs. 125,000/-, and adjudicating accordingly.

The sub-sections which I have to construe are:

> "31C. (1) Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable with the like stamp duty as if it were a conveyance or transfer on sale with the substitution in each case of the value of the property conveyed or transferred for the amount or value of the consideration for the sale.
>
> "(2) Notwithstanding anything in s. 35 of this Ordinance the opinion of the Revenue Authority shall be required under that section on any conveyance or transfer operating as a voluntary disposition inter vivos, and no such conveyance or transfer shall be deemed to be duly stamped unless the Revenue Authority has expressed his opinion thereon in accordance with this section.
>
> "(4) Any conveyance or transfer (not being a disposition made in favour of a purchaser or incumbrancer or other person in good faith and for valuable consideration) shall for the purpose of this section be deemed to be a conveyance or transfer operating as a voluntary disposition inter vivos, and (except where marriage is the consideration) the consideration for any conveyance or transfer shall not for this purpose be deemed to be valuable consideration where the Revenue Authority is of the opinion that by reason of the inadequacy of the sum paid as consideration or other circumstances the conveyance or transfer confers a substantial benefit on the person to whom the property is conveyed or transferred."

In these circumstances I am satisfied that the purchaser has received "a substantial benefit" having obtained property worth Shs. 125,000/-for as low a price as Shs. 66,000/-.

Mr. Wither conceded that the sale was bona fide; there is no allegation of fraud.

I have therefore come to the conclusion that this transfer falls within the second half of sub-s. (4). I therefore answer the first question in the affirmative, and I find that when sub-s. 31C (1) and sub-s. 31C (4) are read together that the Revenue Authority was correct in accepting the valuation of Shs. 125,000/-; and there is a declaration to that effect.

The authorities which were cited to me are set out at the end of this judgment.

The third and fourth questions to the court do not arise.

Declaration accordingly.

For the applicant:
Office of the Revenue Authority, Uganda
A. Wither (Office of the Revenue Authority, Uganda)

For the respondent:
Verjee & Verjee, Kampala
S. G. Patel

Amritlal D Shah v R
[1960] 1 EA 613 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of ruling:	17 September 1960
Case Number:	763/1960
Before:	MacDuff and Pelly Murphy JJ
Sourced by:	LawAfrica

[1] Criminal law – Escape – Aiding prisoner to escape from lawful custody – Prisoner arrested by police for suspected breach of municipal by – law – Whether prisoner in lawful custody – Penal Code, s. 119 (1) (*K.*).

Editor's Summary

Police had arrested an African hawker for hawking without a licence contrary to by-law 345 of the Nairobi Municipality (General) By-laws, 1948. While passing a row of shops they saw and heard the appellant calling and telling an African to run to a bus stop and get help for a man who had been arrested and that the police were few and could be overcome. Proceeding some way the police found a crowd of about forty men assembled who attacked and threatened to beat them if they did not release the hawker. When the prisoner escaped the appellant and others were charged and convicted of aiding a prisoner to escape contrary to s. 119 (1) of the Penal Code. On appeal it was argued that the prosecution had failed to prove that the hawker was in lawful custody when he escaped because no evidence was adduced by the prosecution to prove that the offence in respect of which the hawker was in custody had been committed within the boundaries of the Nairobi Municipality.

Held –

(i) whether the hawker was in lawful custody or not depended on whether he had been lawfully arrested and not on whether the place where the offence was committed was within the boundaries of the Nairobi Municipality.

(ii) it was sufficient for the prosecution to establish and for the magistrate to find that the police constable who arrested the hawker had reasonable grounds to suspect the commission of the offence of hawking without a licence within the Nairobi Municipality.

Appeal against conviction dismissed. Sentence reduced.

Judgment

Macduff J, read the following judgment of the court: The appellant, together with some seven others, was convicted by the resident magistrate, Nairobi, of "aiding a prisoner to escape contrary to s. 119 (1) of the Penal Code" and was sentenced to two years' imprisonment. He now appeals against conviction and sentence. That section provides:

> "119. Any person who –
>
> (1) aids a prisoner in escaping or attempting to escape from lawful custody;
>
> is guilty of a felony, and is liable to imprisonment for seven years."

The facts, which are not in dispute so far as they relate to this appellant, appear sufficiently from the judgment of the learned resident magistrate as follows:

> "It appears that on 17.6.60 at about midday, five members of the Spiv Squad, Kingsway Police Station; P/Cs Joram, Swagei, Were, Kinagene and Simeon, were in the New Pumwani Road, Landhies Road area, checking the licences of hawkers, when at the roundabout they, P/Cs,

> Swagei and Kinagene, arrested one Mwangi Kimani, a hawker, who could not produce a hawker's licence, and having handcuffed him, were taking him to a prisoners' pen in River Road; P/C Kinagene having taking possession of the cardboard box containing his wares. While passing a row of shops, raised above the street level, in the door of one of these they saw an Asian, identified as accused 1, who called to an African with a kikapu near by, and having taken the kikapu from him, told him to run to the Machakos bus stop some distance away, and get help for one of their friends who had been arrested, adding that the police were few in number and could be overcome. This African then ran off while the police, with their prisoner, continued on towards River Road, checking licences as they went.
>
> "Having proceeded a couple of hundred yards, at the Q.T.C. offices at the end of Pumwani Road, they found a crowd of about forty men assembled, and one of these struck P/C Simeon on the shoulder with a ladle, and the rest of the crowd then began throwing stones at him. The other four constables went to his assistance, some being hit by the stones, and the crowd threatened to beat them if they did not release their prisoner. P/C Swagei arrested one of them, and was hit on the chest and thigh by a stone thrown by a man identified as accused 10, and fell as his prisoner escaped."

The only ground of appeal taken against the conviction of the appellant was:

> "That the learned resident magistrate erred in holding that it had been proved by the prosecution that the prisoner Mwangi Kimani was in lawful custody at the time of the escape."

It was contended that Mwangi Kimani had been arrested for the offence of hawking without a licence, an offence created by by-law 345 of the Nairobi Municipality (General) By-laws, 1948, which provides:

> "345. No person shall hawk any goods within the Municipality unless he is a licensed hawker and is wearing on his left arm in a conspicuous position a hawker's badge."

It was conceded that s. 125 of the Municipalities Ordinance (Cap. 136 Laws of Kenya) empowers any police officer to arrest without warrant any person who commits any offence against any by-law in force within any Municipality. However, it was argued that the prosecution was required to prove that the custody of Mwangi Kimani was lawful and that in order to do so the prosecution should have proved that the offence committed by Mwangi Kimani and in respect of which he was in custody had been committed within the boundaries of the Nairobi Municipality. This it was contended, at any rate up to the close of the prosecution case, the prosecution had failed to do in that the only evidence before the court went to show that the offence had occurred at the junction of "Landhies Road and New Pumwani Road" and there was no evidence that this place was within the boundaries of the Nairobi Municipality.

In our opinion this argument cannot be accepted. Whether the hawker, Mwangi Kimani, was in lawful custody was dependent on one fact only, whether he had been lawfully arrested. A police officer may lawfully arrest any person whom he reasonably suspects of having committed an offence. In the instant case he may stop and detain any person whom he suspects of doing any act or thing for which a licence is required under any Ordinance and if he fails to produce such licence he may arrest such person without warrant (s. 27 of the Police Ordinance, No. 79 of 1948).

When counsel for the appellant raised this same defence at the close of the prosecution case in the court below the learned magistrate rejected it, in our view, quite wrongly, for the reason that the boundaries of the Nairobi Municipality are delineated in the First Schedule to the Municipalities Ordinance. There was in fact no direct evidence before the learned magistrate that the "junction of Landhies Road and New Pumwani Road" was within those boundaries. We take the view, however, that all the prosecution was required to establish, and the learned magistrate to find, was that the police constable who arrested Mwangi Kimani had reasonable grounds to suspect the commission of the offence of hawking without a licence within the Nairobi Municipality. In our opinion, although no police constable said so in so many words, on the whole of the evidence the only inference that could be drawn was that the arresting police constable did have reasonable grounds for suspicion sufficient to make his arrest of Mwangi Kimani lawful. Had the learned magistrate considered this question we consider he must necessarily have come to that conclusion. For that reason alone the appeal against conviction must fail and we find it unnecessary to consider the further arguments put forward by counsel for the respondent. The appeal against conviction is dismissed.

In all the circumstances of the case against this appellant, and his youth, we think the sentence imposed was manifestly excessive. In the event that we may consider whether or not the offence committed by this appellant can adequately be dealt with by the imposition of a fine we propose to hear the appellant as to his means.

Sentence set aside and in lieu thereof we substitute a sentence of imprisonment of such period as will result in the appellant's immediate release.

Appeal against conviction dismissed. Sentence reduced.

For the appellant:
J. Gledhill, Nairobi

For the respondent:
The Attorney-General, Kenya
K. C. Brookes (Crown Counsel, Kenya)

The Motor Mart & Exchange Ltd v The Standard General Insurance Co Ltd

[1960] 1 EA 616 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of ruling:	9 August 1960
Case Number:	85/1959
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Practice – Discovery – Application for affidavit of specific documents – No description of documents – Whether applicant entitled to order for discovery – Civil Procedure Rules, O. 10, *r*. 19 (3) (*U*.).

Editor's Summary

In a suit for damages arising out of the alleged failure by the defendant to execute a lease the plaintiff applied for an order for discovery of documents under O. 10, r. 19 (3) of the Civil Procedure Rules. The affidavit supporting the application did not contain any specific description of the documents sought to be discovered and merely referred to "any document or documents relating to" the defendant's letting of an office. The plaintiff submitted that the admitted facts showed that there might be rent receipts or counterfoils for such receipts in the defendant's possession and that it was sufficient if the affidavit showed the probability of their existence.

Held – the application was defective because the specific documents had not been specified in the application or affidavit as required by O. 10, r. 19 (3) and also because the affidavit failed to state the deponent's belief as to the defendant's possession of the documents.

Application dismissed.

Case referred to:

(1) *White v. Spafford & Co.*, [1901] 2 K.B. 241.

Judgment

Sir Audley Mckisack CJ: This is an interlocutory application made in a suit for damages arising out of the alleged failure by the defendant to execute a lease. The application is under O. 10, r. 19 (3) of the Civil Procedure Rules. That rule enables the court to make an order requiring a party

> "to state by affidavit whether any one or more specific documents, to be specified in the application, is or are, or has or have at any time been, in his possession or power; and if not then in his possession, when he parted with the same and what has become thereof".

The rule goes on to say that the application must be made on an affidavit

> "stating that in the belief of the deponent the party against whom the application is made has, or has at some time had, in his possession or power the document or documents specified in the application and that they relate to the matters in question in the suit, or to some of them".

These provisions are similar to those of O. XXXI, r. 19A (3) of the Rules of the Supreme Court in England. The wording of the English rule is, however, a little wider than the Uganda rule, since the former speaks of

> "any particular document or documents or any class or classes of documents specified or indicated in the application",

whereas the Uganda rule refers to "any one or more specific documents to be specified in the application". For the purposes of this application, however, I do not find it necessary to consider the effect of the narrower wording of the Uganda rule.

In England the Court of Appeal has held as follows (see the headnote to *White v. Spafford & Co*. (1), [1901] 2 K.B. 241):

> "To justify an application for discovery of documents under r. 19A (3) of O. XXXI, the party making the application must in his affidavit name and specify, so that they can be identified, the particular documents of which he desires discovery.
>
> "It is not sufficient to make a general affidavit based on a priori reasoning that certain classes of documents must be in his opponent's possession or power.
>
> "The discovery sought must be of a species, not a genus".

The application now before me relates to documents described therein as follows:

> "Any document or documents relating to their" [i.e. the defendants'] "letting of office No. 213 to Mr. Danani".

The affidavit supporting the application does not contain any more specific description of these documents, but merely refers to surrounding circumstances. Nor can I find it stated anywhere in the affidavit (as the rule requires) that in the belief of the applicant the defendant has, or has at sometime had, in his possession or power the documents in question. (See also Chitty's Queen's Bench Forms (18th Edn.), p. 354.) Mr. Sparrow, for the applicant, informed me at the hearing of the application that the admitted facts showed that there might be some rent receipts, or counterfoils for such receipts, in the defendant's possession, and he argued that it was sufficient if his affidavit showed this probability. In my view, however, the application is defective in three respects. Firstly, specific documents, i.e. rent receipts or counterfoils, have not been "specified" in the application or affidavit, as O. 10, r. 19 (3) requires. Secondly, the affidavit contravenes that rule by failing to state the deponent's belief as to the defendant's possession of the documents. And thirdly, the decision in *White v. Spafford* (1) shows that an affidavit is not sufficient if it merely establishes on a priori reasoning that certain classes of documents *must* be (or have been) in the opponent's possession.

I must accordingly dismiss this application with costs against the applicant.

Application dismissed.

For the plaintiff:
Hunter & Greig, Kampala
H. G. H. Sparrow

For the defendant:
Russell & Co., Kampala
R. E. G. Russell

Busoga, A L G, Mut I, Kigulu v Byekwaso Dhirivawa

[1960] 1 EA 618 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of ruling:	29 July 1960
Case Number:	27/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Sentence – Young person – Irregularity – Sentence passed by native court – Sentence revised by magistrate – Revised sentence in excess of jurisdiction of native court – Native Courts Ordinance (*Cap*. 76), *s*. 24 (1) (*U*.) – *Reformatory Schools Ordinance* (*Cap*. 61), *s*. 5 (*U*.).

Editor's Summary

A boy aged under sixteen and probably aged fourteen years was convicted by a native court. The sentence when translated was

> "Accused No. 1 will have the punishment of being imprisoned for two years on probation and be sent to approved schools".

The native court sent the case file to the District Commissioner for confirmation who, sitting as a first-class magistrate, revised the sentence by setting aside the imprisonment and substituting an order that the boy be sent to a reformatory school. By s. 24 of the Native Courts Ordinance a magistrate may not so revise the decision of a native court as to cause the decision so revised to be in excess of the jurisdiction of the court of first instance, and by the Reformatory Schools Ordinance a native court is not empowered to make a reformatory school order. In revision,

Held – in view of the prohibition contained in s. 24 (1) of the Native Courts Ordinance the magistrate had no power to revise the sentence of the native court by way of substituting a reformatory school order and the magistrate's order must be set aside.

Magistrate's order set aside. Sentence reduced.

Judgment

Sir Audley Mckisack CJ: This case has been brought to my notice by the Commissioner of Prisons.

A boy aged under sixteen years, and probably of the age of fourteen years, was convicted in the County Court of Kigulu on a charge of stealing a cow. The sentence of that court, translated literally, is as follows:

> "Accused No. 1 will have the punishment of being imprisoned for two years on probation and be sent to approved schools".

The County Court sent the case file to the District Commissioner, Busoga, for confirmation, on the ground that the convicted youth was aged under sixteen.

The District Commissioner, sitting as a magistrate of the first class, made a revisional order. It seems that he construed the somewhat confused sentence passed by the County Court as being a sentence of two years' imprisonment. He revised this sentence by setting aside the imprisonment and substituting an

order that the boy be sent to a reformatory school.

A native court has no power to make an approved school order, so the magistrate was, no doubt, justified in ignoring the reference to “approved schools” in the County Court’s sentence. And the reference to “probation” seems incompatible with the other parts of the court’s sentence.

I have, however, to consider whether the magistrate had the power to make the reformatory school order. Section 24 (1) of the Native Courts Ordinance (Cap. 76) provides that a magistrate may not revise the decision of a native

court in such a manner as to cause the decision so revised to be in excess of the jurisdiction of the court of first instance. Section 5 of the Reformatory Schools Ordinance (Cap. 61) empowers certain courts to make a reformatory school order, but these courts do not include a native court. The relevant part of that section is as follows:

> "5.(1) Whenever any youthful offender is sentenced to imprisonment, and is, in the judgment of the court by which he is sentenced, a proper person to be sent to a reformatory school, the court may, subject to any rules made by the Governor, direct that, instead of undergoing his sentence, he shall be sent to such a school, and there be detained for a period which shall not be less than three nor more than five years.
>
> "(2) The powers so conferred by this section on the court shall be exercised only by-
>
> (*a*) the High Court;
>
> (*b*) a resident magistrate or a magistrate of the first class; and
>
> (*c*) any magistrate specially empowered by the Governor in this behalf, and may be exercised by such courts whether the case comes before them originally or on appeal or (subject to the provisions of s. 341 of the Criminal Procedure Code) on revision."

The Reformatory Schools Ordinance was enacted in 1930, and the Native Courts Ordinance was enacted in 1940. (It is, I think, immaterial that they were brought into force in the reverse order, that is to say, the Reformatory Schools Ordinance in 1950 and the Native Courts Ordinance in 1941.) In the absence of any provision modifying, in relation to reformatory school orders, the prohibition contained in s. 24 (1) of the Native Courts Ordinance I do not think that s. 5 of the Reformatory Schools Ordinance is effective to empower a magistrate to revise the sentence of a native court by way of substituting a reformatory school order. I must, therefore, set aside the order made by the magistrate.

I am, however, in full agreement with the magistrate that a sentence of two years' imprisonment would be an unsuitable one for a boy of about fourteen years. He has, I understand, been in custody or under detention, either in prison or at the reformatory school (or both), since his conviction on April 11, 1960, and possibly since the date of the offence, which was March 13, 1960. In the circumstances I think he has had sufficient punishment already. I direct that he be set at liberty forthwith, and the sentence of the County Court is varied accordingly.

Magistrate's order set aside. *Sentenced reduced*.

Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd

[1960] 1 EA 620 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	31 August 1960
Case Number:	37/1960
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Simmons J

[1] Practice – Appeal – Argument inconsistent with case at trial raised on appeal – Discretion of appellate court to permit appellant to take a new point – When discretion will be exercised.

[2] Agent – Contract – Sale of goods – Goods purchased through agent from undisclosed principal – Price paid to agent and misappropriated by him – Whether purchasers discharged from liability to vendors – Indian Contracts Act, 1872, *s*. 226 *and s*. 230.

Editor's Summary

The Rungwe African Co-operative Union asked the Iringa branch of the appellants if it had ten tons of groundnuts for sale. Having none themselves the appellants put through an inquiry to Colonial Brokers Ltd., Dar-es-Salaam, who had been soliciting business from the appellants. Colonial Brokers Ltd. telegraphed back offering the appellants ten tons of groundnuts which the appellants in turn offered to the Union at a higher price and the latter accepted. The appellants in turn accepted the offer of Colonial Brokers Ltd. which was in communication with an agent for the respondents who supplied the groundnuts and later despatched them to the Union. The appellants duly paid Colonial Brokers Ltd. which, instead of paying the respondents or their agent, misappropriated the money. When the respondents sued the appellants for the price of the nuts, the appellants denied that there was any privity of contract between themselves and the respondents and also claimed that they had bought from and paid Colonial Brokers Ltd. direct. The trial judge found for the respondents holding that Colonial Brokers Ltd. had not contracted as principals but as brokers and that the appellants knew this. He also held that the appellants had too hastily paid someone they had not been asked and whom they had no business to pay and who had never demanded payment. On appeal counsel for the appellants attempted to treat the evidence of certain witnesses in a way which was the reverse of that adopted by counsel who had appeared for the appellants in the High Court.

Held –

(i) an appellate court has a discretion to allow an appellant to take a new point on appeal if full justice can be done to the parties but since the court was far from satisfied that the matter had been properly pleaded or that all the facts bearing upon the new point had been elicited in the court below the appellants could not now be permitted to argue a new case.

(ii) the respondents had sold to the appellants and in the circumstances of the case Colonial Brokers Ltd. had no implied authority, and were not shown to have any other form of authority to receive payment; accordingly the appellants were liable to the respondents for the price of the groundnuts.

Appeal dismissed.

Cases referred to in judgment:

(1) *The Tasmania*, [1890] 15 A.C. 223.

(2) *Ex parte Firth* (1882), 19 Ch. D. 419.

(3) *North Staffordshire Railway Co. v. Edge*, [1920] A.C. 254.

(4) *Ex parte Reddish: In re Walton* (1877), 5 Ch. D. 882.

(5) *Campbell v. Hassel*, 171 E.R. 457.

(6) *Morris v. Cleasby*, 105 E.R. 943.

(7) *Linck, Moeller v. Jameson* (1886), 2 T.L.R. 206.

(8) *Baring v. Corrie*, 106 E.R. 317.

(9) *Soopromonian Setty v. Heilgers* (1879), 5 Cal. 71.

(10) *Mackinnon v. Lang* (1881), 5 Bom. 584.

(11) *Pearson v. Scott* (1878), 9 Ch. D. 198.

(12) *Irvine v. Watson* (1880), 5 Q.B.D. 414.

(13) *Cooke v. Eshelby* (1887), 12 App. Cas. 271.

(14) *Sweeting v. Pearce*, 141 E.R. 890.

(15) *Butwick v. Grant*, [1924] 2 K.B. 483.

(16) *Drakeford v. Piercy* (1886), 7 B. & S. 515; 147 E.R. 426.

(17) *Scott v. Irving* (1830), 1 B. & Ad. 605; 109 E.R. 912.

The following judgments were read by direction of the court:

Judgment

Gould Ag VP: This is an appeal from a judgment and decree of the High Court of Tanganyika in an action in which the respondents, Unyamwezi Development Corporation Limited successfully claimed from the appellants, Tanganyika Farmers Association Limited the price of ten tons of groundnuts, with interest and costs. The transaction was effected through a company called Colonial Brokers Limited and the groundnuts were delivered to Rungwe African Co-operative Union Limited. For convenience I will refer hereafter to the respondents as “the plaintiffs”, the appellants as “the defendants”, Colonial Brokers Limited as “Colonial Brokers” and Rungwe African Co-operative Union Limited as “Rungwe Union”.

The plaintiffs carry on business at Kahama, the defendants in Iringa; the address of Rungwe Union is Tukuyu and at the relevant time Colonial Brokers carried on business in Dar-es-Salaam as brokers and commission agents. There was one other person concerned in the formation of the contract, Liladhar Vithaldas Visram, an exporter and commission agent, to whom I shall refer as “Visram”. I will set out relevant documents in due course but the short history of the matter is this. The first inquiry for the groundnuts came from Rungwe Union to the defendants. The defendants had no groundnuts available and they put through an inquiry to Colonial Brokers, who had earlier expressed a desire to do business with them. Colonial Brokers offered ten tons of groundnuts by telegram and defendants in turn offered them to Rungwe Union at an augmented price. Rungwe Union communicated their acceptance and the defendants then accepted the offer from Colonial Brokers. Colonial Brokers were in communication with Visram who was agent for the plaintiffs, who supplied the groundnuts and despatched them to Rungwe Union. Colonial Brokers were paid for the groundnuts by the defendants, but it is common ground that Colonial Brokers did not pay the plaintiffs or Visram but misappropriated the money. It should be interpolated here that the defendants have been treated throughout the litigation as having purchased as principals,

and have not sought to escape liability by any claim that they bought merely as agents for Rungwe Union. I therefore accept that position.

The plaint is framed as a claim for goods sold by the plaintiffs to the defendants and delivered to Rungwe Union at their request. Paragraph 3 (*a*) and para. (*d*) of the Written Statement of Defence are as follows:

> "(*a*) The defendants deny that any privity of contract existed between the plaintiffs and the defendants in regard to the alleged transaction.
>
> "(*d*) The defendants purchased the goods in question directly from M/s. Colonial Brokers Ltd. of Dar-es-Salaam to whom they the

defendants have already paid the purchase price in February, 1957, a fact well known to the plaintiffs at all material times."

The following issues were agreed:

"1. Did the plaintiffs promise the defendants to deliver the goods to Rungwe Co-operative in consideration of a promise by the defendants to pay the plaintiffs or their agents Shs. 14815/19 or any other and what sum?

"2. If so, have the defendants paid any and what sum to the plaintiffs or their agents?

"3. If the defendants owe any sum accordingly, are they liable to pay any and what interest on it?"

The learned trial judge found that Colonial Brokers did not enter into the contract for sale as principals but that they acted as brokers. He assumed in favour of the defendants (but without deciding it) that Colonial Brokers were agents for the plaintiffs, and held that the defendants knew that they were acting as agents, that Colonial Brokers had no actual authority to receive payment on behalf of the plaintiffs, nor did they have any authority by custom or any ostensible authority. He found that the defendants had over hastily paid someone whom they had not been asked to pay, who had no business to be paid and who had never demanded payment; therefore the defendants were liable to pay the person rightfully entitled – the vendor.

It will now be convenient to set out the relevant correspondence. Having received the inquiry from Rungwe Union the defendants, on February 4, 1957, wrote to Colonial Brokers as follows:

Exhibit 3.

"Iringa

4th February, 1957.

Messrs. Colonial Brokers Ltd.,

P.O. Box 20343,

Dar-es-Salaam.

Dear Sirs,

We have an inquiry from Tukuyu for up to 100 bags of groundnuts.

We should be grateful if you would let us know of any source of supply, either in the Tukuyu area or in the areas in this neighbourhood.

Failing this, could you please let us have quotations from Dar-es-Salaam?

Yours faithfully,

Tanganyika Farmers Association Ltd.

Branch Manager."

The reply, by telegram was dated February 6, 1957:

Exhibit 4.

"6.2.57.

Dar-es-Salaam.

To: Associated

Your letter 4th available ten tons groundnuts 1525 for Kahama Tukuyu area unavailable. Telegraph reply immediately.

Alert”

The defendants offered this consignment to Rungwe Union at Shs. 1,600/- per ton f.o.r. Kahama, and having received their confirmation, telegraphed Colonial Brokers on February 8, 1957, as follows:

Exhibit 9.

"8.2.57.

Rail ten tons groundnuts Rungwe African Cooperative Union Tukuyu.

Associated"

On February 15, 1957, the defendants wrote in the following terms to Colonial Brokers:

Exhibit 10.

"15th February, 1957.

Messrs. Colonial Brokers Ltd.,

P.O. Box 20343,

Dar-es-Salaam, T.T.

Dear Sirs,

10 tons Groundnuts.

We confirm our advice to you to supply 10 tons of groundnuts from Kahama to the Rungwe African Co-operative Union Ltd., P.O. Box 40, Tukuyu, Tanganyika.

Our cheque for Shs. 15,250/- is enclosed herewith and we would ask you to let us have a copy of the Railway Waybill as soon as the groundnuts have been railed.

Yours faithfully,

Tanganyika Farmers' Association Ltd.

W. S. Rothwell

Branch Manager."

The reply was dated February 18, 1957:

Exhibit 11.

"P.O. Box 20343,

Dar-es-Salaam.

18.2.57.

The Tanganyika Farmers Association Ltd.,

Iringa.

Dear Sirs,

We thank you for cheque for Shs. 15,250/- being the value of 10 tons groundnuts sold to you on behalf of Messrs. Liladhar Vithaldas Visram, Dar-es-Salaam.

We had taken up with the sellers regarding the price as the market have dropped we were able to take from suppliers a reduction of Shs. 50/- per ton making a price of Shs. 1,475/- per ton. You will realise that we have acted in best interests here. We are returning herewith the cheque for Shs. 352/50 being as under:

10 tons at 50/-	Shs. 500.00	
Less Buying comm.	147.50	Shs. 352/50

The undersigned is leaving on a tour and will be meeting you by the March 1957 in Iringa. The undersigned have left a cheque in favour of the sellers which will be paid as soon the way bill is in our hands.

Looking forward to see you.

Yours faithfully,

The Colonial Brokers Ltd."

On March 1, 1957, the defendants wrote acknowledging receipt of the cheque for Shs. 352/50 and asking for a consignment note and invoice and this request was repeated in a number of subsequent letters.

On the sellers' (plaintiffs') side there is very little in writing. There is a letter from Visram to the plaintiffs dated February 12, 1957, in the following terms:

Exhibit 28.

"P.O. Box 1207,

Dar-es-Salaam

Liladhar Vithaldas Visram

Importers, Exporters and Commission Agents.

12th February, 1957.

M/s. Unyamwezi Development Corp. Ltd.,

Kahama/Isaka.

Dear Sir,

re: Ten Tons Karanga.

We confirm having sold the above consignment on your behalf to the Tanganyika Farmers Association, Iringa, through their brokers Messrs. Colonial Brokers Ltd., Dar-es-Salaam, at Shs. 1475/00 per ton of 2,240 lbs. nett F.O.R. Isaka station for immediate delivery.

In pursuance of the above we have today sent the following telegram to your Mr. Yadav at Unimills, Mwanza.

'Unimills Mwanza

Rail Karanga ten tons Rungwe African Cooperative Union Ltd Tukuyu sold at 1475 f.o.r. Kahama

Happy'

The above goods are to be railed immediately to Messrs. Rungwe African Co-operative Union Ltd., Tukuyu, on behalf of the Tanganyika Farmers Association as per the instructions received from Messrs. Colonial Brokers Ltd. Kindly rail the above goods at your earliest.

Messrs. Colonial Brokers Ltd. have assured us that both the above parties are reliable and either of them will make payment on receipt of your invoice, so you need not draw on them simultaneously.

Yours faithfully,

Liladhar V. Visram

Copy: Mr. Yadav, Mwanza."

On March 14, 1957, the plaintiffs wrote to the defendants as follows:

Exhibit 15.

"Unyamwezi Development Corporation Ltd.,

P.O. Box 18,

Kahama, T.T.

14.3.57.

The Manager,

Tanganyika Farmers' Association Ltd.,

P.O. Box 230, Iringa.

Dear Sir,

Re: Groundnuts.

We would like to advise you that on instructions from our Broker, Mr. Liladhar Vithaldas Visram of Dar-es-Salaam, we railed ten tons of groundnuts to the Rungwe African Co-operative Union Ltd., Tukuyu, on the 15th February, 1957. We are now informed that a payment in respect of this produce has not been received by our Broker and he has asked us to write to you in this matter.

We are enclosing a copy of our invoice No. 230 of 15.2.57 and shall remain grateful to you if you would kindly arrange to remit this amount to us in our account with the Standard Bank of S.A. Ltd., Mwanza Branch, preferably by telegram.

You will appreciate that the produce is always sold on cash terms and it is nearly a month now and we hope you will treat this matter as urgent and oblige.

Yours faithfully,

for Unyamwezi Development Corp. Ltd.,

Director.

Copy to: The Rungwe African Co-operative Union Ltd., Tukuyu."

The reply, on March 20, 1957, was:

Exhibit 16.

"P.O. Box 230,

Iringa, T.T.

20th March, 1957.

Unyamwezi Development Corporation Ltd.,

Produce Dept.,

P.O. Box 18,

Kahama, T.T.

Dear Sirs,

We thank you for your letter of the 14th March, and would advise you that a cheque for ten tons of Groundnuts was sent to Colonial Brokers Ltd., Dar-es-Salaam, on the 9th February, 1957. You should, therefore, contact them for payment.

Yours faithfully,

Tanganyika Farmers Association Ltd.

W. S. Rothwell

Branch Manager.

c.c. Colonial Brokers Ltd., P.O. Box 1356, Dar-es-Salaam."

Finally, under date "April 1957" Colonial Brokers sent an account to Visram for Shs. 36.87 brokerage, showing the date of the contract as February 9, the purchaser as "T.F.A. a/c U.D. Corp.", the quantity ten tons, and the price Shs. 14,750/-. The remaining correspondence reflects unsuccessful efforts on the part of the defendants to induce Colonial Brokers to honour their obligations. It is not necessary to reproduce it here.

Visram gave evidence and said that he approached a number of brokers, including Colonial Brokers, to effect a sale of ten tons of groundnuts on behalf of the plaintiffs. He agreed with Patel of Colonial Brokers to sell at Shs. 1,475/- per ton f.o.r. Kahama, with immediate booking to Rungwe Union. The buyers were to pay the sellers direct. In cross-examination he said that he effected this transaction with Colonial Brokers on February 12. He claimed that the date, February 9, shown as the date of the contract on the account for commission sent by Colonial Brokers in April, was not correct – the negotiations were after February 9. He was informed that Colonial Brokers were acting for buyers, and said there was no contract (by which it is to be presumed he meant contract in writing) because there was to be immediate

delivery. Many bargains were made in that way.

Haribhai Dhasbhai Patel, who was at the relevant date the Managing Director of Colonial Brokers said that Colonial Brokers acted as the defendants' agent in the transaction and bought from Visram at Shs. 1,475 per ton. He received the money from the defendants but had no authority from the plaintiffs to receive it on their behalf; the money was utilized by Colonial Brokers. He said

also that when on or about February 6, he quoted Shs. 1,525/- per ton to the defendants, he was referring to some other client's nuts. It was a supplier from the same district but he could not remember who the supplier was. Colonial Brokers did not trade themselves at all; they were unable to do so because brokers and commission agents are not permitted to do so by the Dar-es-Salaam Produce Exchange regulations. He said also that he had experience as a broker, that he arranged contracts by signing agreements between sellers and buyers, but that "In this case we informed them by letter".

There was only one witness for the defendants. He was the Manager of the defendants' Iringa branch and the gist of his evidence was that it was only after the purchase was completed, i.e. when the letter dated February 18, 1957, was received from Colonial Brokers, that the defendants realised that Colonial Brokers were not participating as principals.

Counsel for the defendants commenced his argument before this court by referring to para. 3 (*a*) of the Written Statement of Defence in which it was denied that there was any privity of contract between the plaintiffs and the defendants. He then pointed out that Colonial Brokers, by their telegram of February 6, had offered, and the defendants by their telegram to Colonial Brokers of February 8, had accepted, ten tons of groundnuts at Shs. 1,525/- per ton. He then relied upon the evidence of Visram that he had only concluded his part of the bargain with Colonial Brokers on February 12, and of Patel that the groundnuts offered at Shs. 1,525/- per ton belonged to some other client. He submitted therefore that the contract completed by the exchange of telegrams between the defendants and Colonial Brokers was made by the latter on behalf of some unnamed principal other than the plaintiffs. Hence, there was no contract between plaintiffs and defendants and the plaintiffs delivered their groundnuts to the defendants' nominee under a mistake of fact.

The objection to this submission is that it raises a question which was never in the contemplation of the parties in the court below. It was not argued there, nor was it ever mentioned in the correspondence between the parties. An appeal court has a discretion to allow a new point to be taken on appeal but it will permit such a course only when it is assured that full justice can be done to the parties. In *The Tasmania* (1), [1890] 15 A.C. 223 at 225 Lord Herschell said:

> "My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> "It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

In *Ex parte Firth* (2) (1882), 19 Ch. D. 419 at 429 Jessel, M.R. said:

> "It is quite true that there is some evidence about that, but the point was not taken in the County Court, and the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point

> from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence."

In *North Staffordshire Railway Co. v. Edge* (3), [1920] A.C. 254, Lord Buckmaster, at p. 270 put the matter thus:

> "Upon the question as to whether the appellants should be permitted to raise here a contention not raised in the court of first instance I find myself most closely in accord with the views just stated by my Lord Atkinson. Such a matter is not to be determined by mere consideration of the convenience of this House but by considering whether it is possible to be assured that full justice can be done between the parties by permitting new points of controversy to be discussed. If there be further matters of fact that could possibly and properly influence the judgment to be formed, and one party has omitted to take steps to place such matters before the court because the defined issues did not render it material there, leave to raise a new issue dependent on such facts at a late stage ought to be refused, and this is settled practice."

In the present case it is clear in my opinion, that those who framed the Written Statement of Defence intended para. 3 (*a*) to be read in the light of para. 3 (*d*) – the lack of privity referred to was consequential upon the claim to have purchased the goods from Colonial Brokers. If it were otherwise the Written Statement of Defence is evasive and lacking in particularity. My view is supported by the way in which the first issue was framed, and by the fact that in the lower court Mr. Mann, who then appeared for the defendants rested his argument that there was no privity of contract between the plaintiffs and the defendants upon his submission that Colonial Brokers had contracted as principals to sell the groundnuts to the defendants. Towards the evidence of Visram and Patel, Mr. Mann adopted an attitude which is the reverse of that now assumed in this court by Mr. Dastur. Mr. Mann, arguing that Colonial Brokers were the agents of the plaintiff is recorded as saying:

> "Which nuts were subject of original offer to Defendants? L. V. Visram and Patel tried anxiously to show they were not the same. But L. V. Visram at one stage could not remember how negotiations started but he remembered 12.2.57 as date of his negotiations. Yet brokerage invoice – he said there must be a mistake in the date. Exhibit 5 – offers Kahama nuts – Plaintiffs operate Kahama. Patel said other persons from same area but could not remember who. Clearly L. V. Visram was asked to sell the nuts. He approached Colonial Brokers. Colonial Brokers had been asked for a source of supply. L. V. Visram said 'act as our agents' Colonial Brokers decided to sell at a higher price, instead of putting two principals in touch. They accepted agency from Visram, and offered to Defendants therefore Colonial Brokers sub-agents of Plaintiffs.

The evidence which Mr. Mann criticised, Mr. Dastur now seeks to approbate, and to utilize for a different purpose, which is contrary to what was laid down in *Ex parte Reddish: In re Walton* (4) (1877), 5 Ch. D. 882. I will quote only the relevant portion of the headnote:

> "An appellant is not entitled to raise upon his appeal a new case inconsistent with that which he originally raised in the primary court, even though the evidence taken in that court supports the new case."

In the present case I am far from satisfied that this court has before it all the facts bearing on the question now raised for the first time, which might have been elicited in the lower court had the matter been there in issue. Patel,

for example, might have been requested to go through the correspondence and books of Colonial Brokers to refresh his memory on the subject of groundnuts under offer at the time. Had the matter been properly pleaded the possibility of the defendants' being estopped might have had to be considered. The question of dates as between the plaintiffs and Visram and between Visram and Colonial Brokers would have been investigated with greater care. Furthermore, this court would have had the benefit of a considered finding on the facts by the learned trial judge. For all these reasons I am of opinion that the point now sought to be argued by Mr. Dastur is not one which is open to him to argue, or that he should be permitted to argue. I would add however, that consideration of such evidence as was given, would not incline me to the view that it was established, upon the balance of probabilities, that Colonial Brokers had originally contracted with reference to the groundnuts of some unknown third person.

The next submission by counsel for the appellants was that Colonial Brokers had in fact contracted as principals. There is, in my opinion, no reason at all to disturb the finding of the learned trial judge to the contrary. The price charged to the defendants was the selling price of the plaintiffs and Colonial Brokers charged what they designated as commission to the defendants and brokerage to the plaintiffs' agent Visram. There is no evidence that they purchased and resold upon their own account, and, on the evidence, it would have been contrary to the Produce Exchange regulations for them to have done so.

The question which remains, is whether the legal relationship between Colonial Brokers and the plaintiffs was such as to render payment of the price by the defendants to Colonial Brokers an effective discharge. If Colonial Brokers were acting only as agents for the defendants such a payment would not avail them. The learned judge in the court below assumed however (without finding) that Colonial Brokers were agents for the plaintiffs. If so, they were brokers and not factors, for they were not entrusted with possession of the goods or documents of title.

Assuming then, that Colonial Brokers were agents for the plaintiffs to sell the ten tons of groundnuts, what was their authority? On the evidence they had no actual authority to receive payment. There was no course of dealing between the parties, and the only authority conferred related to the sale of a specific quantity at a specific price. The learned judge's finding concerning the defendants' knowledge of the agency is embodied in the following passage of his judgment:

> "So far as the defendants took the trouble to acquire any knowledge at all they must be taken to have known that Colonial Brokers were acting as agents, whatever the name of the principal might be."

Earlier he had said:

> "The defendants did not write exhibit 3 to ask Colonial Brokers whether they had any groundnuts for sale but to employ Colonial Brokers to bring the defendants into contact with a source of supply. Subsequent correspondence up to but excluding exhibit 11 is neutral but it does not modify the effect of exhibit 3, and exhibit 11 confirms that effect, for in it Colonial Brokers refer to groundnuts sold to the defendants 'on behalf of' L. V. Visram . . ."

I take these passages to mean that the learned judge accepted as a fact, that the defendants knew that Colonial Brokers had a principal. I think it was a finding that was justified by the evidence, particularly having regard to the fact that reading exhibits 3 and 4 together, the answer to the defendants' inquiry was, in effect, that they had no source of supply in the Tukuyu area

but had one in Kahama. Colonial Brokers had their place of business at Dar-es-Salaam and all the circumstances including the names under which Colonial Brokers operated made it highly probable that they were acting as agents.

Counsel for the defendant, on this aspect of the case relied upon *Campbell v. Hassel* (5), 171 E.R. 457, in which the relevant portion of the headnote reads:

> "A payment by the vendee of goods to the brokers is good, if the name of the principal be not disclosed, although the vendee knows that the broker sells for some unknown principal. And it makes no difference in such case, whether or not the broker acts under a del credere commission. But a payment in such case would not be good, if it varied from the original terms of the contract."

In that case the buyers had paid the brokers who had, to the buyer's knowledge, made the contract on behalf of principals (the plaintiffs) but the name of the principals had not been disclosed. Lord Ellenborough said, at pp. 457-8:

> "There was no disclosure of any absolute proprietor; in the late case of *Morris v. Cleasby* (Hil. 1816), in which all the previous authorities were considered, we held, that till the principal appears the broker is to be regarded as the proprietor."

The facts in *Morris v. Cleasby* (6), 105 E.R. 943 are involved and need not be stated. At p. 946 of the report of that case Lord Ellenborough said:

> "It is clear therefore that he was selling the goods of another person at such his public sale, though that person was not then named. The goods were to be delivered in fourteen days, and paid for on delivery in approved bills at two months; there was no need to name the principal till these fourteen days were expired. On their expiration, (the 6th of November, when the goods were to be cleared) the documents for the shipment were to be procured; the defendant then tells the bankrupts that the goods belong to the Le Mesuriers, and refers them to that house for the documents. This is an important date in the transaction; the bankrupts were then in credit and continued so for a month afterwards: the defendant wished to have no trouble about the shipment. The disclosure is made, but the goods were not shipped, and nothing appears to have been said or done either by the defendant, or the Le Mesuriers, respecting the stipulated mode of payment. The question between the parties is, did this disclosure make the bankrupts debtors to the Le Mesuriers, and take away from the defendant the power of paying the Le Mesuriers so as to establish the present claim. The assignees say it did, and rely on the ordinary legal rights and obligations of principal and factor in cases where the principal is known. The defendant contends it does not, and relies on his commission del credere as his authority, though that was not known to the bankrupts till after the defendant had resold the goods on their account. Whether the bankrupts after the disclosure of the principal, might or might not, if they had known of the commission del credere, have paid the defendant safely, is not material to the point now in dispute, nor whether the Le Mesuriers could or could not have prevented their so doing. In fact the bankrupts did not for a long time know of the commission del credere, and the Le Mesuriers did not interfere. We think that this case must be considered as if the principal had been disclosed at the sale. The existence of some other person as principal than the defendant was in effect then disclosed. From the nature of the contract it was not likely that any thing should intervene, which could vary the situation of the parties, or affect

> their obligations and rights between the day of sale and day of delivery. In fact nothing of that kind did happen, and the principal being disclosed before delivery, before payment, and before any steps could be taken either to remove the goods, or to carry into effect the mode of payment stipulated for, we are of opinion that the principal comes into his entire unabridged rights, and that the several parties are under the same obligations to him as if his name had appeared on the face of the contract."

Campbell v. Hassel (5), would appear then to be authority for saying that a broker selling on behalf of an unnamed principal has authority to receive the price, but I find difficulty in accepting this, as nowhere in the various text books on the subject have I found it clearly cited as authority for such a proposition. In Bowstead on Agency (12th Edn.) at p. 63 it is quoted in support of the statement that where a broker sells for an undisclosed principal he has implied authority to receive payment of the price in accordance with the terms of the contract; but that is to be construed in accordance with the definition of "undisclosed principal" at p. 1 as:

> "a principal whose existence is not known at the time of the transaction to the person dealing with the agent;"

Bowstead further states (p. 64) that a broker has no authority to receive payment when the principal is disclosed, and defines that term as:

> "a principal, whether named or not, whose existence is known at the time of the transaction to the person dealing with the agent;"

This last statement of the law is on the authority of *Linck, Moeller v. Jameson* (7) (1886), 2 T.L.R. 206, in which case the name of the seller appears to have been disclosed.

In Benjamin On Sale (8th Edn.) p. 796 *Campbell v. Hassel* (5), is quoted with *Baring v. Corrie* (8), 106 E.R. 317 as authority for the statement that a broker is not a general agent, entitled to receive payment and give a discharge for the price (unless he has been allowed by the principal to sell the goods as his own). In Chitty on Contracts (21st Edn. Vol. 1) p. 266 *Campbell v. Hassel* (5), is not quoted as an authority in respect of the general authority of brokers. Paragraph 482 reads:

> "Payment to a broker will not in all cases bind his principal; but may do so by the custom of trade, or if warranted by the course of dealing between the parties."

Baring v. Corrie (8), is among the authorities for the last part of that passage. In Vol. 2 of the same work *Linck, Moeller v. Jameson* (7), is given as authority for the statement that a broker has normally no power to receive payment for goods sold by him, whereas *Campbell v. Hassel* (5), is selected as authority for saying that a broker cannot receive payment by way of set off. The case receives no mention in Chalmers' Sale of Goods (13th Edn.) Halsbury's Laws of England (3rd Edn.) Vol. 1 on Agency, or anywhere in the Hailsham Edition, in Pollock (13th Edn.) or Anson (21st Edn.) on Contracts. Counsel for the defendants, however, pointed out that in Pollock and Mulla on the Indian Contract Act (8th Edn.) p. 631 and The Law of Contracts by Iyer (3rd Edn.) p. 933, *Campbell v. Hassel* (5), is given as authority for saying that a broker may receive payment if he does not disclose his principal. There is no indication how those writers interpreted the expression "undisclosed principal" but counsel relied upon s. 230, presumption 2, of the Indian Contract Act (in force in Tanganyika) which reads:

> "In the absence of any contract to that effect, an agent cannot personally

enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

> "Such a contract shall be presumed to exist in the following cases:
>
>
>
> "(2) where the agent does not disclose the name of his principal;"

That section at first sight appears to embody a departure from English law but the courts in India have not so construed it. In *Soopromonian Setty v. Heilgers* (9) (1879), 5 Cal. 71 (followed in Bombay in *Mackinnon v. Lang* (10) (1881), 5 Bom. 584) it was held that the second presumption in s. 230 could be rebutted by the language used in the contract, even though the principal was not named therein. The position is therefore the same as it is in England and the section does not appear to assist the defendants' case.

Before considering further the effect of the decision in *Campbell v. Hassel* (5), I will refer to cases relied upon by counsel for the plaintiffs.

The facts in *Baring v. Corrie* (8), bear some resemblance to those of the present case. Messrs. Coles were employed as the plaintiffs' brokers to sell sugar. They sold it to the defendants, disclosing the name of the purchasers to the plaintiffs in the Sold Note but not disclosing in the note sent to the defendants that they had sold for the plaintiffs. In the present case it is clear that Visram knew the names of the purchasers by February 12, 1957. (See letter of that date: exhibit 28.) The defendants were not informed until they received the letter from Colonial Brokers of February 18, that the sale was to Visram; they did not then know Visram, but in any event had already paid the price. The defendants in *Baring v. Corrie* (8), claimed, Messrs. Coles having gone bankrupt, to set off the purchase price of the sugar against a debt which Messrs. Coles had owned them. It was held, however, that the defendants ought to have ascertained, as they could easily have done, that Messrs. Coles were merely acting as brokers and that they were liable to pay the plaintiffs. Bayley, J., said at p. 320:

> "This is an action brought by a merchant, to recover the price of his own goods, and he ought therefore to succeed, unless payment or something equivalent to it, appears to have taken place. The demand, however, is resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of Coles and Co., and that they have a counter-demand against them, which they are entitled to set-off against the price of the goods. A proprietor, generally speaking, is entitled to receive the price of his own goods, unless, by improper conduct on his part, he has enabled some other person to appear as proprietor of the goods, and, by that means, to impose on a third person without any fault on the part of that person. That is the true meaning of the rule laid down in *Hern v. Nichols* (Salk. 289). There arise then three question; first, did the plaintiffs enable Coles and Co. to appear as proprietors of the goods, and to practise a fraud upon the defendants? Secondly, did Coles and Co. actually practice a fraud? and thirdly, did the defendants use due care and diligence to avoid such fraud? All these questions must, under circumstances of this case, be answered against the defendants."

The following passage appears in the judgment of Abbott, C.J., at p. 319:

> "But in this case has there been any negligence on the side of the plaintiffs? or rather has there not been great negligence on the side of the defendants? Coles and Co., it appears, acted in the double capacity of merchants and brokers; and that fact was well known to the defendants. Now the distinction between a broker and factor is not merely nominal, for they differ in many important particulars. A factor is a person to whom goods are consigned for sale by a merchant, residing abroad, or at a distance

> from the place of sale, and he usually sells in his own name, without disclosing that of his principal; the latter, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation; he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal, therefore, who trusts a broker, has a right to expect that he will not sell in his own name. In all the cases cited the factor was in actual possession of the goods, and the purchasers could not know whether they belonged to him or not. And at all events they knew that he had a right to sell the goods. But the case of a broker is quite distinguishable. The plaintiffs in this case have only reposed the usual confidence which every merchant must place in his broker, and if the defendants should succeed, it would not be safe for any merchant ever hereafter to employ a broker: for the latter might, by delivering to the buyer a false note, defeat the rights of his principal altogether."

Holroyd J., said, at p. 321:

> "I am of opinion that the defendants have not any right of set-off in this case. A factor, who has the possession of goods, differs materially from a broker. The former is a person to whom goods are sent or consigned, and he has not only the possession, but in consequence of its being usual to advance money upon them, has also a special property in them, and a general lien upon them. When, therefore, he sells in his own name, it is within the scope of his authority: and it may be right, therefore, that the principal should be bound by the consequences of such sale; amongst which, the right of setting-off a debt due from the factor is one. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing of a person to sell goods as a broker does not authorise him to sell in his own name. If therefore he sells in his own name, he acts beyond the scope of his authority, and his principal is not bound."

There was a suggestion in the judgment of Abbott, C.J., that Messrs. Coles might have had actual authority to receive the price; the learned Chief Justice thought that did not alter the case as

> "this fact applied only to the receipt of the price of goods sold by them as brokers".

The case of *Pearson v. Scott* (11) (1878), 9 Ch. D. 198 and the numerous cases cited in the judgment of Fry, J., therein indicate that a broker authorised to receive purchase money, is not authorised to receive it by way of set off. *Baring v. Corrie* (8), related essentially to set-off and does not therefore touch the position of a buyer who has paid a broker in cash for goods bought from an unnamed principal; the reference by Abbott, C.J., was to actual, and not implied, authority. The case does, however, tend to support the finding of the learned trial judge that the defendants knew, or must be deemed to have known, that Colonial Brokers were acting for a principal.

The case of *Irvine v. Watson* (12) (1880), 5 Q.B.D. 414 was relied upon by the learned judge in the court below, but it does not in fact advance the case of the plaintiffs. The facts were that the defendants employed a broker to buy oil for them. The broker purchased the oil from the plaintiffs, who knew he was buying for principals but did not know who they were. The defendant paid the broker, but it was held that the plaintiff was not precluded from suing for the price unless he had by his conduct induced the defendants to believe that he had already been paid by the broker. The crux of that case

however was that the broker was the agent of the buyers only. This was emphasized by Brett, L.J., when he said (p. 419):

> "There is a contract for the sale of goods made between the plaintiffs and the defendants through the agency of one Conning, a broker. But in making this contract Conning acted solely as agent of the defendants, not as agent of the plaintiffs at all. The contract was for 'cash on or before deliver'; and the goods having been delivered, the defendants pay Conning, who, as I have said before, was their agent and no one else's. Now, apart from authority, I should certainly say that a payment to such an agent could not be a good payment to the plaintiffs."

I find no assistance in that case.

Counsel for the plaintiffs relied upon the decision of the House of Lords in *Cooke v. Eshelby* (13) (1887), 12 App. Cas. 271. That was a case very similar to *Baring v. Corrie* (8). The purchasers were unaware whether the broker was contracting for an unnamed principal or on his own account – in the particular cotton market it was the practice for brokers to buy and sell sometimes for themselves and sometimes for principals. The gist of the decision is given in the following passage from the speech of Lord Watson, at pp. 278-9:

> "These decisions appear to me to establish conclusively that, in order to sustain the defence pleaded by the appellants, it is not enough to shew that the agent sold in his own name. It must be shewn that he sold the goods as his own, or, in other words, that the circumstances attending the sale were calculated to induce, and did induce, in the mind of the purchaser a reasonable belief that the agent was selling on his own account and not for an undisclosed principal; and it must also be shewn that the agent was enabled to appear as the real contracting party by the conduct, or by the authority, express or implied, of the principal. The rule thus explained is intelligible and just; and I agree with Bowen, L.J., that it rests upon the doctrine of estoppel. It would be inconsistent with fair dealing that a latent principal should by his own act or omission lead a purchaser to rely upon a right of set-off against the agent as the real seller, and should nevertheless be permitted to intervene and deprive the purchaser of that right at the very time when it had become necessary for his protection.
>
> "I therefore agree with the conclusion of the learned judges of the Court of Appeal and with the reasoning upon which it is founded. A broker who effects a sale in his own name with an intimation, express or implied, that he is possibly selling as an agent, does not sell the goods as his own, and in such a case the purchaser has no reasonable grounds for believing that the agent is the real party with whom he has contracted."

This case, like *Baring v. Corrie* (8), would conclude the matter in favour of the plaintiffs, if it had been dealing with payment to a broker in cash instead of by set-off. That there is a difference in this context, is illustrated by the following passage from the judgment of Byles, J., in *Sweeting v. Pearce* (14), 141 E.R. 890 at p. 905:

> "I entirely accede to the proposition, that, when Walton & Sons were entrusted with the policy, they were entitled to receive the money under it from the defendant. The policy was the title-deed, which they had no authority to hand over to the defendant without receiving payment. On that point, I agree with the view taken by the defendant's counsel. But, on the other hand, I think the plaintiff gave Walton & Sons no authority to settle the loss in the way they did. It is not disputed that the general rule of law is, that an authority to an agent to receive money implies that

> he is to receive it in cash. If the agent receives the money in cash the probability is that he will hand it over to his principal: but, if he is to be allowed to receive it by means of a settlement of accounts between himself and the debtor, he might not be able to pay it over: at all events, it would very much diminish the chance of the principal ever receiving it; and upon that principle it has been held that the agent, as a general rule cannot receive payment in anything else but cash. Unless, therefore, there is some usage to control it, payment to the agent must be made in money."

The learned trial judge relied also upon the decision in *Butwick v. Grant* (15), [1924] 2 K.B. 483. In that case, however, the sale was made through an agent (it is not apparent that he was in business as a broker) who had no actual authority to receive payment; the agent sold the goods, not as owner but as agent, and the buyer received the goods and the seller's invoice before he made payment to the agent. It was held that the seller could recover. Sankey, J., said, at pp. 489-90:

> "I agree. I found my judgment upon that of Lush, J., in *Drakeford v. Piercy*. He there said: 'that an agent authorised to sell has as a necessary legal consequence authority to receive payment is a proposition utterly untenable and contrary to authority.' In an action by the seller of goods against the buyer for the price it would be open to the buyer who had paid the seller's agent to show, and in the absence of any reason to the contrary he would be entitled to succeed on showing either that the agent had actual authority to receive payment, or that he had ostensible authority to receive payment, or that he had a customary authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question."

That case was one in which the existence of the principal was known to the buyer at the time of the purchase, and his identity was known, if not at that time, at least before payment was made. The case referred to in the passage above quoted (*Drakeford v. Piercy* (16) (1866), 7 B & S. 515) appears to have been one of a principal of whose existence the purchaser claimed to have been unaware.

When Sankey, J., referred to

> "customary authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question"

he no doubt had in mind agencies such as factors, brokers, auctioneers, etc.; and the only indication I have found anywhere that such customary authority exists generally in the case of brokers selling for a disclosed but unnamed principal is what was said by Lord Ellenborough in *Campbell v. Hassel* (5). I can find no record of that case ever having been quoted in support of that proposition, and except for its having been distinguished in *Scott v. Irving* (17) (1830), 1 B. & Ad. 605, on another point, the various digests do not show that it has ever been discussed. Neither do the text books which I have referred to above, appear to regard it as such an authority, and the combined effect of the references in Bowstead on Agency, is to the contrary. Lord Ellenborough may have been referring to the specific types of brokerage business before him, but there appears to be good ground for thinking that, at least in *Morris v. Cleasby* (6), by reference to which the judgment in *Campbell v. Hassel* (5), was given, he was dealing with factors and not brokers. In the judgment in *Morris v. Cleasby* (6), both words are used without distinction, but in *Baring v. Corrie* (8), counsel contended, and Abbott, C.J., accepted, that *Morris v. Cleasby* (6), was a case involving a factor, as distinct from a broker (see 106 E.R.

pp. 318 and 319). In these circumstances I do not feel justified in accepting *Campbell v. Hassel* (5), as authority for the sweeping statement that every broker has authority to receive payment for an unnamed principal even if his existence is disclosed, and prefer to accept what is stated in Bowstead on Agency, that a broker has implied authority, as incidental to his employment, to receive payment if the existence of the principal is undisclosed but not if it is disclosed, even though the name be not. He may of course have additional authority, either actual or by holding out, by the custom of a particular trade or by a course of dealing.

The defendants claim to have purchased the groundnuts from Colonial Brokers as principals having been rejected, it was upon them to establish that some such additional authority existed, and this they did not do. There was no course of dealing, as this was the first time that the defendants had dealt with Colonial Brokers. No custom of the trade was established. The following passages from the judgment under appeal, so far as findings of fact are involved, are to be supported on the evidence:

> "Still assuming, in favour of the defendants, that Colonial Brokers were agents of the plaintiffs I find that they had no authority to receive payment on behalf of the plaintiffs. There is no evidence of it and no reason to assume it. Such authority is not necessary to the business of brokerage and was not necessary to this particular transaction. There is no evidence or precedent of any relevant customary authority;
>
>
>
> "There was no reason to suppose that Colonial Brokers had paid or had been asked or were expected to or would pay this sum to the plaintiffs. The defendants had not received an invoice or demand for payment from anyone, or any indication as to whom they should pay. Colonial Brokers had not apparently been entrusted with the goods or documents of title and had not purported to sell the goods as their own. There was nothing in the course of dealing between the parties warranting such an inference.
>
> "There being no actual or customary authority it remains only to add that there was no ostensible authority. The plaintiffs had done nothing to induce the defendants to think that Colonial Brokers had authority to receive payment, and in fairness it must be said that neither had Colonial Brokers."

For these reasons I am of opinion that the learned judge was correct in giving judgment for the plaintiffs. The plaintiffs had sold their goods to the defendants and in the circumstances of the case Colonial Brokers had no implied authority and were not shown to have had any other form of authority, to receive payment. The plaintiffs were therefore entitled to say to the defendants: "You have had our goods and you have not paid us". The case is another of that unfortunate class in which one of two innocent parties must suffer for the dishonesty of a third; in the particular circumstances, in my opinion, the law placed the burden on the defendants.

I would therefore dismiss the appeal with costs.

Crawshaw JA: Mr. Dastur for the defendants has submitted, inter alia, that there was no privity of contract between the defendants and the plaintiffs in that there was no consensus ad idem. He maintains that the evidence of Patel, Managing Director of Colonial Brokers, and of Visram, the plaintiffs' agent, shows that the groundnuts agreed to be purchased by the defendants were a different lot of nuts from those supplied by the plaintiffs and were the property of a different seller.

This point was not taken before the trial Court and the question is whether it would now be proper to consider it. In *Ex parte Reddish*: *In re Walton* (4), it was held in the terms of the headnote,

> "An appellant is not entitled to raise upon his appeal a new case inconsistent with that which he originally raises in the primary court, even though the evidence taken in that court supports the new case."

There are special features about the instant case however, in that the defendants did not apparently know that there were two lots of nuts and could not therefore have taken the point in their pleadings nor have led evidence on it. The defendants called only one witness, Rothwell, their Manager, and he gave evidence de bene esse before the plaintiffs' witnesses, who included Patel and Visram; the defendants were therefore taken by surprise.

Admittedly the written statement of defence alleges that there was no privity of contract, but that was on the basis that Colonial Brokers sold as principals and were not the agents of the defendants, and not on the basis of there being different lots of nuts. Had Mr. Mann, who appeared for the defendants at the trial, regarded the evidence of two lots of nuts as being against the interests of the plaintiffs, as one might perhaps have expected him to have done, and argued it before the trial court as Mr. Dastur has done before this court, the trial judge would no doubt have considered it in the light of such argument, and the evidence having been led by the plaintiffs and accepted by the defendants it would have been difficult for him not to have accepted it also, even should he have thought the evidence not entirely satisfactory. Mr. Mann, however, far from adopting the evidence, clearly questioned its reliability, and based his case on an entirely different line of argument. What then was the position of the trial judge? It seems to me that he would have been quite wrong to have accepted evidence as to facts apparently (if so he thought) in favour of the defendants, if the defendants contested the correctness of them. I am of the opinion that the defendants cannot now change their view of the facts merely to support a different argument. If this was permitted on an appeal where would litigation end? If the party appealing was again dissatisfied with the judgment of the appeal tribunal, it might seek to go further yet on another view of the evidence.

The evidence as a whole in my opinion points to the Colonial Brokers being agents for the defendants and not that they sold to the defendants as principals. This view is consistent with much of Rothwell's own evidence in court and certain of his letters exhibited in court, especially that to Colonial Brokers bearing reference CF/C/IR/57 (the date does not appear on the exhibit), and that of May 7, 1957, to Dar-es-Salaam Produce Exchange. His saying that he regarded the Colonial Brokers as principals would seem to be a failure to appreciate the legal position rather than any dispute as to the facts.

The learned judge came to no finding on the question whether the Colonial Brokers were agents also for the plaintiffs, but arrived at the conclusion that in any event payment to Colonial Brokers was not payment to the plaintiffs. The evidence does not to my mind support a proposition that Colonial Brokers were at any time agents of the plaintiffs. The defendants and plaintiffs came into contractual relationship through the defendant's agents, Colonial Brokers, buying from the appellants through the latter's agent, Visram. Visram had been instructed by the plaintiffs to try and find a purchaser in the same way as Colonial Brokers had been asked by the defendants to try and find a "source of supply". Visram approached Colonial Brokers, amongst other brokers, and the deal was made. Each appears to have known that the other was acting for a principal, and the plaintiffs did nothing to lead the defendants to believe that payment could be made to or through Colonial Brokers. As is said in Iyer on the Indian Law of Contract, (3rd Edn.), at p. 920,

> "Primarily, the broker is the agent of the party by whom he is originally employed"

and

> "His chief function is to establish privity of contract between two parties with regard to a transaction".

And in Pollock & Mulla (8th Edn.), at p. 619, it is said,

> "The essential point about an agent's position is his power of making the principal answerable to third persons."

These are no legal profundities, but then I think this case turns on simple principles. In the present case each party was represented by an agent, and on behalf of their respective principals and within the scope of their authority the agents established privity of contract between the principals. It seems to me to be as simple as that. Admittedly Colonial Brokers in their letter of February 18, 1957, to the defendants acknowledged the defendants' cheque as being in respect of nuts sold "on behalf of M/s. Liladhar Vithaldas Visram." This, in the light of the evidence as a whole, could only have been careless wording however. This becomes apparent even from the letter itself, for it goes on to explain that in the best interests of the defendants Colonial Brokers had managed to obtain a reduced price from the "suppliers". Visram in evidence also said,

> "Colonial Brokers I understood were brokers for buyers and sellers. In this particular case sellers not in Dar-es-Salaam so they might be his agent".

He does not say from whom he "understood" this, but it seems that he must have been referring to a period after, so far as he was concerned, the transaction had been completed. His other evidence, and his letter of February 12, 1957, to the plaintiffs, make it quite clear how he regarded the position at the time the transaction was being entered into. In the letter he said

> "We confirm having sold the above consignment on your behalf to the Tanganyika Farmers Association, Iringa, through their brokers Messrs. Colonial Brokers Ltd.",

and this on the evidence as a whole would certainly appear to have been the true position. There is no evidence relating to subsequent events to suggest that it changed thereafter, and there was no communication between the plaintiffs and Colonial Brokers. Even the appellants in para. 8 of the Memorandum of Appeal say:

> "The learned trial judge should have held on evidence:
>
> (*a*) That Colonial Brokers Limited did not purport to sell anything for the plaintiff/respondent giving rise to any question of agency between them."

It is true that Colonial Brokers charged Visram brokerage, but in explanation of that Visram said,

> "It is the usual practice 1/4% from buyers and 1/4% from sellers. If it is 1/4% it is not brokerage but commission."

I confess that I find this explanation a little difficult to follow unless the liability for the commission was passed on to the principals, as otherwise the brokerage would appear to cancel out; it was not however further pursued in examination of the witness. If, as seems to me to be the case, Colonial Brokers were not agents of the plaintiffs, but were agents of the defendants and not selling as

principals, payment to Colonial Brokers would be no discharge of the defendants liability, and they would still be liable to the plaintiffs under the provisions of s. 226 of the Indian Contract Act. I feel sympathy for the defendants, but payment to their agents was to my mind a palpable misconception of the real relationship between the parties.

I would therefore dismiss the appeal with costs to the respondents.

Sir Kenneth O'Connor P: I have had the advantage of reading the judgments of the Acting Vice-President and the learned Justice of Appeal. I agree with the conclusion at which they have arrived. The appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
P. R. Dastur, Dar-es-Salaam

For the respondent:
Laxman & Co., Mwanza
W. D. Fraser Murray

Boota Singh s/o Naranjan Singh v R
[1960] 1 EA 638 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	31 August 1960
Case Number:	17/1960
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Connell, J.

[1] Criminal law – Evidence – Corroboration – Whether evidence of accessories after the fact requires corroboration.

Editor's Summary

The appellant was convicted of manslaughter of his wife and was sentenced to eight years' imprisonment. When the appeal against conviction was dismissed the court commented upon *R. v. Erunasani Sekoni s/o Eria* (1947), 14 E.A.C.A. 74.

Held –

(i) the decision in *R. v. Erunasani* so far as it deals with the need for corroboration of accessories after the fact is no longer law, as was pointed out in *Githae s/o Gathigi and Another v. R.* (1956), 23 E.A.C.A. 440 following *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507.

(ii) while false and evasive statements by an accused may be taken into account e.g. in assessing his credibility or as tending to show mens rea, an accused is not bound to give any explanation at all and even if he gives an untrue or evasive explanation the prosecution is not absolved from proving his guilt affirmatively beyond reasonable doubt.

Appeal against conviction dismissed. Sentence reduced to six years' imprisonment.

Cases referred to in judgment:

(1) *R. v. Erunasani Sekoni s/o Eria* (1947), 14 E.A.C.A. 74.

(2) *Davies v. Director of Public Prosecutions*, [1954] 1 All E.R. 507; 38 Cr. App. R. 11.

(3) *Githae s/o Gathigi and Another v. R.* (1956), 23 E.A.C.A. 440.

(4) *Dawson v. McKenzie*, 45 S.L.R. 474.

Judgment

Sir Kenneth O'Connor P, read the following judgment of the court: The appellant was convicted by the Supreme Court of Kenya on June 10, 1960 of the manslaughter on January 30, 1960, contrary to s. 198 of the Penal Code, of his wife Simran Kaur and was sentenced to eight years' imprisonment. Against this conviction he appealed to this court. He also appealed (with the leave of this court) against his sentence. On August 12, 1960, we dismissed his appeal against conviction and reserved for further consideration our decision on the question of sentence. The following are our reasons for dismissing the appeal against conviction:

The appellant was, at the material time, a Sikh aged 22 years, employed as a Fitter/Mechanic at the Kilindini Docks by the East African Railways and Harbours Administration. He lived with his parents in a railway quarter at Queensway, Mombasa. In December, 1957, the appellant went to India and married a Sikh girl by name Simran Kaur. She was then 14 years of age. The appellant returned to Kenya where, after an interval, his young wife followed him. They lived with his parents. There was evidence that Simran Kaur did not get on with her mother-in-law, the wife of the appellant's father, Naranjan Singh, and that the mother-in-law considered Simran Kaur untidy, lazy and dirty and used to reprove, torment and insult her. After her death Simran Kaur was found to be suffering from severe anaemia. That and her unhappy relations with her mother-in-law and latterly with her husband may have accounted to some extent for her listlessness and slovenly behaviour.

In the evening of Saturday, January 30, 1960, probably about 5.30 p.m., Simran Kaur died in Naranjan Singh's railway quarter. Her husband, the appellant, made a statement regarding her death to the police at 11.20 p.m. the same night. He said that he had returned to the house from work about 12.10 p.m. and had found his wife sitting down. She was then "quite all right". In the afternoon his wife had slept, and had got up about 3.30 p.m. and had tea. After a few minutes she had gone to their bed-room and had lain down. The appellant had followed her. She lay on the bed and started gnashing her teeth. The appellant had tried unsuccessfully to make her drink water from a tea-spoon but she had died about 5.30 p.m. The appellant's father had gone to fetch a doctor and had reported to the police who had arrived and taken the body to the mortuary. The appellant said:

> "I never had any dispute with my wife. I never beat my wife at any time since I got married with her."

A post mortem examination of the body of Simran Kaur deceased was made by the police pathologist, Dr. Rogoff. He found, inter alia, a small bruise associated with a lacerated wound on the forehead; three linear bruises on the upper part of the left chest, an area of bruising over the left arm, both upper arms swollen, oedema and swelling of all the back from the lower cervical vertebrae to the sacrum, swelling and oedema of the buttocks and linear bruises running inwards and upwards on the thighs. There was a wide area of oedema in the loins and across the back with extravasated blood in all layers of the muscle tissues, areas of bruising in deep areas of the buttock muscles and collections of blood in the fat and muscle tissues of the thighs. Some of the injuries had a linear shape, especially over the back, and were probably caused by a thin stick. A thin stick, used as a churner, and handed to the police by Naranjan Singh, was an exhibit at the trial.

Dr. Rogoff gave it as his opinion that it was most likely that the injuries (except the injuries to the thighs and head which had been inflicted earlier) had been inflicted two or three hours before death; it was possible that they

could have been inflicted as little as half an hour, or as long as six hours, before death, but two to three hours was the most likely. The learned judge adopted Dr. Rogoff's opinion.

The cause of death was

> "acute oedema of the lungs (accumulation of fluid) due to acute shock due to severe muscular injury due to a multiple beating".

Dr. Rogoff said

> "This girl's death is the result of a severe beating. Her anaemic condition and the dilated and flabby state of her heart muscles made her more susceptible to shock than if she had been in normal health."

But Dr. Rogoff said, and the learned judge found, that the injuries inflicted would have been sufficient to cause the death of a person in normal health: the injuries to the back would alone have been sufficient for this.

The police took a further statement from the appellant on February 4, 1960. Both his statements were made exhibits at the trial. In his second statement he repeated that he had returned to the house at 12 noon and that his wife's condition was then "quite well as usual". Giving the history of the marriage, he said that his relations with his wife had been good for the first month. Thereafter they had started to change: she had paid no attention when he used to ask her to make tea and look after his clothes: in order to chastise her, he had beaten her. The appellant was then cautioned in the usual form, but elected to continue his statement. He said inter alia:

> "Write down. I understand the caution. After I had beaten her she behaved all right for one or two days. She went back to her previous ways. I tried to make her listen to me by persuations. She did not care for what I had said to her. After I had waited for a few more days she still did not heed me. For example, she would not go out with me, change her clothes as you are a newcomer and you may get some women visitors. What opinion they will form as you are a new bride. You should keep clean and nicely dressed. She never cared about these things. She used to wear dirty clothes just like a sweeper. After finishing the housework you must keep yourself clean. She never paid any attention to my words. I then again beat her. Why don't you pay attention to what I say. I then again beat her as a husband would do, to a disobedient wife. She was not fulfilling her duty as a wife. She never listened to any of my words. I tried to persuade her but she never listened. After all this, this thing happened on Saturday. Now we come to Saturday. I returned home at 12 noon. When I arrived father was in the house. The food was ready. We had the food. All the family had the food. My wife cleaned the utensils. It was now about 2 p.m. o'clock. She came and sat near the table. I was standing near her. I told her to stand up, it being a Saturday we may have visitors – you better go and change your clothes. She never paid any attention, and remained sitting down. I told her twice or three times to stand up but she never listened to me. I pulled her from the table and made her stand up. I pushed her to where a trunk was lying under a bed and I told her to take out her dress. She kept quiet and was standing still. I pushed her, telling her, why don't you take out your clothes. When I pushed her she fell forward on the bed with the chest hitting the edge of the frame of the bed. She stood up and then pulled her trunk from underneath the bed and took out her clothes. She kept the clothes on the bed. It was now about four o'clock."

He went on to describe how when the girl was taken ill, they had endeavoured, with more or less success, to get her to drink tea and various household remedies;

but she remained lying on her bed and eventually became unconscious. They had gone to fetch the doctor, but before he arrived the girl had died. The appellant added:

> "In my statement I have mentioned that she pulled out the trunk from under the bed, put the clothes on the bed and she kept squatting. I kicked her, telling her to put on her clothes, close the trunk and push it back under the bed. When I kicked her she fell forward across the trunk. After taking her clothes out she left the trunk lying there and went to lie down on the bed."

It will be recalled that Dr. Rogoff had said that the girl had died as a result of a severe beating and that the injuries to the back, which themselves could cause death, had probably been inflicted two to three hours before death. The death was put at about 5.30 p.m. It was, therefore, of importance that the appellant admitted having been in the house with his wife from about 12 noon until he had left to call the doctor very shortly before her death. It was also important that he admitted having assaulted her on that afternoon. Though he did not admit having beaten her that day, he did, however, admit a course of marital correction which had included beating on other occasions.

The assessors unanimously found that the appellant was not guilty on the ground that the Crown had put forward circumstantial evidence and had not called direct evidence to incriminate him; and that they could not find him guilty until the mother-in-law had been cleared of suspicion.

The first ground of appeal to this court asserted that the learned judge had misdirected himself as to the rule to be applied in cases depending wholly or mainly on circumstantial evidence. We think, however, that there was no misdirection. The learned judge, having directed himself correctly, found that the evidence pointed irresistibly to the appellant as the person who had inflicted the beating from which his wife had died. An effort was made at the trial to shift the blame on to the mother-in-law; but the learned judge (rightly we think) rejected this as an unreasonable hypothesis. There was no evidence whatever in support of it and it was inherently highly improbable that the young wife could have been beaten to death by her mother-in-law with her husband in the house unless he was at the least present aiding and abetting. It was suggested that the mother-in-law might have beaten the girl in the morning, before the appellant returned. This, however, hardly squared with the medical evidence and the appellant's statement that this wife was "quite all right" at 12.10 p.m. As already stated, the learned judge, as he was entitled to do, rejected the suggestion.

According to the evidence of Mrs. Gohan, a neighbour who lived four doors away from Naranjan Singh's house, she saw the body of the deceased in a disused boy's quarter when she arrived at the house after 5.30 p.m. on the day in question. When the police arrived, however, the body was in the sitting room on a bed. The learned judge found that the deceased had been beaten in the boy's quarter, probably because her cries and whimpers would there be less audible. The finding that she was beaten in the boy's quarter was attacked by counsel for the appellant who characterized it as pure surmise and said that this suggestion had never been made until it was made in the final speech for the Crown. In our opinion, it is quite unimportant in which room the beating was carried out.

Counsel for the appellant also attacked the learned judge's findings that the appellant's statements had been evasive and untrue and that the appellant had been systematically beating his wife over a considerable period. When, however, the appellant's first statement to the police is contrasted with his second statement, it is clear that the first statement was evasive and untrue, and the part of the second statement which has been quoted above does give ground for a finding that the appellant systematically beat his wife over a period of at

least some days. The appellant, in an unsworn statement in the court below, acknowledged the truth of his second statement to the police but explained that he had not beaten his wife with a stick or fists, but had only slapped her. This assertion was quite inconsistent with the medical evidence and, in our view, the learned judge was right in disbelieving it.

There were no less than eighteen grounds of appeal against the conviction, largely repetitive. We considered them all and were of opinion that none of them disclosed any adequate reason for interfering with the conclusion reached by the learned judge which we considered to have been amply supported by the evidence.

One aspect of the judgment caused us some anxiety. The learned judge relied upon the case of *R. v. Erunasani Sekoni s/o Eria* (1) (1947), 14 E.A.C.A. 74. In that case it was held: (1) that there is no rule of law or practice which requires the evidence of accessories after the fact to be corroborated; and (2) that although lies and evasions on the part of an accused person do not in themselves prove the correctness of the facts against him, they may, if no material issues, be taken into account along with other matters when considering his guilt or innocence. With respect to the learned judges who tried *Erunasani's* case (1), the first of the above-mentioned propositions conflicts with the decision of the House of Lords in *Davies v. Director of Public Prosecutions* (2), [1954] 1 All E.R. 507, 513; 38 Cr. App. R. 11, 33, and (as has already been stated by this court in *Githae s/o Gathigi and Another v. R.* (3) (1956), 23 E.A.C.A. 440, 441) is no longer law. It was, however, on the second of the two findings in *Erunasani's* case (1) that the learned judge relied and in particular on the following passage in that case at p. 76:

> ". . . their evidence now has the effect of proving that the first appellant had been evasive and untruthful with regard to his whereabouts at the time of the shooting. Their evidence in short proves a fact of a kind which, it needs no authority to say, can be taken into account against the accused when assessing the case against him. This idea has been expressed in the Scottish case of *Dawson v. McKenzie*, 45 S.L.R. p. 474 by Lord Dunedin, where he says 'Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration'. Here we may pause to say that such suspicion is scarcely raised by the circumstances of the proved opportunity in the present case. Lord Dunedin, however, continues 'The other is that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made'."

The learned judge relied somewhat heavily on the last sentence of the above passage. With regard to this we should point out that the case of *Dawson v. McKenzie* (4), 45 S.L.R. 474 was a civil case and that care should be taken in applying the doctrines there laid down to criminal matters. No doubt, in criminal, as in civil, cases, the circumstances and locality of the opportunity may amount to corroboration to a greater or less degree. No doubt, also, false and evasive statements made by an accused person may be taken into account in assessing his credibility, or as tending to show mens rea or as failing to rebut some presumption where such exists, for instance the inference which may be drawn from recent possession of stolen goods or a presumption arising from possession of house-breaking implements by night (these examples are

not intended to be exhaustive). But it must not be forgotten that, generally speaking, an accused person is not bound to give any explanation at all and that the fact that he gives an untrue or evasive explanation, though it may be taken into account, does not absolve the prosecution from proving his guilt affirmatively beyond reasonable doubt.

In the present case we thought that there was ample evidence to justify the conclusion at which the learned judge arrived and, as already mentioned, we dismissed the appellant's appeal against conviction.

We have considered the grounds raised in the Memorandum of Appeal against sentence. One of the reasons given by the learned judge in passing the sentence was as follows:

> "If, as Mr. Sharma urges, a stratum of society exists in which wife-beating is regarded as a prerogative, then all I can say is that it is the court's bounden duty to pass as severe a deterrent sentence as it can to stop that sort of outlook."

This was based merely upon a submission made by learned counsel for the defence that there was a certain stratum of Asian society which regarded it as the prerogative of a husband to chastise his wife. That may have been correct: there was no evidence of it and no evidence that serious bodily assaults on wives were prevalent in Mombasa at the time. We think that, in the absence of evidence, that was an unsound reason for the court "to pass as severe a deterrent sentence as it can." Taking into consideration, on the one hand, the protracted and cruel beatings inflicted by the appellant on his young wife resulting in her death; and, on the other, the appellant's youth, the fact that this was a first offence and that he probably did not realise how serious would be the effect of chastisement with a light stick, we think that justice would be met by reducing the sentence to one of six years' imprisonment. We order accordingly.

Appeal against conviction dismissed.

Sentence reduced to six years' imprisonment.

For the appellant:
Sharma & Shah, Mombasa

For the respondent:
The Attorney-General, Kenya
A. R. Hancox (Crown Counsel, Kenya)

Peter Harold Richard Poole v R
[1960] 1 EA 644 (PC)

Division:	Privy Council
Date of judgment:	28 July 1960
Case Number:	26/1960
Before:	Lord Tucker, Lord Denning and Lord Morris of Borth-y-Gest
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Appeal from: E.A.C.A. Criminal Appeal No. 217 of 1959 on appeal from H.M. Supreme Court of Kenya – Sir Ronald Sinclair, C.J.

[1] Criminal law – Trial – Irregularity – Accused absent from part of trial – Whether trial vitiated – Criminal Procedure Code (*Cap.* 27), *s.* 193 *and s.* 381 (*K.*).

[2] Criminal law – Practice – Entry of nolle prosequi – Simultaneous filing of new information – Both informations identical – Whether entry of nolle prosequi at trial discharges proceedings at preliminary inquiry – Whether trial a nullity – Criminal Procedure Code (*Cap.* 27), *s.* 82, *s.* 89 (4), *s.* 233, *s.* 246, *s.* 250, *s.* 255, *s.* 275 *and s.* 299 (*K.*).

Editor's Summary

The appellant pleaded not guilty to a charge of murder and a jury was chosen and sworn. Counsel for the Crown then opened his case and was about to call the first witness when a juror intimated that he had a conscientious objection on religious grounds to giving a verdict of guilty. After an adjournment a nolle prosequi was entered and simultaneously a new information which was in identical terms with the first information except for the date was handed to the deputy registrar who served it upon the appellant after his discharge on the first information. The deputy registrar then executed a warrant as authority for the detention of the appellant in custody pending trial upon the new information, and he was later tried and convicted of murder. On appeal to the Court of Appeal and subsequently to the Privy Council it was contended inter alia that the absence of the accused during a demonstration of distances by a witness, which were later repeated in the accused's presence, was a fatal irregularity in view of s. 193 of the Criminal Procedure Code, and that the trial was a nullity because after the Attorney-General had entered a nolle prosequi in respect of the first information the appellant was tried and convicted without a preliminary enquiry and committal by a subordinate court.

Held –

(i) the absence of the appellant during the demonstration was an irregularity but it was curable under s. 381 of the Criminal Procedure Code, and the circumstances of the irregularity were not such as to warrant the intervention of the Board in its criminal jurisdiction.

(ii) the entry of the nolle prosequi did not discharge the proceedings at the preliminary inquiry so as to preclude the filing of another charge based on the facts disclosed at the preliminary inquiry.

(iii) a second indictment or information is not inherently bad by reason of the pendency of an earlier one for the same offence against the same person on the same facts.

Appeal dismissed.

[**Editorial Note:** See also *P. H. R. Poole v. R.*, [1960] E.A. 62 (C.A.).

Cases referred to in judgment:

(1) *R. v. Wylie and Others* (1919), 83 J.P. 295.

(2) *R. v. Noormohamed Kanji* (1937), 4 E.A.C.A. 34.

(3) *Sey v. R.* (1950), 13 W.A.C.A. 128.

(4) *R. v. John Swan and Elizabeth Jefferys*, [1751] Fost. 104.

(5) *R. v. Stratton and Others* (1779), 1 Doug. 239.

(6) *R. v. Dunn* (1843), 1 C. & K. 730.

(7) *R. v. Mitchell*, 3 Cox C.C. 93.

(8) *R. v. Allen* (1862), 1 B. & S. 850.

Judgment

Lord Tucker: On December 10, 1959, the appellant was convicted of murder after a trial before Sinclair, C.J., and a jury in the Supreme Court of Kenya. His appeal to the Court of Appeal for Eastern Africa was dismissed on March 21, 1960. From this decision he appealed to Her Majesty in Council by special leave and the appeal was heard by the Board on July 25, 26, and 27, 1960. On July 28, their lordships announced that they would humbly advise Her Majesty that the appeal be dismissed. They now give their reasons.

Except for one incident in the course of the trial (which will be dealt with at once) no complaint was made before the Board on behalf of the appellant with regard to the evidence, the summing up or the conduct of the trial. The exception was the following incident. At the conclusion of the evidence of a witness for the prosecution named Titoro, who had said that he saw the appellant shoot the deceased man named Kamawe, the Chief Justice asked the witness to indicate certain positions and distances which he had described, but this could not conveniently be done in the court room as it was too small. He accordingly proceeded with the witness and counsel for the prosecution and defence to the steps outside the judges' entrance where the witness indicated the positions and distances of which he had spoken. The distances indicated were all agreed with counsel, sometimes after having been paced out. On returning to court counsel for the prosecution stated that he did not know whether the appellant had been present at the demonstration. It was ascertained that he had not been present. The court was then adjourned to the same place and the demonstration repeated in the presence of the appellant. The second demonstration took about half the time occupied by the first which had taken from 15 to 20 minutes. There was no material variation in the positions or distances indicated on each occasion. Section 193 of the Criminal Procedure Code of Kenya provides:

> "Except as otherwise expressly provided, all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any)."

It was contended on behalf of the appellant that this being a felony the whole trial must take place in the presence of the prisoner and that no action taken by the trial judge could cure the irregularity which had occurred and which vitiated the whole trail.

It will be observed that s. 193 draws no distinction between felonies and misdemeanours. Moreover, s. 381 of the Code provides:

> "Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account –
>
> (*a*) of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code; or
>
>(*b*) or
>
> (*c*) of any misdirection in any charge to a jury.

unless such error, omission, irregularity or misdirection has in fact occasioned a failure of justice:

> "Provided that in determining whether any error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings."

The Court of Appeal for Eastern Africa after considering certain English authorities and some Indian decisions under s. 537 of the Indian Code of Criminal Procedure, which is in similar terms to s. 381 of the Kenya Code set out above, were of opinion that although an irregularity had occurred and it could not be said that the accused's presence had been dispensed with, his presence throughout a trial was not an absolute requirement necessarily going to the root of a conviction, and that in the circumstances of this case the appellant had been in no way prejudiced by the incident which was curable under s. 381. Their lordships are in agreement with this reasoning and would only observe that the decision in such cases must always be a matter of degree. The consequences of accepting to the full the submission of counsel for the appellant would result (to take an extreme case) in vitiating a trial because a formal witness had given his name and address in the witness box after an adjournment and it had not been noticed that the prisoner had not yet been brought up from the cells. On the other hand it is not difficult to envisage many instances in which his absence would be fatal.

Their lordships should, perhaps, add that whatever be the proper interpretation of the relevant provisions of the Kenya Code the circumstances of the present irregularity are not of such a nature as would bring the case within the principles upon which the Board intervenes in the exercise of its criminal jurisdiction.

Their lordships accordingly pass to the important ground of appeal upon which special leave was granted and which was the reason for the appeal before the Court of Appeal for Eastern Africa having been heard by a full court of five judges (O'Connor, P., Forbes, V.-P., Gould and Windham, JJ. A. and Farrell, J.), viz. that the trial was a nullity by reason of the fact that the Attorney-General had entered a nolle prosequi in respect of a previous information charging the same offence as that upon which the appellant was subsequently convicted without a fresh committal after investigation by a subordinate court.

Before recounting the circumstances in which the nolle prosequi was entered it will be convenient at this stage to set out the relevant sections of the Criminal Procedure Code of Kenya (Laws of Kenya 1948, Cap. 27).

> "3(1) All offences under the Penal Code shall be inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
>
>(2)
>
> (3) Provided, however, and notwithstanding anything in this Code contained, the Supreme Court may, subject to the provisions of any law for the time being in force in the Colony, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure and practice observed by and before His Majesty's High Court of Justice in England at the date of the coming into operation on this Code."
>
> "66. Every court has authority to cause to be brought before it any person who is within the local limits of its jurisdiction and is charged with an offence committed within the Colony, or which according to law may be dealt with as if it had been committed within the Colony, and to deal with the accused person according to its jurisdiction."
>
> "69. The Supreme Court may inquire into and try any offence subject to its jurisdiction at any place where

it has power to hold sittings:

Provided that except under s. 84, no criminal case shall be brought under the cognizance of the Supreme Court unless the same shall have been previously investigated by a subordinate court and the accused person shall have been committed for trial before the Supreme Court."

"82(1) In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter a nolle prosequi, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the nolle prosequi is entered, and if he has been committed to prison shall be released, or if on bail his recognizances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

(2) If the accused shall not be before the court when such nolle prosequi is entered the registrar or clerk of such court shall forthwith cause notice in writing of the entry of such nolle prosequi to be given to the keeper of the prison in which such accused may be detained, and also, if the accused person has been committed for trial, to the subordinate court by which he was so committed, and such subordinate court shall forthwith cause a similar notice in writing to be given to any witnesses bound over to prosecute and give evidence and to their sureties (if any) and also to the accused and his sureties in case he shall have been admitted to bail."

"83. The Attorney-General may order in writing that all or any of the powers vested in him by the two last preceding sections and by Part VIII of this Code be vested for the time being in the Solicitor General or a Crown Counsel, and the exercise of these powers by the Solicitor General or a Crown Counsel shall then operate as if they had been exercised by the Attorney-General:

Provided that the Attorney-General may in writing revoke any order made by him under this section."

"89(1) Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

.

(4) The magistrate, upon receiving any such complaint or where an accused person who has been arrested without a warrant is brought before him, shall, subject to the provisions of the next succeeding sub-section, draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged, unless such a charge shall be signed and presented by a police officer."

"138. A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence."

"226. Any magistrate empowered to hold a subordinate court of the first, second or third class may commit any person for trial to the Supreme Court:

Provided that it shall not be competent for a magistrate empowered to hold a subordinate court of the third class to commit a European for trial to the Supreme Court."

"227. Whenever any charge has been brought against any person of an offence not triable by a subordinate

court or as to which the subordinate court is of opinion that it is not suitable to be disposed of upon summary trial, a preliminary inquiry shall be held according to the provisions hereinafter contained by a subordinate court, locally and otherwise competent."

"228. A magistrate conducting a preliminary inquiry shall, at the commencement of such inquiry, read over and explain to the accused person the charge in respect of which the inquiry is being held, but the accused person shall not be required to make any statement in reply thereto."

"233 (1) If, after examination of the witnesses called on behalf of the prosecution, the court considers that on the evidence as it stands, there are sufficient grounds for committing the accused for trial, the magistrate shall frame a charge under his hand declaring with what offence or offences the accused is charged and shall read the charge to the accused person . . ."

"246. In the event of a committal for trial the written charge (if any), the depositions, the statement of the accused person, the recognizances of the complainant and of the witnesses, the recognizances of bail (if any), and any documents or things which have been put in evidence, shall be transmitted without delay by the committing court to the registrar of the Supreme Court, and an authenticated copy of the depositions and statement aforesaid shall be also transmitted to the Attorney-General."

"249. If, prior to the trial before the Supreme Court, the Attorney General is of opinion, upon the record of the committal proceedings received by him, that the case is one which may suitably be tried by a subordinate court, he may cause the depositions to be returned to the court which committed the accused, and thereupon the case shall be reopened, tried and determined in the same manner as if such person had not been committed for trial:

Provided that in every such case the accused shall be entitled to have recalled for cross-examination or further cross-examination all or any of the witnesses for the prosecution."

"250 (1) If, after the receipt of the authenticated copy of the depositions as aforesaid, the Attorney-General shall be of the opinion that the case is one which should be tried upon information before the Supreme Court, an information shall be drawn up in accordance with the provisions of this Code, and when signed by the Attorney-General shall be filed in the registry of the Supreme Court.

(2) In any such information the Attorney-General may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial."

"251. The registrar or his deputy shall endorse on or annex to every information filed as aforesaid, and to every copy thereof delivered to the officer of the court or police officer for service thereof, a notice of trial, which notice shall specify the particular sessions of the Supreme Court at which the accused person is to be tried on the said information, and shall be in the following form, or as near thereto as may be:

'A.B.

Take notice that you will be tried on the information whereof this is a true copy at the sessions of the Supreme Court to be held at on the day of 19 '."

"255. All informations drawn up in pursuance of s. 250 of this Code shall be in the name of and (subject to the provisions of s. 83) signed by the Attorney-General, and when so signed shall be as valid and effectual in all

respects as an indictment in England which has been signed by the proper officer of the court in accordance with the Administration of Justice (Miscellaneous Provisions) Act, 1933."

"257. The practice of the Supreme Court in its criminal jurisdiction shall be assimilated as nearly as circumstances will admit to the practice of His Majesty's High Court of Justice in its criminal jurisdiction and of Courts of Oyer and Terminer and General Gaol Delivery in England."

"272. If any information does not state, and cannot by any amendment authorised by the last preceding section be made to state, any offence of which the accused has had notice, it shall be quashed either on a motion made before the accused pleads or on a motion made in arrest of judgment.

A written statement of every such motion shall be delivered to the registrar or other officer of the court by or on behalf of the accused and shall be entered upon the record."

"275. Any accused person against whom an information is filed may plead:

(*a*) that he has been previously convicted or acquitted, as the case may be, of the same offence, or

(*b*) that he has obtained the King's pardon for his offence.

If either of such pleas are pleaded in any case and denied to be true in fact, the court shall try whether such plea is true in fact or not.

If the court holds that the facts alleged by the accused do not prove the plea, or if it finds that it is false in fact, the accused shall be required to plead to the information."

On November 11, 1959, the resident magistrate at Nairobi having heard the witnesses adduced on behalf of the prosecution whose evidence was recorded in the form of depositions directed that a charge be drawn up against the appellant of the murder of Kamawe on October 12, 1959, contrary to s. 199 of the Penal Code and that he be committed to the Supreme Court for trial.

On November 18, 1959, an information was signed by the Deputy Public Prosecutor for the Attorney-General which recited as follows:

"At the sessions holden at Nairobi on November 30, 1959, the court is informed by the Attorney-General on behalf of Our Lady the Queen that Peter Harold Richard Poole is charged with the following offence . . ."

then followed the charge of murder of Kamawe on October 12, 1959.

On this information the appellant was arraigned on November 30, 1959, and pleaded not guilty. He was given in charge of the jury and the case for the Crown was opened by the Crown counsel. Before the first witness was called one of the jury stated that he had a conscientious objection on religious grounds to giving a verdict of guilty in this case. After a short adjournment counsel for the appellant submitted that the juror's statement did not incapacitate him from sitting, but that if the court held otherwise the case should proceed with eleven jurors. It being then 11.20 a.m. Crown counsel asked for an adjournment and the court adjourned until 2.15 p.m. It appears that during the adjournment the acting senior Crown counsel on behalf of the Attorney-General signed a fresh information dated November 30, charging the appellant with the offence of murder in the same terms as the first information dated November 18. On the resumption of the Court after the adjournment Crown counsel submitted there was no power to discharge the juror as he was not incapable. He said that the court might have inherent power to discharge the jury but he thought it safer to enter a nolle prosequi which he then did and at the same time handed in

the fresh information dated November 30. Counsel for the appellant contended that there was no inherent power to discharge the jury in the circumstances and that it was not a case in which a nolle prosequi could be entered. The learned Chief Justice thereupon ruled as follows:

> "In view of the entry of a nolle prosequi the accused is discharged in respect of the charge for which the nolle prosequi is entered."

After the appellant had been discharged and left the dock he was asked by the deputy registrar to accompany him to the ante-room of the court where he served him with the new information of that date and executed a warrant as authority for the prison officers to detain him pending his trial upon the new information. It was not contested that the acting senior Crown counsel was duly authorised under s. 83 to enter a nolle prosequi and sign an information. Thereafter the appellant was duly tried on the new information at the December sessions of the Supreme Court holden at Nariobi and convicted on December 10. It was contended by counsel for the appellant that on the true construction of s. 82 of the Code the entry of the nolle prosequi brought the prosecution to an end subject always to the right of the Crown to start another prosecution against the accused de novo by re-arresting him and taking him again before a subordinate court with a view to a fresh committal for trial. He submitted that the words the "proceedings shall not continue" in s. 82 (1) referred to the "proceedings" which had been instituted under s. 89 (1) and that the words "discharged in respect of the charge" refers to the charge drawn up and signed under s. 89 (4), and that the words "subsequent proceedings" in the penultimate line of s. 82 (1) similarly implies proceedings which could only be initiated in accordance with s. 89 (1). He sought to re-inforce his submission on the ground of certain procedural difficulties which he suggested would necessarily follow from the construction relied upon by the Crown.

Their lordships will return later to the procedural consequences and will for the present content themselves with the construction of the language of s. 82 in the context in which they appear in relation to a nolle prosequi entered at the stage at which it was entered in this case. Unlike the procedure with regard to nolle prosequi in England, where it cannot be used until an indictment has been found (see the observations of Darling, J. in *R. v. Wylie and Others* (1) (1919), 83 J.P. 295) the words "in any criminal case and at any stage thereof before verdict or judgment" in sub-s. (1) and the provisions of sub-s. (2) make it clear that in Kenya a nolle prosequi may be entered at different stages and before an information has been signed. It follows from this that the words "the charge" must necessarily have a different meaning according to the stage at which it is entered. If entered before committal it must necessarily refer to the charge drawn up and signed under s. 89 (4) and if entered after committal and before an information has been signed it will have reference to the charge drawn up under s. 233. Where an information has been duly signed under s. 250 and the accused has been arraigned and pleaded to it it contains the only effective charge and that is the charge and the only charge in respect of which the accused is discharged and it is the proceedings on that information which shall not continue.

Reverting to the consequences said to follow from the construction contended for by the Crown. It is said that a person may remain committed for trial for an indefinite period and it is asked what is to happen to the exhibits which have been remitted to the Registrar of the Supreme Court under s. 246, similarly it is asked what is to happen to the recognizances of the witnesses bound over to give evidence at the trial having regard to the provisions of s. 82 (2). Finally it is said that grave injustice may be done to an accused under the provisions of s. 299 of the Code which provides for the circumstances in which the

depositions of a witness may be read at the trial when he is absent from the colony.

Their lordships do not consider these consequences necessarily follow. The exhibits are in the custody of the court and the court on application made and notice given would clearly have jurisdiction to make such order as seemed proper with regard to the exhibits.

As to the recognizances of the witnesses it appears that they are merely bound over to attend and give evidence in the Supreme Court and subsequently they receive notice of the time and place of trial. There is nothing in s. 82 (2), as pointed out in the judgment of the Court of Appeal, which operates to discharge the witnesses from attendance at any subseqent trial of which they may receive notice.

With regard to the reading of the depositions of absent witnesses it is not to be assumed that the court will not be alert to ensure that the provisions of that section shall not be allowed to operate so as to cause injustice to an accused person as a consequence of the use of the nolle prosequi procedure by the Crown. It must also be remembered that all prosecutions in Kenya are in the hands of the Attorney-General. There are no private prosecutions. The provisions of the Code should not be interpreted on the assumption that the wide powers vested in the Attorney-General may be abused by the indefinite postponement of trials by means of the use of the nolle prosequi procedure for which he would be answerable as a minister of the Crown. In any event there is in their lordships' opinion nothing in the difficulties envisaged above sufficient to compel a construction of s. 82 different to that which it would otherwise seem to bear. It should perhaps be noted that a further difficulty was much relied upon on the hearing before the Court of Appeal viz. as to the procedural difficulty of bringing an accused person before the Supreme Court again after he had been released upon entry of a nolle prosequi. This objection was disposed of in the judgment of the Court of Appeal by reference to s. 66 of the Code which had not been cited in argument and was not relied upon in the present appeal.

Their lordships have so far confined their observations to the proper construction of s. 82 of the Code without reference to previous authority or, except for passing references, to the careful and detailed reasoning of the judgment of the Court of Appeal for Eastern Africa delivered by the Vice-President. The interpretation now placed upon the section is, however, in accord with the previous decision of the Court of Appeal for Eastern Africa in the case of *R. v. Noormahomed Kanji* (2) (1937), 4 E.A.C.A. 34 decided on a similar provision in the Criminal Procedure Code of Uganda, and of the West African Court of Appeal in the case of *Sey v. R.* (3) (1950), 13 W.A.C.A. 128 upon the corresponding provisions of the Criminal Procedure Code of the Gold Coast as it then was. In the present case the Court of Appeal for Eastern Africa have followed their previous judgment in the case of *Noormahomed Kanji* (2) for substantially the reasons which their lordships have endeavoured to express.

It is necessary, however, to deal with a further and independent submission of counsel for the appellant to the effect that whatever be the proper construction of s. 82 there were in the present case two separate informations in existence at the same time for the same offence against the same person which he contended was a situation which the law would not recognise as legally possible. He agreed that there could be two or more separate informations for different offences based on the same facts in existence at the same time and that a nolle prosequi entered in respect of one such information would not preclude a trial or trials on the others but he submitted that there could not be in existence at the same time two informations against the same man for the same offence on the same facts.

There is nothing in the Criminal Procedure Code which expressly prohibits or authorises such a course, but s. 275 provides for pleas of autrefois acquit and convict and no such plea as autrefois arraign is recognised. Furthermore there is no limit to the number of informations which the Attorney-General may sign.

It was, however, argued that the situation was so alien to the practice at common law that it must be regarded as inherently bad in the absence of express statutory authorisation. The researchers of counsel for the Crown, however, reveal that so far from being inherently bad there is ancient authority to the contrary effect though the court will not allow an accused to be tried upon both indictments. In the case of *R. v. John Swan and Elizabeth Jefferys* (4), [1751] Fost. 104 the prisoners were indicted for murder. They pleaded not guilty at the Chelmsford summar assizes and their trial was postponed to the next assizes. In the meantime the Attorney-General preferred another bill against them charging Swan with petty treason and Jefferys with murder and at the next assize a true bill was found and the prisoners arraigned upon it. The prisoners pleaded in abatement ore tenus that another indictment was depending for the same offence and pleaded over to the treason and felony. Counsel for the prisoners contended they should not have been arraigned on the new bill pending the former indictment on which issue had been joined. They asked that the trial on the first indictment should proceed before the prisoners were called upon to plead to the second. The court (Mr. Justice Wright with whom Mr. Justice Foster was sitting at the request of the former) was of opinion that the charge in the bill last found must be answered notwithstanding the pendency of the former, for autrefois arraign was no plea in the case, but that the court must take care that the prisoners be not exposed to the inconvenience of undergoing two trials for one and the same fact. The court proposed that the first indictment should be quashed by consent to which counsel agreed and the trial on the second indictment proceeded.

In *R. v. Stratton and Others* (5) (1779), 1 Doug. 239 the Solicitor General in support of a motion to quash an information filed ex officio by the Attorney-General to which the defendants had pleaded in order that another which stated the offence more particularly might be filed stated that the defendants could suffer no injury by quashing the indictment because the Crown might go to trial and judgment on the new one notwithstanding the pendency of the other; for that on indictments or informations for crimes the pendency of another prosecution for the same offence cannot be pleaded as it might to informations for penalties. Lord Mansfield observed that if it was proper to stop the information he did not see why the Attorney-General might not do it by entering a nolle prosequi without the interference of the court. Mr. Justice Bullen said that what the Solicitor General had stated viz. that the pendency of the first information would be no plea to the second was decisive against the motion. The court accordingly refused to quash the information. In *R. v. Dunn* (6) (1843), 1 C. & K. 730 a true bill for perjury was found by the grand jury against the defendant at the Durham spring assizes in 1843 and the case remitted to the next summer assizes. Before the summer assizes it was discovered that there were defects in the indictment and accordingly a fresh bill was prepared and found by the grand jury in July, 1843. Counsel for the prisoner submitted he was entitled to be tried on the first indictment before the second. Mr. Justice Wightman held that the defendant was entitled to have the first indictment disposed of before he could be tried on the second. Mr. Archbold for the Crown then proposed to enter a nolle prosequi on the first indictment, but Mr. Justice Wightman held that this could only be done with the authority of the Attorney-General. Mr. Archbold then moved to quash the first indictment upon the ground of defects apparent on its face, which application was granted upon terms as to costs.

R. v. Mitchell (7), 3 Cox C.C. 93 was a decision of the Court of the Queen's Bench in Ireland in 1848. At p. 118 of the report C.J. Blackburne posed the question – Is the plea of an indictment pending a bar to this information for the same matter? And proceeded as follows –

> "In support of the affirmative, that it is, there is neither precedent, the authority of any case, the dictum of any judge, or even the opinion of any text writer: but on the other hand there are authorities that such a plea is utterly invalid".

He went on to examine the authorities, some of which have been referred to above and to quote from Hale's Pleas of the Crown (Vol. 2), 221 and 222 and Ch. 34 of Hawkins' on Pleas in Abatement. At p. 119 he said,

> "I have only further to add on this part of the case that even if the plea of a former prosecution depending could be pleaded, the entering of the nolle prosequi would be an answer to it, and this appears to have been plainly decided by the *R. v. Stratton* (5)."

In Roscoe's Criminal Evidence (16th Edn.) at p. 233 it is stated

> "where there are two indictments (sic) for the same act (e.g. by coronor's inquisition and the justices) defendant ought to be tried on both at once."

In the light of the authorities cited above the statement by Mr. Justice Crompton in *R. v. Allen* (8) (1862), 1 B. & S. 850 at p. 856 to the effect that there cannot be two prosecutions against a man for the same offence at the same time cannot have been intended to mean that there cannot be two indictments in existence for the same offence against the same person on the same facts. Their lordships are therefore satisfied that a second indictment or information is not inherently bad by reason of the pendency of an earlier one for the same offence against the same person on the same facts.

In the present case whether or not there were at any moment of time two such informations in existence depends upon the proper construction of s. 250 and s. 255 of the Penal Code. Section 255 provides that the indictment

> "when so signed shall be as valid and effectual in all respects as an indictment in England which has been signed by the proper officer of the court in accordance with the provisions of the Administration of Justice (Miscellaneous Provisions) Act, 1933."

Is the word "when" used temporarily or is it equivalent to "if" with the result that the information takes effect on being filed in accordance with s. 250? Counsel for the appellant contended that it took effect at the moment of signature and this was the view of the Court of Appeal. On the other hand counsel for the Crown before the Board submitted that on a proper construction of the two sections read together the word "when" should not be given a temporal meaning.

Their lordships' decision in the present case does not depend upon the preference of one interpretation to the other as in their view on the proper construction of s. 82 of the Criminal Procedure Code the only proceedings which were discontinued as a result of the entering of the nolle prosequi were the proceedings under the information in respect of which it was entered and that if the second information took effect from the date of signature it was not rendered invalid by the existence at that moment of the former information. If on the other hand the second information only took effect when filed it was valid from that moment and unaffected by the entry of the nolle prosequi in respect of the first information. This being the position their lordships do

not consider it necessary in this case to determine whether under s. 250 and s. 255 an information signed by the Attorney-General becomes valid and effectual on signature before being filed or on filing after signature.

For the reasons set out above their lordships have humbly advised Her Majesty that the appeal should be dismissed.

Appeal dismissed.

For the appellant:
Solicitors: Merriman, White & Co., London
F.H. Lawton, Q.C. and H. Cassel (both of the English Bar)

For the respondent:
Charles Russell & Co., London
L.G. Searman Q.C., J.G. Le Quesne (both of the English Bar) and *K.C. Brookes* (Crown Counsel, Kenya)

Labhshanker Harjiwan Bhatt v R
[1960] 1 EA 654 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	17 September 1960
Case Number:	815/1960
Before:	MacDuff and Pelly Murphy JJ
Sourced by:	LawAfrica

[1] Criminal law – Charge – Duplicity – Averment of possession of articles for several distinct purposes in the alternative – Whether charge bad – Penal Code, s. 177 (1) (*a*) (*K*.).

Editor's Summary

The charge against the appellant of which he was convicted alleged that the appellant "for the purpose of, or by way of trade, or for the purpose of distribution or public exhibition had in your possession thirty seven photographs of an obscene nature which would tend to corrupt the morals of any person into whose hands these publications are likely to fall". The main ground of appeal was that the charge was bad for duplicity in that the offence created by s. 177 (1) (*a*) of the Penal Code was not made out by proof of mere possession but it was necessary also to allege and prove that the possession was for one or other of the purposes set out therein and accordingly the charge must specify which of the unlawful purposes the appellant was alleged to have had in contemplation.

Held – the particular purpose for which the appellant had the photographs in his possession should have

been averred in the charge and the averment of several purposes in the alternative made the charge bad in law and the trial a nullity.

Appeal allowed. Conviction quashed and sentence set aside.

Case referred to:

(1) *R. v. Surrey Justices ex parte Witherick*, [1932] 1 K.B. 450.

Judgment

Macduff J, read the following judgment of the court: The appellant was convicted of the offence of traffic in obscene publications contrary to s. 177 (1) (*a*) of the Penal Code. The particulars of offence as set forth in the charge were:

> "Labhshanker Harjivan Bhatt on the 5th day of August, 1960 at Nairobi, in the Nairobi Extra Provincial District for the purpose of, or

> by way of trade, or for the purpose of distribution or public exhibition had in your possession thirty seven photographs of an obscene nature which would tend to corrupt the morals of any person into whose hands these publications are likely to fall."

The first ground of appeal argued on behalf of the appellant was that the charge as laid was bad for duplicity in that the offence created by s. 177 (1) (*a*) was not that of mere possession, that it was necessary to allege and prove that the possession was for one or other of the purposes set out therein and that the charge must specify which of the unlawful purposes the appellant was alleged to have had in contemplation.

In *R. v. Surrey Justices ex parte Witherick* (1), [1932] 1 K.B. 450 at p. 452, Avory, J., said:

> "It is not necessary to give illustrations of how a man may be driving with due care and attention, so far as his own safety is concerned, and yet driving without reasonable consideration for other persons, but, if a person may do one without the other, it follows as a matter of law that an information which charges him in the alternative is bad. It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with the precision with what he is charged and of what he is convicted and may be prevented on a furture occasion from pleading autrefois convict."

No authorities were cited to us by counsel, but, so far as we are aware, that statement of the law has never been doubted.

In the instant case we think that the particular purpose for which the appellant had the photographs in his possession should have been averred in the charge and that the averment of several purposes in the alternative make the charge bad in law and the trial a nullity. For this reason the conviction must be quashed and the sentence set aside.

We would add, moreover, that the conviction could not have been allowed to stand on the second ground urged on behalf of the appellant, namely, that the plea was not an unequivocal plea of guilty. The appellant's plea was not an admission of the purpose for which he had the photographs in his possession which is an essential ingredient of the offence.

Appeal allowed.

Appeal allowed.

Conviction quashed and sentence set aside.

For the appellant:
M. J. E. Morgan, Nairobi

For the respondent:
The Attorney-General, Kenya
F. de F. Stratton (Crown Counsel)

Re an Application by Ratanshaw Bejonji Sutaria
[1960] 1 EA 656 (HCZ)

Division: HM High Court of Zanzibar

Date of judgment:	16 August 1960
Case Number:	2A/1959
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] Costs – Taxation – Party and party costs – Expenses of bringing witnesses from outside jurisdiction – What costs are allowable – Civil Procedure Rules, O. 17, *r.* 9; *O.* 65, *r.* 27 (9) *and Appendix I* (*Z.*) *– Rules of Court,* 1922 *to* 1934, *r.* 73, *r.* 83, *r.* 88 (*Z.*) *– Rules of the Supreme Court, O. LXV, r.* 27.

Editor's Summary

On taxation of a bill of costs an item for writing a letter to the employer at Mombasa of a witness whom it was intended to call to give evidence at Zanzibar was disallowed on the ground that it would permit an advocate to write a letter in lieu of summoning the witness. Another item disallowed was a telephone call by the advocate to a witness telling him to come by air instead of as arranged by sea since otherwise he appeared likely to arrive late for the hearing. Claims by two witnesses from Mombasa for loss of earnings and hotel expenses whilst detained as witnesses at Zanzibar were disallowed on the ground that these were not within Appendix I to the Civil Procedure Rules. On review of taxation

Held –

(i) where the attendance of a witness cannot be secured by a witness summons because he is outside the jurisdiction of the court, it is reasonable to allow the costs of a letter to his employer, requesting permission for him to attend a trial.

(ii) a telephone call made to ensure the arrival within the jurisdiction of a witness in time for a trial may be necessarily incurred, and in the instant case should have been allowed.

(iii) where a witness is outside the jurisdiction of the court there is no process which can compel his attendance against his will, and it may, therefore, be necessary to pay such a witness more than the sums allowed by Appendix I to induce him to attend the hearing, and on taxation of a party and party bill of costs, the taxing officer should exercise his discretion by considering whether any extra payment made to such a witness was necessary and proper for the attainment of justice and the proper conduct of the case; if the extra payments appear to be luxuries they can be disallowed or a lesser sum allowed.

Order remitting taxation to taxing officer for further consideration.

Judgment

Horsfall Ag CJ: Mr. Talati in answering an observation from the bench that his application for review of taxation referred to mainly minor items in value compared to the total amount which the taxing officer had taxed off his bill of costs said that he was mainly interested in getting established matters of principle.

So far as this review is concerned the principles which should guide a taxing officer appear to be contained in r. 74, r. 83 and r. 88 referring in particular to r. 88 (8), (14) and (16) of the Rules of Court

1922 to 1934. I think that the taxing officer properly stated the general nature of his duties when he said:

> "A party will only be allowed on taxation such costs as are requisite and necessary for carrying on the litigation as distinguished from costs which are in the nature of luxuries to carry it on more conveniently".

This is not of course meant to be an accurate précis of r. 88 (14) but it does I think describe in homely language the spirit behind the principles governing party and party taxations. As I am dealing with broad principles I will quote Halsbury's Laws of England (2nd Edn.), Vol. 31, art. 239:

> "The taxing master has a wide discretion upon a taxation and when he bona fide exercises his discretion and does not err in the principle of allowance, the court will not as a rule interfere on appeal, particularly on the question of quantum of allowance."

Items 29 and 30 of the respondents' bill of costs. – These referred to the writing of a letter to the witnesses' employer in Mombasa and the perusal of the letter in reply. A sum of Shs. 12/- was involved. The taxing officer in giving his decision stated:

> "I do not consider that letters addressed to the employers of the clint's witness requesting permission for the employees to attend the court to give evidence can be allowed on a party and party bill. If this were allowed it would mean that an advocate may address a letter in lieu of a summons to a witness and claim costs of such letter."

I agree with this reasoning when the employers of the client's witness are within the jurisdiction. Here they were outside the jurisdiction in Mombasa. A witness summons issued by this court would have been ineffective to secure the attendance of the witness if he had refused to attend voluntarily. It is provided by O. XVII, r. 9, of the Civil Procedure Rules:

> "No one shall be ordered to attend in person to give evidence unless at the time of service he is within Zanzibar."

An alternative would have been to take his evidence on commission, but I consider that the preliminary step taken of writing to his employer requesting permission for the attendance of the employee was the more reasonable step with a view to saving expense and increasing the effectiveness of his evidence. I consider that grounds exist here for me to review the discretion of taxing officer. I allow these items on review.

Item 7 of the disbursements. – The taxing officer recorded:

> "A telephone call be an advocate to his witness is in my opinion not chargeable in a party and party bill."

It appears that this witness was coming by sea and would arrive a day late for the court hearing. The phone call was made to tell him to come by air and so arrive in time for the hearing. The value of this item is Shs. 7/50. I again consider that grounds exist for me to review the discretion of the taxing officer. I allow this item as being an expense necessarily incurred in order to avoid his arriving too late to give evidence.

Items 3 (iv) and (v) and 4 (iv) and (v) of the disbursements. – These refer to two witnesses from Mombasa. The taxing officer disallowed a claim for (1) their loss of earnings and (2) for their hotel expenses while they were detained as witnesses in Zanzibar. He stated:

> "Under the circumstances I propose to follow strictly the terms of G.N. 76/57 and allow only the reasonable travelling expenses and allowance on the scale in Appendix I thereof."

He also stated that:

> "I do not consider that the wording of this notice gives me any discretion to allow separately hotel or subsistence expenses in addition to the sums allowed in the scale. Nor do the Rules provide for payment of

> compensation to witnesses for loss of business or employment by having to attend court."

A sum of Shs. 250/- is involved.

Mr. Talati's argument is that the "Allowances to Witnesses" Scale has been removed from Schedule II of the Rules of Court and inserted as Appendix I to the Civil Procedure Rules (see G.N. 90 and 91 of 1953). It has been taken out of the body of the rules governing taxation of costs and now refers only to the scale of remunerating witnesses within the jurisdiction who are amenable to obey the process of the court. It follows, says Mr. Talati, that Appendix I is not applicable when it comes to a taxation of a party and party bill of costs relating to the expenses of summoning witnesses from outside the jurisdiction. The taxing officer should not have followed it.

Alternatively, if the Appendix 1 is applicable then the taxing officer under the rules relating to taxation contained in the Rules of Court has a discretion which enables him in a proper case to depart from it.

Mr. Talati has referred me to the English provisions relating to costs which appear in O. LXV of the Rules of Supreme Court. These provisions seem to approximate fairly closely with the Zanzibar Rules of Court, except that the English Scale of Allowances to Witnesses appear in Appendix II. That is to say in under the rules relating to taxation of costs. The note on allowances to witnesses contained at p. 2529 of the Annual Practice 1960 is interesting as showing the wide discretion given to the English taxing master.

> "No table of allowances to witnesses either in the Chancery Division or Queen's Bench Division has been issued since the table (reprinted below) which is taken from 'Directions to Masters' of Hilary Term, 1853, issued under the Common Law Procedure Act, 1852. This table is still to some extent a guide to allowances, although it is in consequence of the 8th rule of special allowances of 1875 (now O. LXV, r. 27/9) no longer binding on a taxing master. In practice a more liberal scale of allowances is usually adopted in both divisions."

Order LXV, r. 27 (9) is identical in wording with Zanzibar Rule of Court 88 (8):

> "As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence, and the attendance of witnesses, are to be allowed."

In my opinion the effect of the Zanzibar law is that the discretion given to a taxing officer is to be exercised as follows: Where the witnesses have been summoned from within the jurisdiction the taxing officer should not allow on a party and party taxation any item in a bill of costs which is not provided for in G.N. 76/57. A witness summoned from within the jurisdiction must attend to give evidence if he has been provided with his travelling expenses and allowances prescribed and if he fails to attend process exists to compel his attendance. If a party chooses to pay his witness something extra to more fully reward or compensate him for giving evidence on his behalf this is a luxury which was not necessary to secure the witness's attendance and it should not be allowed as an expense recoverable from the other party on a party and party taxation. It is noted that the Scale of Allowances to Witnesses originally contained as Schedule III in the Rules of Court was changed by G.N. 91/53 and again by G.N. 77/57. When the witness has been summoned from outside the jurisdiction there is no process which can compel his attendance against his will. He can only be brought within the jurisdiction to give evidence if he voluntarily consents to come. Therefore it may be necessary for a party to pay such a witness larger sums than are contained in Appendix I

in order to make it worth his while to come within the jurisdiction. On a party and party taxation it may well be that the taxing officer in exercise of the discretion given him by r. 88 (8) and (14) will consider such extra payments to have been necessary and proper for the attainment of justice especially where it was necessary for the proper conduct of the case that the witnesses be heard in court. If, of course, he considers those extra payments luxuries he will not allow these or allow a lesser sum than the sum claimed according as he thinks proper.

I do not think that the taxing officer is entirely accurate concerning the comparison he makes between calling the overseas witnesses' person and taking their evidence on commission. He is right in considering that their evidence was necessary. If their evidence had been taken on commission in Mombasa I consider that it would have been necessary to have engaged counsel there to attend the proceedings before the commissioner. They were witnesses on an important and disputed issue in the trial. I also think that the costs of such a commission must have been considerably higher than the costs of the commission relating to Zanzibar Civil Case No. 132/59 which I am informed was a case in the court of the resident magistrate, Zanzibar.

In the result it follows that I consider that the taxing officer had a discretion not to strictly follow the terms of G.N. 76/57. I send this taxation back to the taxing officer to reconsider whether in view of what has been said in this ruling he will allow any or how much of the items 3 (iv), (v) and 4 (iv) and (v) of the disbursements. Costs of this application to applicant respondent.

Order remitting taxation to taxing officer for further consideration.

For the applicant:
H.D. Nathoo, Zanzibar

For the respondent:
Wiggins & Stephens, Zanzibar
K. D. Talati

Uganda Credit and Savings Bank v Yosamu Muzei Kirya and others
[1960] 1 EA 660 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	29 September 1960
Case Number:	101/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Practice – Particulars – Action for balance of account – Particulars sought of two items in account – Order for particulars in proper form within specified time – Failure to comply with order as items

found incorrect – Application for amendment of plaint – Whether failure to comply with order or to show proposed amendments in red ink justifies dismissal of suit – Civil Procedure Rules, O. 6, *r.* 18 (*U.*).

Editor's Summary

The plaintiffs, who had failed to comply with an order to give within 21 days, and in proper form, certain particulars of two items of their claim, applied by summons for leave to amend their plaint as they had discovered these two items were incorrect. The particulars ordered by the court were given in the affidavit supporting the application, with an explanation of the reasons for the course taken. The defendants applied for dismissal of the suit for non-compliance by the plaintiffs with the order for particulars, and also raised objections to the application for amendment of the plaint on the grounds inter alia that the particulars contained in the affidavit were not in proper form, and that an amended plaint with the amendments shown in red ink had not been filed.

Held –

(i) the argument, that the particulars order by the court should be supplied before amendment of the plaint could be considered, did not allow for the difficulties in which the plaintiffs found themselves when they discovered the mistakes which had been made in the two items particulars of which had been ordered.

(ii) since application to amend the plaint had been made when the errors came to light and, in effect, the particulars had since been given as ordered, in that they were contained in the affidavit supporting the application, the plaintiffs' application for leave to amend should be granted; although the practice of showing proposed amendments to a pleading in red ink is desirable, failure to do so is not fatal to an application for amendment.

Order that amendment of plaint be allowed. Application for dismissal of suit dismissed.

Cases referred to in judgment:

(1) *Basheer Ahmed s/o Mubarakali v. Najam-ud-Din* (1954), 27 K.L.R. 56.

(2) *Reiss v. Woolf*, [1952] 2 All E.R. 3.

(3) *Davy v. Bentinck*, [1893] 1 Q.B. 185.

(4) *The Official Receiver and Liquidator of Sejpal Ltd. v. Narandas Nanji Chandrani*, Uganda High Court Civil Case No. 167 of 1959 (Jinja Registry) (unreported).

Judgment

Sheridan J: I have before me (1) an application by the plaintiffs dated September 15, 1960, under the Civil Procedure Rules, O. 6, r. 18, to amend the plaint

> "by substituting the annexure 'BAK. 3' for the annexure 'BAK. 2' to the plaint and by substituting the sum of Shs. 25,732/90 for the sum of Shs. 22,607/90 in para. 4 and the prayer of the plaint.";

(2) a notice of motion by the defendants dated September 19, 1960,

> "for an order that this action be dismissed with costs to be taxed and paid by the plaintiffs to the defendants, the plaintiffs having failed to comply with the order herein made by the Honourable Mr. Justice Bennett, dated the 25th day of August, 1960, for particulars to be supplied within 21 days by the plaintiffs to the defendants about the sum of Shs. 1,540/05 mentioned in the annexure 'BAK. 2' of the plaint and that the costs of and occasioned by this application be the defendants' in any event."

The matter arose in this way. By a plaint filed on February 10, 1960, the plaintiffs sued the defendants, inter alia, for Shs. 22,607/90 representing the balance of a loan of Shs. 50,000/- which they had advanced to the defendants. The particulars are set out in annexure BAK. 2 to the plaint and they include (1) balance of instalment due on 1.10.56 – Shs. 1,540/05; (2) total of interest Shs. 2,317/85. By a written statement of defence dated April 19, 1960, the defendants denied liability and in the alternative they disputed the amount claimed.

By letter dated April 5, 1960, the defendants' advocate wrote to the plaintiffs' advocates requesting particulars of the two sums mentioned above. No reply was received and on April 16, a further letter was written. It also refers to an abortive effort by the defendants to settle the claim out of court. On May 7, the defendants took out a Chamber Summons applying for an order for those particulars to be delivered by the plaintiffs. On May 19, I made a consent order for these particulars to be delivered within 14 days with costs in the cause. This was not done and on July 20, the defendants took out a fresh summons asking for an order that the plaintiffs should comply with the previous order within 14 days and that in default the suit should be dismissed. On August 28, Mr. Justice Bennett ordered the plaintiffs to supply particulars as to how the sum of Shs. 1,540/05 was arrived at. The particulars were to be filed in proper form and the costs of the application were to be the defendants' in any event.

Mr. Hunt, for the plaintiffs, concedes that this order has not been complied with and the reasons for this are set out in the affidavit of George Senfuna Bwete, a training grade accountant employed by the plaintiffs, in support of the application for leave to amend the plaint. The substance of this affidavit is that owing to clerical errors the two items of Shs. 1,540/05 and Shs. 2,318/85 in annexure BAK. 2 are incorrect and that due to an incorrect date in the plaintiffs' ledger one instalment of Shs. 3,125/- has been omitted in error. According to the annexure BAK. 3 to the affidavit for the item "balance of instalment due on 1.10.56 – Shs. 1,540/05" there should be substituted the item "balance of instalment due on 1.4.56 – Shs. 722/10. There was a similar miscalculation over the amount of interest due, and the omission of one instalment meant that the correct amount due at October 1, 1959, was Shs. 25,732/90 and not Shs. 22,607/90.

Mr. Hunt's argument is that owing to these clerical errors it was impossible to give particulars of the Shs. 1,540/05 which was a wrong figure and that the defendants have not been embarrassed as they have been able to file their written statement of defence without them. He points out that as soon as the errors came to light the present application to amend the plaint was made, and that if incorrect or impossible particulars had been given before that it would have been impossible to apply to amend them subsequently. In effect the particulars have now been given as ordered in that they are contained in the affidavit. In support of his application he relies on passages in Chitaley &

Rao's Code of Civil Procedure (2nd Edn.) Vol. 2, dealing with the corresponding Indian rule to the effect that the court should allow all amendments and all errors to be corrected, for the purpose of determining the real question in controversy between the parties provided that this can be done without causing injustice to the other side and which can be compensated by the award of costs. It is not a valid objection that the granting of the proposed amendment will prolong the proceedings.

Mr. Bhatt, for the defendants, raises several objections to the application (1) the particulars as now set out in the affidavit cannot be said to comply with the order of mr. Justice Bennett as they are not in the proper form. They should be delivered as a formal document in the same way as a pleading: the Annual Practice 1960, Vol. 1, 460, Chitty Kings Bench Forms (17th Edn.) 238. I agree that the particulars in the affidavit cannot be considered as a compliance with the order of Mr. Justice Bennett that they should be in the proper form; (2) the plaintiffs have failed to file the proposed amended plaint showing the amendments in red ink. This is mandatory in the case of an amended writ under R.S.C. O. 28, r. 1, and the practice is general and desirable in order to assist the court in the case of an amended plaint in Uganda, but failure to do so is not fatal to the application. As Mr. Hunt points out, the summons itself formulates the amendments asked for. Mr. Bhatt's other objections can be considered in conjunction with the originating summons. He submits that when the plaintiffs failed to comply with the order of Mr. Justice Bennett he had no option but to ask for an order to dismiss the suit. He further submits that the particulars should be supplied before the amendment of the plaint is considered, but this submission does not allow for the difficulties in which the plaintiffs found themselves owing to the clerical errors of their accountant. He cites a number of authorities in support of his application. In *Basheer Ahmed s/o Mubarakali v. Najam-ud-Din* (1) (1954), 27 K.L.R. 56, particulars were filed a day out of time consequent on an order which had specified that in default of compliance the suit should be dismissed. It was held that the order involved an anticipatory dismissal of the suit for failure of performance and that it automatically died after the time specified in the order had lapsed without compliance. It would be otherwise in the case of a partial compliance: *Reiss v. Woolf* (2), [1952] 2 All E.R. 3. In *Davy v. Bentinck* (3), [1893] 1 Q.B. 185 where R.S.C. O. 19, r. 7, which corresponds to our O. 6, r. 3, was under consideration it was held that it might be a term of an order for further and better particulars that the action should be dismissed unless the particulars were delivered within a certain time. An important distinction between those cases and the instant case is that although the defendants applied for a peremptory order Mr. Justice Bennett did not grant it. The court has a discretion in the matter and I could make such an order on the present application if I thought it would serve any useful purpose. In *Bentinck's* case (3), the plaintiff had been asked for particulars of services rendered and all he had done was to repeat the statement that the services had been rendered. Here the affidavit of the plaintiffs' accountant does show that when the order was made they did take steps to put their house in order. Finally, Mr. Bhatt relies on *The Official Receiver and Liquidator of Sejpal Ltd. v. Narandas Nanji Chandrani* (4), Uganda High Court Civil Case No. 167 of 1959 (Jinja Registry) (unreported). There the defendant was ordered to give particulars stating specifically and by way of set-off or counterclaim what goods he had sold and delivered and what monies he had paid to Sejpal Ltd. The defendant did not comply with this order and his advocate's only explanation for this omission was that he misunderstood it. In these circumstances it is hardly surprising that a paragraph of the written statement of defence was struck out. That case is of no assistance to me.

In these circumstances and for the reasons which I have endeavoured to state I grant the plaintiffs' application to amend the plaint as prayed. Amended

plaint to be filed within 15 days. Amended written statement of defence, if any, to be filed within 15 days thereafter. I dismiss the defendants' application for an order dismissing the suit, but they are entitled to the costs of the notice of motion and all costs of and occasioned by the amendment.

Order that amendment of plaint be allowed.

Application for dismissal of suit dismissed.

For the plaintiff:
Wilkinson & Hunt, Kampala
R. E. Hunt

For the defendants:
J. H. Bhatt, Jinja

Ageni s/o George v R
[1960] 1 EA 663 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 September 1960
Case Number:	126/1960
Before:	Sir Kenneth O'Connor P, Gould Ag VP, Rudd Ag CJ, Crawshaw JA and MacDuff J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Edmonds, J.

[1] Criminal law – Sentence – Committal to superior court for sentence – Conviction by magistrate – Sentence passed by superior court – Whether appeal against conviction and sentence lies to Court of Appeal – Penal Code, s. 291 (*K.*) *– Criminal Procedure Code, s.* 217 (2) (*b*), *s.* 217 (*A*), *s.* 347 *and s.* 378 (*K.*) *– Criminal Justice Act* 1948, *s.* 29 *– Magistrate's Courts Act* 1953, 3. 29.

Editor's Summary

The appellant, an habitual criminal, having been convicted by a magistrate of robbery with violence contrary to s. 291 of the Penal Code was committed to the Supreme Court for sentence pursuant to s. 217A of the Criminal Procedure Code. The Supreme Court imposed a sentence of six years imprisonment to be followed by five years police supervision and informed the appellant of his right to appeal against conviction and sentence. The appellant filed an appeal in the Court of Appeal for Eastern Africa against both conviction and sentence and at the hearing Crown Counsel submitted that the court could only deal with the appeal against sentence.

Held – where a magistrate convicts but commits the accused to the Supreme Court for sentence, any appeal against conviction lies to the Supreme Court and against sentence to the Court of Appeal. *Ndirango s/o Njuma v. R.* (1953), 20 E.A.C.A. 190 and *Anyuma v. R.* (1953), 20 E.A.C.A. 218 disapproved.

Per Curiam: "In future, appeals against sentence under s. 217A will not be heard by the Court of Appeal until the appeal against conviction has been determined by the Supreme Court or the time for appealing has expired without an appeal having been filed or until the accused has stated that he does not intend to appeal against conviction."

Appeal against conviction struck out. Appeal against sentence adjourned pending disposal of appeal against conviction.

Cases referred to in judgment:

(1) *Ndirango s/o Njuma v. R.* (1953), 20 E.A.C.A. 190.

(2) *Public Trustee v. Inland Revenue Commissioners*, [1959] W.L.R. 203; [1960] 1 All E.R. 1.

(3) *Cowley* (*Earl*) *v. Inland Revenue Commissioners*, [1899] A.C. 198.

(4) *R. v. Dennis Browes*, 33 Cr. App. R. 164.

(5) *R. v. Faithful*, [1950] 2 All E.R. 1251; 34 Cr. App. R. 220.

(6) *R. v. Grant*, [1951] 1 K.B. 500; [1951] 1 All E.R. 28.

(7) *R. v. Warren*, [1954] 1 All E.R. 597.

(8)*Anyuma v. R.* (1953), 20 E.A.C.A. 218.

(9) *Trimble v. Hill* (1879), 5 App. Cas. 342.

(10) *Nadarajan Chettiar v. Walauma Mahatmee*, [1950] A.C. 481.

(11) *Cooray v. R.*, [1933] A.C. 407.

(12) *Morelle Ltd. v. Wakeling*, [1955] 1 All E.R. 708.

Judgment

The following judgment prepared by **Sir Kenneth O**'C**onnor P,** was read by direction of the court.

The appellant was jointly charged with one Emanuel s/o Gerald and convicted of robbery with violence contrary to s. 291 of the Penal Code of Kenya. He and his co-accused were convicted by a Mombasa resident magistrate on May 7, 1960. Emanuel being a young man and a first offender was sentenced by the resident magistrate to two years' imprisonment. The appellant, an habitual criminal with eighteen previous convictions, was committed to the Supreme Court for sentence under the provisions of s. 217A of the Kenya Criminal Procedure Code. The Supreme Court imposed a sentence of six years' imprisonment to be followed by five years' police supervision and informed the appellant of his right to appeal against conviction and sentence.

The appellant filed an appeal to this court against conviction as well as against sentence. On the appeal coming on for hearing, learned Crown Counsel submitted that this court had no power to entertain the appeal against conviction which, he contended, lay to the Supreme Court, this court's powers being confined to dealing with the appeal against sentence.

After hearing Mr. Brookes it became apparent that the court was being asked not to follow two previous decisions of this court. Accordingly a rehearing was arranged before a bench of five judges.

The relevant provisions of the Kenya Criminal Procedure Code are:

> "Appeal to Supreme Court.
>
> "347 (1) Save as hereinafter provided, and except in a case to which s. 17 of this code applies, any person convicted on a trial held by any subordinate court may appeal to the Supreme Court, and shall be so informed by the magistrate at the time when sentence is passed.

(2) An appeal to the Supreme Court may be on a matter of fact as well as on a matter of law.

(Section 17 of the Code is not material in this case.)

"Committal by Subordinate Court to Supreme Court for Sentence.

"217A (1) Where any person, being not less than eighteen years of age, is tried by a subordinate court of the first or second class for an offence which is punishable either by that court or by the Supreme Court and such person is convicted by the subordinate court of that offence, then, if, on obtaining information as to his character and antecedents, the subordinate

court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than the subordinate court has power to inflict, the subordinate court may, in lieu of dealing with him in any manner in which the subordinate court has power to deal with him, commit him in custody to the Supreme Court for sentence in accordance with the following provisions of this section.

(2) Where the offender is so committed for sentence as aforesaid the following provisions shall have effect, that is to say –

(*a*) the Supreme Court shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with if he had been convicted by the Supreme Court; and

(*b*) if the Supreme Court passes a sentence which the subordinate court would not have had power to pass, the offender may appeal against the sentence to the Court of Appeal for Eastern Africa as if he had been convicted by the Supreme Court, but, save as aforesaid, the offender shall have the same right of appeal in all respects as if he had been convicted and sentenced by the subordinate court.

(Ordinance No. 39 of 1951)".

Mr. Brookes stressed the words in s. 217A (2) (*b*)

"may appeal against the sentence to the Court of Appeal for Eastern Africa"

and submitted that, upon its ordinary and grammatical meaning, the sub-section confined appeals to the Court of Appeal to appeals against sentence. He contended that this construction was unaffected by the words "as if he had been convicted by the Supreme Court", and was strengthened by the words "but save as aforesaid" (which, he contended, meant save for the right of appeal to the Court of Appeal against sentence)

"the offender shall have the same right of appeal in all respects as if he had been convicted and sentenced by the subordinate court".

The offender's ordinary right of appeal from a conviction and sentence by a subordinate court would be a right of appeal to the Supreme Court under s. 347 (supra) and this was preserved to him.

Paragraph (*b*) is not very happily worded; but, had the matter been res integra, we should have been disposed to agree with Mr. Brookes that the ordinary and grammatical meaning of the words was that for which he contended. This court has, however, in a previous case, expressed an opinion contrary to that advanced by Mr. Brookes. In *Ndirango s/o Njuma v. R.* (1) (1953), 20 E.A.C.A. 190 the appellant had been convicted by a magistrate and committed to the Supreme Court for sentence. The Supreme Court imposed a sentence of imprisonment in excess of that which the subordinate court could have imposed. It was held that the phrase "as if he had been convicted by the Supreme Court" used in sub-s. (2) of s. 217A of the Criminal Procedure Code must be interpreted in the light of s. 378 thereof which confers on a person so convicted a right of appeal to the Court of Appeal against both conviction and sentence. In that case the learned counsel who appeared for the Crown conceded that the Court of Appeal had power to deal with an appeal against conviction as well as with an appeal against sentence.

Section 378 of the Criminal Procedure Code of Kenya, as it stood in 1952 when *Ndirango's* case (1) was decided, conferred upon a person convicted on a trial held by the Supreme Court a right of appeal to this court against conviction

(on certain grounds) and, with the leave of this court, against sentence. Section 378 has since been replaced; but the new section is similar to the extent that it confers upon any person convicted on a trial held by the Supreme Court and sentenced to (inter alia) imprisonment for more than twelve months, a right of appeal to this court against the conviction (on certain grounds) and, with the leave of this court, against sentence.

In *Ndirango's* case (1), this court, commenting on section 217A (2) (*b*), said, at p. 191:

> "At first sight the use of the expression 'the offender may appeal against the sentence to the Court of Appeal for Eastern Africa' seems to limit the right; but we think, and counsel who has appeared for the Crown on this appeal agrees, that that is not so. The offender may appeal to this court 'as if he had been convicted by the Supreme Court', and that phrase must be interpreted in the light of section 378 of the Code which confers on a person so convicted a right of appeal against both conviction and sentence. Any construction by which an appeal against conviction lies to the Supreme Court while the appeal against sentence lies to this court would result in absurdities and should therefore be avoided if the words used will bear a more reasonable meaning. We are satisfied therefore that the construction we favour accords with the intention of the legislature, however imperfectly expressed, and that this appeal is properly brought to this court.
>
> "We do not however propose to hear the appeal on its merits because it is apparent to us that the learned resident magistrate's order committing the appellant to the Supreme Court for sentence was a nullity and the sentences consequent thereon a nullity."

It is plain from the last sentence of the above-quoted passage that the decision in *Ndirango's* case (1), turned upon the finding that the committal order was a nullity and that the passage dealing with the right of appeal conferred by s. 217A was not necessary to the decision of the case. Accordingly, we think that it is not binding upon us and that it is open to us to review it. In *Public Trustee v. Inland Revenue Commissioners* (2), [1959] W.L.R. 203, the House of Lords dissented (on the grounds that it was patently wrong and ignored the provisions of a statute) from a famous dictum in the House of Lords of Lord Macnaghten in *Earl Cowley v. Inland Revenue Commissioners* (3), [1899] A.C. 198; which had been repeatedly followed (although frequently queried) and made the ratio of subsequent decisions for fifty years. With the greatest respect to the learned judges who decided *Ndirango's* case (1), we think that their dictum was patently wrong and was contrary to the plain meaning of the statute. The words "as if he had been convicted by the Supreme Court" are governed by, and do not govern, the preceding words. The test is to ask "What may the offender do 'as if he had been convicted by the Supreme Court'?" The answer, upon the plain wording of para. (*b*) of s. 217A, is that he "may appeal against the sentence of the Court of Appeal." Save for that, he

> "shall have the same right of appeal in all respects as if he had been convicted and sentenced by the subordinate court."

The language and the meaning are plain: except for his right to appeal against the sentences to the Court of Appeal, the offender is to have the same right of appeal as if he had been convicted and sentenced by the subordinate court, that is a right of appeal against conviction to the Supreme Court. With great respect, on this wording, the only provisions of s. 378 which can apply are those regulating an appeal from the Supreme Court to the Court of Appeal against sentence. The provisions of s. 378 relating to appeals from the Supreme Court to the Court of Appeal against conviction are expressly excluded by the

words of s. 217 (2) (*b*) which give the offender the same right of appeal in all respects as if he had been convicted (as in fact he has) by a subordinate court – that is a right of appeal under s. 347 to the Supreme Court. The interpretation adopted in *Ndirango's* case (1) would render nugatory this express provision. With the utmost respect, we think that a construction which renders nugatory an express statutory provision was not permissible.

It was said, however, in *Ndirango's* case (1), that it would lead to absurdities if the appeal against conviction were to go to one tribunal and the appeal against sentence to another. That is, however, what happens under the similar provisions of s. 29 of the Criminal Justice Act, 1948 in England, and, so far as we are aware, no absurdities have resulted. Section 29 of that Act (so far as material) reads:

"Committal for Sentence in Respect of Indictable Offences Tried Summarily.

"29(1) Where, under sub-s. (2) of s. 28 of this Act or s. 24 of the Criminal Justice Act, 1925, a person who is not less than seventeen years of age is tried summarily by a court of summary jurisdiction for an indictable offence, and is convicted by that court of that offence, then if, on obtaining information as to his character and antecedents, the court is of opinion that they are such that greater punishment should be inflicted in respect of the offence than that court has power to inflict, the court may, in lieu of dealing with him in any manner in which the court has power to deal with him, commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section.

....."(2)

"(3) Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say:

.

(*d*) if the appeal committee or court of quarter sessions passes a sentence which the court of summary jurisdiction would not have had power to pass, the offender may appeal against the sentence to the Court of Criminal Appeal as if he had been convicted on indictment; and the provisions of the Criminal Appeal Act, 1907, shall apply accordingly."

(See also s. 29 of the Magistrate's Courts Act, 1952).

Those provisions have been construed on various occasions by the Court of Criminal Appeal in England.

In *R. v. Dennis Browes* (4), 33 Cr. App. R. 164, the Court of Criminal Appeal said, of the appellant at p. 168:

"He has in fact been convicted by the magistrates and sent forward to be dealt with by quarter sessions, and it is important that that should be remembered because once he has been sent forward for sentence to the sessions he can appeal against his sentence to this court. If he was not in the same position as a person convicted on indictment, he would not be able to appeal to this court. Although he has been convicted by the magistrates, he can appeal to this court not against conviction but against sentence.

"The court has no doubt that the intention of the Act is that once a person is sent forward to quarter sessions for sentence he is to be treated for all purposes as though he had been convicted on indictment."

It is plain from the context that "for all purposes" in the last sentence means

"for all purposes relating to sentence". The question under discussion was whether the prisoner could be made to give his name and address to an appointed society, so that they could keep a watch on him, a matter which did not affect conviction.

The report in *R. v. Faithful* (5), 34 Cr. App. R. 220 makes it plain that where an offender was committed by a metropolitan magistrate to the County of London Sessions for sentence, his appeal against sentence was heard by the Appeal Committee of the London Sessions, but his appeal against conviction was heard by quarter sessions. The court laid down a procedure for ensuring that the appeal against sentence was not heard until the appeal against conviction had been determined.

In *R. v. Grant* (6), [1951] 1 K.B. 500 'Lord Goddard, C.J., at p. 503, commenting on s. 29 of the Criminal Justice Act, 1948, said:

> "It is to be noticed that an express provision is put in to enable him to appeal. An appeal from a conviction before magistrates does not come to this court: it goes to quarter sessions; and if a prisoner who has been sent forward for sentence to quarter sessions wishes to dispute his guilt he still has to appeal to quarter sessions."

In *R. v. Warren* (7), 38 Cr. App. R. 44 a prisoner was committed to quarter sessions for sentence under s. 29 of the Criminal Justice Act, 1948. Lord Goddard, C.J., said at p. 48:

> "In our opinion, it is quite clear that once the prisoner comes to this court we cannot inquire into the conviction; we can only look at the sentence which has been passed, and if we find that it is a more severe sentence than the court of summary jurisdiction could have passed, we can consider the sentence under the powers given to us by s. 4 of the Criminal Appeal Act, 1907."

In *Anyuma v. R.* (8) (1953), 20 E.A.C.A. 218 this court apparently followed *Ndirango's* case (1), and, where an appellant had been committed to the Supreme Court for sentence and that court had passed a sentence in excess of the sentence which could have been passed by the subordinate court, entertained an appeal against conviction and decided it on its merits. Again, no argument seems to have been raised to the court to the effect that they had no jurisdiction to adopt this course.

We are of opinion that if the learned judges who decided *Ndirango's* case (1), had had the benefit of counsel's argument upon this issue and had had their attention drawn, as our attention has been drawn, to the English authorities on s. 29 of the Criminal Justice Act, they would have come to a different conclusion.

In our opinion, s. 217A is based upon s. 29 of the Criminal Justice Act, 1948, and is pro tanto an enactment in pari materia with that section. In *Trimble v. Hill* (9) (1879), 5 App. Cas. 342, it was held that where a Colonial Legislature had passed a "like enactment" to an Imperial statute, and the latter has been authoritatively construed by the Court of Appeal in England, Colonial Courts should follow that construction. That was stated to be "a sound rule" by the Judicial Committee in *Nadarajan Chettiar v. Walauwa Mahatmee* (10), [1950] A.C. 481; and in *Cooray v. R.* (11), [1933] A.C. 407 at p. 419 the rule was extended to courts of members of the British Commonwealth of Nations and to a decision in a criminal statute of the Court of Crown Cases reserved. The rule was said to apply with especial force where there had been a series of decisions. It seems that the rule would also apply to a series of decisions on a "like enactment" by the Court of Criminal Appeal in England. In our opinion, the decision that this court had jurisdiction to hear the appeal against conviction reached in *Anyuma's* case (8), was given in ignorance or forgetfulness of a series

of decisions of the Court of Criminal Appeal in England which have been set out above and which this court ought to have followed. That decision may, therefore, be said to have been given per incuriam within the interpretation of that phrase enunciated by the Master of the Rolls in *Morelle Ltd. v. Wakeling* (12), [1955] 1 All E.R. 708 at p. 718. Accordingly we are not bound to follow it.

We hold that we have no jurisdiction to hear the appellant's appeal against conviction and that appeal is struck out. The appellant can apply to the Supreme Court of Kenya for leave to file an appeal out of time. The decision of his appeal against sentence is adjourned to await the result of that application and, if that application is granted, to await the result of his appeal to the Supreme Court. For convenience we have heard the argument on sentence.

In future, appeals against sentence under s. 217A will not be heard by this court until the appeal against conviction has been determined by the Supreme Court or the time for appealing has expired without an appeal having been filed or until the accused has stated that he does not intend to appeal against conviction.

Appeal against conviction struck out. Appeal against sentence adjourned pending disposal of appeal against conviction.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Kenya.
K.C. Brookes (Crown Counsel, Kenya)

I I Dias v R X Souto
[1960] 1 EA 669 (HCZ)

Division:	HM High Court for Zanzibar at Zanzibar
Date of judgment:	22 August 1960
Case Number:	10/1960
Before:	Horsfall J
Sourced by:	LawAfrica

[1] Trade – Covenant in restraint of trade – Grocer – Covenant not to engage in grocery business for five years – Area of restraint coextensive with area of jurisdiction of court – Reasonableness – Severability of area between two islands – Contract Decree (*Cap.* 80), *s.* 27 (Z) *– Indian Contract Act,* 1872.

Editor's Summary

The agreement for sale of a grocer's business at Zanzibar which specialised in merchandise for the

expatriate community contained a clause whereby the vendor was restrained for five years from carrying on a similar business within the Zanzibar protectorate. The price paid by the purchaser was Shs. 184,000/-, whereof Shs. 15,000/- was for goodwill and the balance for fittings and stock-in-trade. In an action by the purchaser counsel for the vendor took the preliminary point that the clause was void, on the grounds that since the area covered by the clause was the entire area of the jurisdiction of the court, the area, in effect, was unlimited and unreasonable; alternatively the area was more than was reasonably necessary for the protection of the purchaser.

Held –

(i) the business was of a specialised kind patronised by most of the expatriate residents of Zanzibar town, and a few residing in Pemba Island, and having regard inter alia to the long experience of the vendor, it would be possible for him by opening a business in Pemba to injure the purchaser in the conduct of the business at Zanzibar; accordingly the clause was valid.

(ii) in any event, since the area comprised the islands of Zanzibar and Pemba, the covenant appeared to be severable and by severance could be limited to Zanzibar alone. (*Ronbar Enterprises Ltd. v. Green*, [1954] 2 All E.R. 266 followed).

Order accordingly.

Cases referred to in judgment:

(1) *Empire Meat Co. Ltd. v. Patrick*, [1939] 2 All E.R. 85.

(2) *Ronbar Enterprises Ltd. v. Green*, [1954] 2 All E.R. 266.

(3) *Attwood v. Lamont*, [1920] 3 K.B. 571.

(4) *Goldsoll v. Goldman*, [1915] 1 Ch. 292.

Judgment

Horsfall J: By consent I am asked to decide the preliminary point:

> "In as much as cl. 9 of the agreement governing the sale of the defendant's business to the plaintiff restrains the defendant from carrying on a similar business within the Zanzibar Protectorate it is void."

Counsel for both parties rested their cases on a proper interpretation of s. 27 of the Contract Decree (Cap. 80) and the first exception. This section is taken verbatim from the Indian Contract Act, 1872. Section 27 and Exception 1 read:

> "Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."
>
> "Exception 1 – One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein: Provided that such limits appear to the court reasonable regard being had to the nature of the business."

Clause 9 of the sale agreement dated 24.8.56 reads:

> "The vendor shall not for five years from the date of assignment of the good-will without the consent in writing of the purchaser carry on or be concerned or interested in the business similar to that hereby agreed to be sold within the Zanzibar Protectorate."

I will first state the Zanzibar law as I intend to apply it. The effect of s. 27 is to make all contracts in restraint of trade void unless they fall within the exceptions. Only Exception 1 is relevant for the purpose of this case. (See Dutt on the Indian Contract Act at p. 216. The book was published in 1936 by Eastern Law House, Calcutta.) In this case the burden is on the plaintiff to prove that cl. 9 falls within Exception 1. Counsel for the defendant has argued (1) Clause 9 can never be valid because it is unlimited as to area, that is, it extends to the whole jurisdiction of the court; (2) If this proposition is not correct, in any event the covenant gives to the plaintiff more than is reasonably necessary for protecting the business sold. In Webster's New International Dictionary (2nd Edn.), Unabridged, 1941, the first meaning of the adjective "local" is as follows: "characterised by, or relating to, place or position in space". In my opinion cl. 9 does not specify local limits in that it clearly states the area of restraint in relation to the business sold. These local limits can be the whole of the Zanzibar Protectorate provided these limits are reasonable having regard to the nature of the business sold. See the Indian Contract Act by Cunningham and Shephard (11th Edn.), 1915, at p. 148:

> "and in point of space the covenant must state certain limits, which limits must be reasonable with reference to the nature of business."

I therefore reject the first part of the argument of counsel for the defendant and proceed to consider his second part.

I agree that the question of reasonableness is one of law for the court to decide

having regard to the evidence. The onus is on the plaintiff to establish that the restraint goes no further than was reasonably necessary for the protection of the business sold. I find that the business sold related to groceries, provisions, wines and spirits and miscellaneous articles which involved crockery, stationery and toys, glass-ware and a small amount of cutlery, toilet articles and general household requirements. The price paid was Shs. 184,000/- divided into Shs. 169,000/- for stock-in-trade fittings and chattels in the shop and Shs. 15,000/- for good-will. At the time of the sale in 1956 the customers were mainly credit customers comprising in the main European Government officers, a few Goans and some Parsees. It is still confined to these types of persons. There are perhaps 200 credit customers mainly residing in Zanzibar Town and Mazizini. Of these five customers reside in Pemba. The European population of the Zanzibar Protectorate is given at 507 persons. I agree with an observation by counsel for the defendant that these Pemba customers are an infinitesimal proportion of the total customers.

Prior to the sale in 1956 the plaintiff had no experience of running this type of business. The defendant had founded the business sold in 1928 and between then and 1956 had had those number of years' experience in running it.

The evidence I feel, justifies me in finding that the business sold was a specialised kind of store-keeping business in that the class of persons from which the overwhelming number of its customers came was small in numbers relating to certain types of expatriates who presumably would expect the store to supply merchandise of a rather different type than is sold in an ordinary local shop. This being the nature of the business sold, what is necessary to protect it? Counsel for the defendant urges that cl. 9 prevents his client from setting up a grocer shop anywhere in the Protectorate. It is surely unreasonable to forbid him from setting up a grocery business in Pemba solely for the purpose of protecting a business having 195 customers in Zanzibar Town and Mazizini and only five customers in Pemba. Is Pemba an area in which competition by the defendant would probably injure the plaintiff in the business sold? Having regard, among other things, to the differences in experience between the parties of running this type of specialised grocery store I consider that the defendant could, if he were so minded, by opening a grocery business in Pemba, considerably injure the plaintiff in the business sold in Zanzibar. It would not pay him to open a shop in Mkoani to supply direct to the five customers of the business sold who reside in Pemba, but he could from such a shop, as suggested by the plaintiff, order merchandise from abroad, which must be imported through Zanzibar, and without leaving Zanzibar it could supply special customers in Zanzibar to the detriment of the business sold. I would not regard as adequate protection the alternative suggested by counsel for the defendant that the few customers in Pemba could have been specifically dealt with in the agreement of sale. This was a course suggested by Finlay, L.J., in *Empire Meat Co. Ltd. v. Patrick* (1), [1939] 2 All E.R. 85 at p. 93 (*g*) as reasonable but the facts of that case are not similar to the facts of the instant case.

If I am wrong in holding that cl. 9 in seeking to restrain the defendant from carrying on a similar business anywhere in the Protectorate is valid then I consider that the area of the covenant can be severed. The Protectorate of Zanzibar comprises the islands of Zanzibar and Pemba. The covenant is a twofold covenant in that it restricts trading in both Zanzibar and Pemba. The words "the" and "Protectorate" would be deleted in the last line which would read "sold within Zanzibar". This would limit the restriction only to the island of Zanzibar. In making these observations I rely on the remarks of Jenkins, L.J., in *Ronbar Enterprises Ltd. v. Green* (2), [1954] 2 All E.R. at paragraphs A, B and C at top of p. 270 where he distinguished the master and servant case of *Attwood v. Lamont*, (3) [1920] 3 K.B. 571 from the vendor and purchaser case of *Goldsoll v. Goldman*, (4) [1915] 1 Ch. 292.

Also see the remarks of hodson, l.j., in the same case at paragraph G on p. 271:

> "It is clear that in a vendor and purchaser case, in so far as matters of geography are concerned, it is quite legitimate to deal with the area by severance".

Order accordingly.

For the plaintiff:
Lakha & Co., Zanzibar
A. A. Lakha

For the defendant:
Wiggins & Stephens, Zanzibar
P. S. Talati

The Attorney-General v Abdulla and others
[1960] 1 EA 672 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	15 August 1960
Case Number:	443/1960
Before:	MacDuff and Goudie JJ
Sourced by:	LawAfrica

[1] Statute – Construction – Penal Code – Whether ejusdem generis rule applies – Legislation in pari materia – Intention of legislature – Constructions of words "or other place" – Penal Code, s. 91 *B* (*K.*) *– Conspiracy and Protection of Property Act* 1875, *s.* 7.

Editor's Summary

The respondents were charged under s. 91 B of the Penal Code with unlawfully besetting the Tudor Road, Mombasa, with a view to preventing one, Donye, from doing an act which he was entitled to do, namely, to ride a bicycle. Section 91 B of the Penal Code provides that "Any person who watches or besets any premises, or the house or other place where any person resides or works or carries on business or happens to be, or the approaches to such premises, house or other place, with a view to preventing any person from doing, or compelling him to do, any act which such person has a legal right to do or abstain from doing, is guilty of an offence and is liable to imprisonment for a term not exceeding six months or to a fine not exceeding five thousand shillings, or to both such imprisonment or fine." The magistrate acquitted the respondents on the ground that the words "or other place" must be construed "ejusdem generis" with the words "any premises, or the house" in the section. The Crown then asked the magistrate to state a case.

Held –

(i) there was no reason, especially in view of the comprehensive nature of the words “happens to be”, to restrict “other place” to a place of the genus of a “house”.

(ii) the trial magistrate was not correct in law in holding that the words “or other place” must be construed ejusdem generis with the words “any premises, or the house” in s. 91 B of the Penal Code and therefore, was not correct in law in acquitting the respondents.

Proceedings returned to magistrate with a direction to substitute a conviction in place of an acquittal against all the respondents.

Cases referred to in judgment:

(1) *R. v. Hibbert and Others*, 13 Cox C.C. 82.

(2) *Culley and Others v. Harrison*, [1956] 2 All E.R. 254.

(3) *Charnock v. Court*, [1899] 2 Ch. 35.

Judgment

Macduff J, read the following judgment of the court: This is an appeal by way of case stated made at the request of the honourable the Attorney-General on behalf of the Crown against the acquittal by the senior resident magistrate, Mombasa, of the three respondents on Count 1 of the charge sheet as being erroneous in point of law.

The respondents were charged as follows:

"Count 1 Statement Of Offence

Besetting contrary to s. 91 B of the Penal Code

Particulars Of Offence

"Abdulla s/o Ibrahim, Maji s/o Nyawonga, Foyo s/o Mwavodo: on the 20th day of October, 1959, at Tudor Road, Mombasa, in the Coast Province, unlawfully beset the Tudor Road, Mombasa, with a view to preventing one Donye s/o Mcheki from doing an act which the said Donye s/o Mcheki was entitled to do, namely to ride a bicycle."

Section 91 B of the Penal Code provides as follows:

"Any person who watches or besets any premises, or the house or other place where any person resides or works or carries on business or happens to be, or the approaches to such premises, house or other place, with a view to preventing any person from doing, or compelling him to do, any act which such person has a legal right to do or abstain from doing, is guilty of an offence and is liable to imprisonment for a term not exceeding six months or to a fine not exceeding five thousand shillings, or to both such imprisonment or fine."

The section then contains a proviso which has no relevance to the present case.

The learned senior resident magistrate found the following facts to be admitted or proved:

"(1) Donye s/o Mcheki is employed by M.M. Chandaria as a houseboy in the Old Town, Mombasa.

(2) Donye lives in Tudor Estate, Mombasa.

(3) Donye goes to and from his work by bicycle.

(4) On October 20, 1959, Donye went to his employer's house in the morning but returned to his own house at about 9 a.m.

(5) Whilst returning from his house to his place of work Donye was stopped by the three respondents in Tudor Road.

(6) The respondents asked Donye if he did not know that it was the 20th and that he should not cycle. The conversation continued about Jomo Kenyatta until the police arrived."

At the conclusion of the prosecution case a submission of no case to answer was made but was overruled, the learned magistrate stating that he would give his reasons if necessary in his judgment. None of the respondents gave evidence or made unsworn statements and none of them called witnesses.

The learned magistrate delivered the following judgment:

"The three accused, Abdulla Ibrahim, Maji Nyawonga and Foyo Mwavodo, are charged on two counts. The first count alleges besetting,

contrary to s. 91 B of the Penal Code, and the second, conduct likely to cause a breach of the peace, contrary to s. 178 (4) of the Penal Code.

"The facts are not really in dispute. The three accused stopped Donye s/o Mcheki (P.W. 1) who was riding his bicycle in Tudor Road, Mombasa, on October 20, 1959. They told him that he should not be riding a bicycle that day as the day had some connection with Kenyatta and Africans were forbidden to ride bicycles on that day.

"The three accused were arrested by the police. Mr. Rustam Hira for accused – having earlier submitted that there was no case to answer – a submission which was overruled, submitted that in s. 91 B of the Penal Code the words "or other place" came within the ejusdem generis rule. In support of the contention he referred me to p. 1483 of stroud's judicial dictionary (2nd Edn.), under Title, Place. I think his submission is correct although I am not very impressed with the actual authority quoted in support of it. The matter is more clearly dealt with in maxwell on the Interpretation of Statutes (7th Edn.), at s. V of Chapter XI at p. 284 onwards. It is also of interest to note that the form of charge *R. v. Hibbert*, 13 Cox, p. 87, gives support to the learned advocate's contention although he cited it for a different purpose.

"I therefore find all the accused not guilty on the first count. I am satisfied that there is ample evidence to convict each accused on the second count. I accordingly find each accused guilty on the second count."

The issue on which our opinion is sought and the questions for determination are set out by the learned magistrate in his case stated as follows:

"Opinion

"Little need be added to the authorities given in the judgment except to refer to p. 2025 of Stroud's Judicial Dictionary (3rd Edn.) under Title: 'Other' at para. 6 where Lord Tenterden's Rule is stated, and p. 2204 of the same work at the Title: 'Place' para. 15 'Other Place'.

"Question

"The question upon which the opinion of the court is desired is whether upon the facts of the present case, I came to a correct determination and decision in point of law and if not the Supreme Court is respectfully requested to reverse or amend my determination or remit the case to me with the opinion of the court thereon.

"The questions of law which the learned Attorney-General desires to be submitted for the opinion of the Supreme Court are as follows:

(i) Was the learned trial magistrate correct in law in acquitting the accused on the first count.

(ii) Was the learned trial magistrate correct in law in holding that the words 'or other place' in s. 91 B of the Penal Code must be construed ejusdem generis with the words 'any premises, or the house' in that section."

We propose to consider the second of these questions first, since the answer to the first question posed is dependent on the answer to the second question.

To support his decision the learned magistrate relied on certain authorities. The first of these is Stroud's Judicial Dictionary of which we have the 3rd Edition. Under the title "place" there are numerous examples cited of the words "place" and "other place" being interpreted by the courts. We agree, however, that it is impossible to obtain from those examples any clear guidance as to the meaning to be given to the words "or other place" in an enactment

not in pari materia with one of the instances there quoted. The learned magistrate also refers to the title "other" at para. (6) (at p. 2025 et seq.). Where he has apparently relied on the author's statement that:

> "(6) 'Where general words follow particular ones, the rule is to construe them as applicable to persons ejusdem generis' (per tenterden, c.j., *Sandiman v. Breach*, 7 B & C. 99). This rule has been 'acted upon in all times, but nowhere more clearly stated than by lord tenterden in *Sandiman v. Breach*' (per denman, c.j., *Kitchen v. Shaw*, 7 L.J.M.C. 16); and it is therefore sometimes called lord tenterden's Rule, which as regards the word 'other' may perhaps be more fully stated thus: Where a statute, or other document, enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause embraces 'other' persons or things – the word 'other' will generally be read as 'other such like', so that the persons or things therein comprised may be read as ejusdem generis with, and not of a quality superior to, or different from, those specifically enumerated. The principle of this rule as regards statutes was explained by kenyon, c.j., in *R. v. Wallis* (5 T.R. 379), wherein he said that if the legislature had meant the general words to be applied without restriction it 'would have used only one compendious word'."

This general statement is qualified in the same paragraph by the following statement:

> "Yet, on the other hand, though 'it is very likely that in former days the doctrine was applied strictly, there are cases which show that the modern tendency is to reject a restricted construction' (per esher, m.r., *Anderson v. Anderson*, [1895] 1 Q.B. 749), and very frequently the word receives its wide and larger interpretation of 'every other sort or kind'."

And at para. (8) the author says:

> "(8) It is perhaps impossible to lay down any workable rule to determine which of these two interpretations the word should receive in any case not already covered by authority. Therefore, it would seem to be the most practically useful way to range, so far as possible, the cases into their two classes of interpretation –
>
> A. Ejusdem generis.
>
> B. Unrestrictedly comprehensive."

He then goes on to give examples of both interpretations. In our view no assistance can be derived from this authority.

The learned magistrate refers to the form of charge in *R. v. Hibbert and Others* (1), 13 Cox C.C. 82. This charge was based on the particulars of that case and has no application to the circumstances of the present case.

The learned magistrate next relied on Maxwell On The Interpretation Of Statutes (7th Edn.), section V of Chapter XI at p. 284 et seq. He does not refer to any passage in particular but it would appear from the generality with which he has treated this commentary as supporting the defence contention that he has taken it as an authority for the proposition that the words "or other place" must necessarily be construed under the ejusdem generis doctrine and to be restricted in application to the same genus as the words antecedent thereto. We do not think that the explanation given in maxwell is properly capable of such an exclusive interpretation. We think the learned magistrate may have concentrated his attention on the following passage:

> "But the general word which follows particular and specific words of the same nature as itself takes its meaning from them and is presumed to be restricted to the same genus as those words."

The sentence following, however, reads:

> "In other words, it is to be read as comprehending only things of the same kind as those designated by them, unless, of course, there be something to show that a wider sense was intended." (Maxwell on the Interpretation of Statutes (8th Edn.), at p. 289).

The meaning of this latter passage is more fully explained at p. 293 as follows:

> "Of course, the restricted meaning which primarily attaches to the general word in such circumstances is rejected when there are adequate grounds to show that it has not been used in the limited order of ideas to which its predecessors belong. If it can be seen from a wider inspection of the scope of the legislation that the general words, notwithstanding that they follow particular words, are nevertheless to be construed generally, effect must be given to the intention of the legislature as gathered from the larger survey."

It will be evident then that the question as to whether the words "or other place" are to be interpreted restrictively under the ejusdem generis doctrine or can be given a comprehensive interpretation falls to be considered in the light of the interpretation of legislation in pari materia, if any, which has been the subject of judicial interpretation and in the light of the intention of the legislature.

We were referred to the case of *Culley and Others v. Harrison* (2), [1956] 2 All E.R. 254, where the words "house, room or other place" were used in s. 1 of the Sunday Observance Act, 1780, and Goddard, C.J., held that the meaning of the word "place" was not restricted by the words "house" or "room" which preceded it and that part of a park used for a motor cycle competition was a "place" within the section. While we do not think that that decision is of sufficient authority to enable us to apply it in the present case since the evil aimed at was very different, it is at the least illustrative of the application of the more comprehensive interpretation required to be given to these words to meet the intention of the legislature.

In *Charnock v. Court* (3), [1899] 2 Ch. 35, however, this decision does not apply. This was a case which was decided on the meaning of s. 7 of the Conspiracy and Protection of Property Act, 1875. The relevant parts of this section read:

> "Penalty for intimidation or annoyance by violence or otherwise. Every person who with a view to compel any other person to abstain from doing or to do any act which such other person has a legal right to do or abstain from doing, wrongfully and without legal authority, –
>
> "4. Watches or besets the house or other place where such other person resides, or works, or carries on business, or happens to be, or the approach to such house or place
>
> Shall on conviction thereof be liable . . ."

It was held that the words in the enactment covered a "landing-stage" and Stirling, J., in his ratio decidendi stated:

> "the words 'place where he happens to be' seem to me to embrace any place where the workman is found, however casually."

We think it is clear that the wording of s. 91 B of the Penal Code was taken from the enactment under consideration in *Charnock's* case (3), and that in itself this decision constitutes strong persuasive reasoning for a like decision in the present case. Moreover, if we look, as we consider we must, to what we believe to have been the intention of the legislature in enacting s. 91 B of the Penal Code, then we think this also provides a strong reason for not applying the ejusdem generis doctrine. Quite clearly the intention of the legislature in s. 91 B of the

Penal Code was to protect the unfettered liberty of the individual in going about his lawful occasions without let or hindrance and for that purpose to protect him in whatever "place he happened to be". We cannot conceive that the legislature could possibly have intended to protect the individual from being "beset" at his residence or workplace whilst leaving it open to wrong-doers to beset him on, for example, a public highway on his way to or from his home or workplace. We cannot see any reason to conclude that there was ever any intention, especially in view of the comprehensive nature of the words "happens to be", to restrict the "other place" to a place of the genus of a "house".

The learned magistrate does not appear to have considered the meaning of the word "besetting", but in our view there was clear evidence of the complainant having been encircled by the respondents with the intent necessary to constitute the offence and that he was in fact "beset".

The answer to the questions stated for our determination therefore is:

(i) the learned trial magistrate was not correct in law in holding that the words "or other place" in s. 91 B of the Penal Code must be construed ejusdem generis with the words "any premises, or the house" in that section.

(ii) the learned trial magistrate was not therefore correct in law in acquitting the respondents on the first count.

The proceedings are therefore returned to the magistrate with a direction that he substitute a conviction in place of an acquittal against all the respondents on the first count.

With regard to sentence the Crown has intimated that it is not seeking additional punishment. In view of that intimation the learned magistrate may feel disposed to consider whether the provisions of s. 33 of the Penal Code may meet the justice of the case.

Proceedings returned to magistrate with a direction to substitute a conviction in place of an acquittal against all the respondents.

For the appellant:
The Attorney-General, Kenya
J.P. Webber (Deputy Public Prosecutor, Kenya)

For the respondents:
M.J. Seroney, Nairobi

Haji Moledina and another v R
[1960] 1 EA 678 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	2 August 1960
Case Number:	46 and 47/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Criminal law – Corruption by a public officer – Police officer not acting in lawful conduct of employment – Whether charge of corruption as a public officer is applicable – Penal Code, s. 78 (1) (*U.*).

[2] Criminal law – Evidence – Accomplice – Offence complete before witness involved – Whether witness can be an accomplice.

[3] Criminal law – Evidence – Accomplice – Corruption – Bargaining between person threatened and police officer as to amount of corrupt gift to officer – Whether person threatened is an accomplice.

[4] Criminal law – Demanding money with menaces – Whether person threatened must be alarmed by threat – Penal Code, s. 279(*U.*) *– Larceny Act,* 1861, *s*. 45.

Editor's Summary

The appellant, H. with the appellant, K., a police inspector, and one, S. were tried on a charge containing five counts. Count 1 alleged that with intent to steal they had demanded Shs. 10,000/- from one, P. with menaces. Count 2 alleged corruption against K. in that he agreed to permit his conduct as a public officer to be influenced by the gift of Shs. 6,000/- from P. in which offence H. and S. had aided and abetted. Count 3 also alleged corruption against K. in offering to permit his conduct as a public officer to be influenced by the gift of Shs. 10,000/- from one, M. in which offence H. and S. had aided and abetted. Count 4 alleged that H., S. and K. with intent to steal had demanded Shs. 10,000/- from one M. with menaces and count 5 alleged corruption against K. in agreeing to permit his conduct as a public officer to be influenced by the gift of Shs. 6,000/- from M. in which offence H. and S. had aided and abetted. The five counts concerned two distinct transactions. In the first, according to one, P., a coffee estate owner, H., S. and K. visited P. on November 5, 1959 and, after K. had told P. that he wished to search his premises for Bugisu coffee, K. and S. searched and found none. K. then accused P. of getting rid of the coffee and said "If you do not want to get into trouble, pay me Shs. 10,000/- and I will close the case". After some discussion S. told P. that K. would take Shs. 6,000/-, and P. later paid Shs. 3,900/- to H., who gave it to K. Other witnesses confirmed that K. had visited and entered the premises and inspected the coffee there, and that on November 5 and November 6, P. accompanied by H. had tried to raise Shs. 6,000/-. There was also evidence that on November 5, K. had visited Jinja railway station to inquire about a truck of coffee he might have to stop, and that K. later telephoned the station that his superior officer had decided not to stop the truck. A superintendent of police stated that he knew of no occasion for any such investigation and that K., as a sub-inspector, was not allowed to investigate cases without instructions. K. in evidence admitted visiting P.'s premises when giving S. and H. a lift, but denied entering the premises or visiting Jinja station. The evidence regarding the second incident showed that on November 5, S. told one, M., a coffee dealer at Kampala, that the police were investigating the despatch by M. of a consignment of coffee to Mombasa which was suspected to be Bugisu coffee, which M. denied. On November 6, S. telephoned M. advising him to settle the matter with the police, whereupon M. reported the matter to the police. Subsequently, M., on police instructions, agreed to pay Shs. 6,000/- to S. and

K. on November 11. On November 11, S. came to M.'s house alone, and asked for the money, which S. refused to pay, because K. had not appeared. On November 14, K. telephoned M. and, after making clear that he was acting with S., complained that M. had broken his promise to pay. At a meeting with K. that evening M. arranged to pay, at his own shop at 9 p.m. on November 16. On November 16, at 7.30 p.m., before the police had been able to hide in the shop, S., H. and K. arrived by car, S. and H. got out and K. drove away, telling M. to pay them. M. persuaded H. and S. to go away until M. had dined and, meantime, the police arrived and concealed themselves in the shop. S. and H. soon returned, when M. handed over to S. bundles of marked notes, and, as S. and H. were leaving the shop, the police emerged, seized the money and handcuffed S. and H. There was then a knock at the door and K. entered. K. denied having telephoned M., and said that when subsequently K. visited Kampala, it was to see his parents, and that the purpose of his visit later to M.'s shop was to pick up S. and H. to whom he was giving a lift. The magistrate convicted all three accused on all counts whereupon H. and K. appealed.

Held –

(i) a count alleging a demand for money with menaces and with intent to steal is not necessarily irreconcilable with a count based on the same facts alleging an agreement to allow one's conduct to be influenced by a gift; the two counts were not based on one and the same utterance and there was first a demand with menaces followed by bargaining which led to K. agreeing to accept Shs. 6,000/-.

(ii) the intent to steal was established by showing that the demand was made fraudulently and without claim of right and the menaces were the threat to prosecute.

(iii) the application of s. 78 (1) of the Penal Code is not confined to cases where a public officer is acting in the lawful conduct of his employment, and an offer to drop a prosecution, whether he has power to do so or not, is made with reference to his conduct as a police officer.

(iv) P. was not an accomplice in the offence of demanding money with menaces as the offence was complete when K. uttered his demand; however, P. was an accomplice in the count alleging corruption since he had bargained with K. as to the amount of the gift but the other evidence materially corroborated P.'s evidence so as to implicate K. in both counts.

(v) the evidence against H. concerning the visit to P. did not show that though present he had taken any part in the incident before both offences were complete and although his presence was not accidental there was no proof of encouragement by him; accordingly he should have been given the benefit of the doubt.

(vi) M. was manifestly not an accomplice and in any event material parts of his evidence were corroborated by his sons.

(vii) on a charge under s. 279 of the Penal Code it is sufficient if the accused has the intent to unsettle his victim's mind and the threat is such as to operate on a person of ordinarily firm mind. *R. v. Walton and Ogden*, 9 Cox C.C. 268 not followed.

(viii) the evidence of what occurred prior to November 14, 1959 was essential to explain what K. said on that date and was admissible against K.

(ix) the magistrate was amply justified in rejecting the evidence of H. and in finding that he aided and abetted in the incident with M.

Appeals of H. on counts 1, 2 and 3 and of K. on count 3 allowed. Conviction on other counts and sentences thereon affirmed.

Cases referred to in judgment:

(1) *Wilcox v. Jeffery*, [1951] 1 All E.R. 464.

(2) *R. v. Walton & Ogden*, 9 Cox C.C. 268.

Judgment

Sir Audley McKisack CJ: There men were tried in the District Court of Busoga on a charge containing five counts, and all three were convicted on all the counts. I shall refer to these three men by the following names:

Sherali (accused No. 1 at the trial),

Haji (accused No. 2 and appellant No. 1),

Khan (accused No. 3 and appellant No. 2).

Sherali has not appealed. The appeals of Haji and Khan have been consolidated.

Of the five counts the first two relate to one incident, and the other three to another incident. I shall deal with these two groups of counts separately. The first two counts are as follows:

"Count 1. Statement of Offence.

Demanding money with menaces, contrary to s. 279 of the Penal Code.

Particulars Of Offence.

Zia-ud-Deen Khan, Sherali Karim and Haji Moledina on or about the 5th day of November, 1959, at Nyenga in the Mengo District of the Buganda Province, with intent to steal the sum of Shs. 10,000/- and demanded the said sum from Khushalbhai Ambalai Patel with menaces.

"Count 2. Statement of Offence.

Corruption by a public officer, contrary to s. 78 (1) of the Penal Code.

Particulars of Offence.

Zia-ud-Deen Khan, being a person employed in the public service, namely, a police officer, on or about the 5th day of November, 1959, at Nyenga in the Mengo District of the Buganda Province, agreed to permit his conduct in such employment to be influenced by the gift of Shs. 6,000/- from Khushalbhai Ambalai Patel. Sherali Karim and Haji Moledina aided and abetted the said Zia-ud-Deen Khan in the commission of such offence."

The evidence of Khushalbhai Patel was to the following effect. He is the owner of a coffee estate at Nyenga. The three accused came to his house on November 5, 1959, in a car. They all got out of the car. Khan, who is a sub-inspector of police, was in uniform. Sherali is a coffee buyer and Haji is a cafe owner. Khan said he wished to search for some "Bugisu coffee". Khan and Sherali went into the factory and examined the coffee by extracting samples from bags with an instrument adapted to that purpose. They found no Bugisu coffee, and the witness in fact had none. Khan then said that the witness had got rid of the Bugisu coffee. The witness, Khan and Sherali went into the compound and joined Haji. After further accusations by Khan about the Bugisu coffee, and denials by the witness that he had had anything to do with Bugisu coffee, Khan said to the witness:

"If you don't want to get into trouble, pay me Shs. 10,000/- and I will close the case".

Here it should be mentioned that, under the Bugisu Coffee Ordinance, 1955, there are penalties, viz., a fine of Shs. 10,000/- or imprisonment for a year, or both such fine and imprisonment, which are imposed on unauthorised

persons purchasing or removing from a scheduled area coffee grown in that area. Khushalbhai, as a coffee estate owner, was aware of this and Khan, as a policeman, would presumably also be aware of that.

The words spoken by Khan which I have just quoted are those to which count No. 1 (demanding money with menaces) is relevant. After this utterance the witness took Sherali aside and said he had not got the sum demanded, but only about Shs. 50/- or Shs. 100/-. Sherali then went to Khan and those two conferred together. Sherali then returned to the witness and said Khan insisted on Shs. 10,000/-. The witness then offered Shs. 500/- or Shs. 1,000/- Sherali went back to Khan and had another talk. Then Sherali came to the witness and said Khan would be willing to take Shs. 6,000/-. It is to this statement that count No. 2 (corruption by a public officer) is relevant. The witness went on to give evidence of how, being frightened of what Khan had said, he made efforts to raise the Shs. 6,000/-, and how he paid Shs. 3,900/- to Haji, who handed it over to Khan.

Certain points of law have been argued in respect of these two counts. Firstly, it is said that the two counts are irreconcilable; a demanding with intent to steal and with menaces cannot be based on the same facts as an agreement to permit one's conduct to be influenced by a gift. If the two counts were based on one and the same utterance, I would agree. But, if the evidence of Khushalbhai is accepted, there was, as I have already indicated, a demand with menaces in the first place, and this was followed by a kind of bargaining which led to Khan agreeing to drop the case if given Shs. 6,000/-. The two counts, therefore, appear to me to be properly framed in relation to the prosecution evidence, though it is true that the learned trial magistrate in his otherwise detailed and careful judgment did not expressly deal with this point.

On the question whether there was an intent to steal, which is an essential ingredient of a contravention of s. 279 of the Penal Code, this intent is established by showing that the demand was made fraudulently and without claim of right; the term "fraudulently" being construed in accordance with s. 245 (2) of the Penal Code. I think it was quite plain from Khushalbhai's evidence that the demand made by Khan was both fraudulent and without claim of right.

It is equally clear that the demand was made with "menaces", since Khan's words in effect threatened a prosecution for an offence.

In regard to count No. 2 it was argued that s. 78 (1) of the Penal Code is applicable only to a case where the public officer is acting in the lawful conduct of his employment, or where the conduct to be influenced is the lawful conduct of his employment. I cannot read any such limitation into s. 78 (1). If a police officer offers to drop a prosecution, even though he has no power to do so, or it is not lawful for him to do so, the offer, in my opinion, is nevertheless made with reference to his conduct in his employment as a police officer.

I now turn to the question whether Khushalbhai was an accomplice and, if so, whether there was sufficient corroboration. The learned magistrate dealt at length with this question and carefully directed himself thereon. He came to the conclusion that Khushalbhai was to be treated as an accomplice, but that he was a reliable witness and that there was sufficient corroboration of his evidence. The ground on which the magistrate found that he was an accomplice was that he never reported to the police or other authorities what the accused persons had done until after they had been arrested in connection with the incident which is the basis of the other three counts in this charge. But I think the question should be approached from another angle. Taking count No. 1, I think it clear that the offence of demanding money

with menaces was complete when Khan uttered his demand for Shs. 10,000/- as the price for Khushalbhai being saved from getting into trouble. Nothing up to that point had made, or could have made, Khushalbhai an accomplice; and he did nothing after that which made him an accessory after the fact within the meaning of s. 376

of the Penal Code – that is to say, he did not receive or assist any of the accused in order to enable them to escape punishment.

In regard to count 2, I think that Khushalbhai is an accomplice, in that he bargained with Khan (through Sherali) about how much should be paid, and this bargaining led to Khan agreeing to permit his conduct to be influenced by a gift of Shs. 6,000/-. Further, although Khushalbhai is not, in my view, an accomplice in relation to count 1, his evidence must, nevertheless, be regarded as tainted in respect of that count also, by reason of his having been an accomplice in the very closely related offence which is the subject of count 2.

The next question is whether Khushalbhai's evidence was sufficiently corroborated to justify the conviction, and here the corroborative evidence must be considered in relation to each of the two appellants. I shall deal first with Khan.

In his evidence at the trial Khan admitted going to Khushalbhai's factory on November 5 in company with Sherali and Haji, but says it was only because he was giving them a lift. He denied having any speech with Khushalbhai, other than an exchange of greetings, and denied entering the factory or making any inspection of coffee bags. This, of course, is an entirely different version from Khushalbhai's. But a witness (P. 4) corroborates Khushalbhai as to Khan having entered the factory, and another (P. 5) as to Khan inspecting coffee beans there.

Three witnesses (P. 2, P. 3 and P. 6) gave evidence concerning Khushalbhai's efforts to raise Shs. 6,000/- on November 5 and 6. This does not directly implicate Khan, but bears out that, immediately following Khan's visit to Khushalbhai, the latter was looking for a large sum in cash in company with Haji. Moreover, Shivabhai's (P. 2) evidence contradicts that of Khan, who said that, during the visit to the factory, Khushalbhai and Haji went off to get a bottle of whisky (which they failed to find), not money.

It is argued that these three witnesses are accomplices, in that they knowingly helped to provide the money for a bribe. I do not agree. The offences charged are not ones of obtaining money dishonestly; they are of demanding money, and of offering to accept money, respectively. The offences would have been complete without any payment being made. These witnesses may have been assisting the accused men – albeit reluctantly – to obtain the fruits of their crimes, but they were not assisting them to escape punishment.

There was a discrepancy as between Khushalbhai and Shivabhai on the question whether the former told the latter the reason why he wanted the money. This did not escape the learned magistrate, and I see no reason to differ from his conclusion about it.

There was evidence by the chief goods clerk at Jinja railway station (P. 12) that, on November 5 (the date of the accused men's visit to Khushalbhai in the evening), Khan had come to the station to inquire about a truck of coffee and said he might have to stop it. The witness told him to give his instructions by 4 p.m. if he did wish to stop the truck. No such instructions were received. That evening the witness mentioned to an inspector of police (P. 13) the matter of Khan's visit to the station. Next morning Khan came to the station again and was told the truck had left. The witness gave him some information about how to stop the truck in Kenya if he so wished. On November 7 Khan telephoned the witness to say that his superior officer had decided not to stop the truck.

In his evidence Khan says that he did not go to the railway station on November 5, but that he did

telephone the chief goods clerk (P. 12) about a consignment of coffee, because of information received from Sherali. He agrees that he did go to the station on November 6 and obtained information from the clerk.

The inspector of police (P. 13) to whom the clerk had spoken says that, on

the morning following his conversation with the clerk, he mentioned this conversation to Khan, who replied that he was no longer interested in the coffee, as there was no truth in the information he had received about it. Thus, on the same day that Khan told this to the inspector, he was paying a second visit to the station to obtain information about stopping the truck in Kenya.

A district superintendent of police in charge of Jinja police station (P. 14) testified that Khan was under his command, that he (the witness) knew of no occasion for investigating a consignment of coffee, and that it was known to every police officer that a sub-inspector (which was Khan's rank) is not allowed to "investigate privately of his own accord", though

> "it would be quite reasonable to inquire about the truck, to see if it existed, without referring it to his superior officer".

That is the evidence by witness other than Khushalbhai in relation to Khan. In my view it is quite enough to justify a finding that it corroborated Khushalbhai's evidence in material particulars implicating this appellant. It is said that the magistrate also took account of other matters which may have been relevant to the other accused but not to Khan. Some general observations of the magistrate may perhaps be criticised as not sufficiently indicating whether he was considering parts of the evidence in relation to each of the accused separately. I do not think that he in fact failed to make this distinction, and, on the evidence I have summarised, he could not have reasonably arrived at a different conclusion. The evidence as a whole, in so far as it is relevant to Khan, supports his conviction on both counts 1 and 2.

I turn now to the case against the appellant Haji in relation to counts 1 and 2. As to the latter count, it is argued that it is not, in law, possible to aid or abet a person in agreeing to permit his conduct to be influenced; that one might aid and abet an attempt to obtain money, but not the mental process of "agreeing". I think that is too narrow a view. If the agreeing is induced by something in the nature of persuasion or bargaining, I think a person taking part in the persuasion or bargaining can rightly be said to be abetting the agreement.

But what are the facts relied on to prove the guilt of Haji? As I have said, the offences specified in counts 1 and 2 were each complete when certain words were spoken by Khan (directly or through Sherali) to Khushalbhai at Nyenga on November 5. There was a good deal of evidence that thereafter Haji was very active in helping to obtain for Khan the Shs. 6,000/- referred to in count 2. But, in my view, that evidence does not prove that Haji was a participant in these two already completed crimes, either as principal or as accessory. I agree that this evidence may be relevant to show whether Haji's previous conduct was guilty or innocent, but that conduct only amounts to his having accompanied Khan and Sherali on the visit to Khushalbhai, and to his having been present for part of the conversation that took place there. He is said by Khushalbhai to have been "standing near" when Khan said he had come to search the coffee, but not to have entered the factory when the others carried out the search. He was present when Khan made the demand with menaces, but took no part in the subsequent bargaining. There is no evidence that he uttered a single word before both offences were complete.

The Crown says that, despite his silence, Haji's presence, coupled with his knowledge of what was going on, was sufficient to constitute aiding or abetting. Reliance is placed on *Wilcox v. Jeffery* (1), [1951] 1 All E.R. 464, where it was held that the presence of the accused at a concert given by an alien in contravention of a condition that he should not take employment was not "accidental" presence, and in the circumstances of the case it was open to the magistrate to find that his presence was an encouragement to the alien in committing the offence of contravening the said condition, and to convict the accused of aiding and

abetting. But in that case the circumstances were such as to show more actual encouragement of the commission of the offence than in the instant case. Haji's presence was, I agree, not "accidental", but I doubt if it can be rightly said that there were any other circumstances to prove encouragement. If the learned magistrate had looked at the question in that light, I think he must have given Haji the benefit of the doubt and have come to a different conclusion. I accordingly allow the appeal of Haji against his conviction on counts 1 and 2.

I shall now deal with the second group of counts, No. 3, No. 4 and No. 5, which are as follows:

"Count 3. Statement of Offence.

Corruption by a public officer, contrary to s. 78 (1) of the Penal Code.

Particulars of Offence.

Zia-ud-Deen Khan being a person employed in the public service, namely a police officer, on or about the 14th day of November, 1959, at Jinja in the Busoga District of the Eastern Province, offered to permit his conduct in such employment to be influenced by the gift of Shs. 10,000/- from Maherali Daya. Sherali Karim and Haji Moledina aided and abetted the said Zia-ud-Deen Khan in the commission of such offence.

"Count 4. Statement of Offence.

Demanding money with menaces contrary to s. 279 of the Penal Code.

Particulars of Offence.

Zia-ud-Deen Khan, Sherali Karim and Haji Moledina, on or about the 14th day of November, 1959, at Jinja in the Busoga District of the Eastern Province, with intent to steal the sum of Shs. 10,000/- demanded the said sum from Maherali Daya with menaces.

"Count 5. Statement of Offence.

Corruption by a public officer, contrary to s. 78 (1) of the Penal Code.

Particulars of Offence.

Zia-ud-Deen Khan, being a person employed in the public service, namely, a police officer, on or about the 14th day of November, 1959, at Jinja in the Busoga District of the Eastern Province, agreed to permit his conduct in such employment to be influenced by the gift of Shs. 6,000/- from Maherali Daya. Sherali Karim and Haji Moledina aided and abetted the said Zia-ud-Deen Khan in the commission of such offence."

The Crown case with reference to these counts is that a coffee dealer living in Kampala, Maherali Daya (P. 7), railed a consignment of coffee from Jinja to Mombasa in November, 1959. On November 5 Sherali told him that the police were investigating this consignment, as it was suspected to be Bugisu coffee. Maherali said it was not. On November 6 Sherali again telephoned to Maherali and said that Maherali should settle the matter with the police, as otherwise he would be sent to prison and his coffee would be confiscated. On November 6 Maherali told the Criminal Investigation Department what had happened, and thereafter kept them informed of his dealings with the accused men. On November 9 Sherali telephoned Maherali that the truck of coffee had been detained at Tororo, and that, if he wanted to settle, he should go to Jinja straight away. Maherali agreed to do so, and went to Jinja the same afternoon. There he went to Haji's cafe, as Sherali had told him to do so, and asked if Sherali was there. Haji replied that Sherali was coming, and Sherali arrived shortly after. There followed a long conversation between

Maherali and Sherali. In the course of it Maherali told Sherali not to detain the truck any longer, and Sherali replied that it was a police matter. Maherali asked to be taken to the police station, and Sherali said he would call the police to join them, mentioning Khan's name; he went away three times but without bringing any policeman back with him. On the third occasion Sherali said that Khan was not coming and that Maherali should settle with him (Sherali), and, after further conversation, said Maherali would have to pay Shs. 10,000/-. Maherali said that was too much. Sherali said that the coffee would be seized by the police and Maherali would be sent to prison. Some bargaining followed and eventually Sherali accepted Maherali's offer of Shs. 6,000/-. It was then arranged that Sherali should come with Khan to Kampala for the money on November 11.

On November 11 Sherali came to Maherali's house, alone, and asked for the Shs. 6,000/-. Maherali refused to pay, on the ground that Khan had not come. Sherali said Khan had agreed to Sherali collecting the money. When Maherali persisted in his refusal to pay up, Sherali threatened to ruin him, and that he would be imprisoned.

So far, it will be observed, there had been no contact between Maherali and Khan, and nothing to show that Sherali was speaking the truth in purporting to act on Khan's behalf. On November 14, however, Khan telephoned to Maherali and made it quite clear that he was acting in concert with Sherali and had adopted what Sherali had been saying. He pointed out that, by failing to pay Sherali, Maherali had broken his promise. Maherali explained that he did not trust Sherali and wanted to see Khan personally. Khan replied that, if Maherali now failed to keep his promise, he (Khan) would detain the coffee at Mombasa and would come on Monday "and take down Maherali's statement". It was agreed that they should meet that evening at Haji's cafe. They did so, and Khan then confirmed it was he who had telephoned to Maherali and that he had in fact detained the coffee. When Maherali said he had not been able to get the money yet, it being Saturday, it was arranged that he should hand over the money at Maherali's shop (in Kampala) on the Monday, November 16, at 9 p.m.

Maherali arranged with the C.I.D. for police officers to be concealed in his shop on the night of the 16th, and he was provided by them with bundles of currency notes. But at 7.30 p.m., before any police officers had come to the shop, the three accused arrived in a car. Sherali and Haji got out of the car. Khan said to Maherali, "Give the money to these people", and drove away. Maherali contrived to persuade Haji and Sherali to go away until Maherali had had dinner. In the interval the police officers came and concealed themselves in the back room of the shop. When Maherali returned to the shop from his dinner, he found Sherali and Haji waiting on the other side of the road. They came across and asked for the money. Maherali invited them in, and all three entered, though Haji appeared reluctant to do so. Maherali produced the bundles of notes from the safe and Sherali put them in his pocket. As Sherali and Haji were about to leave the shop, the concealed police officers emerged, removed the money from Sherali, and handcuffed both of them. At that moment there was a knock on the door and Khan entered.

Khan's defence at the trial was that he had not made any telephone call to Maherali, but that he did meet Maherali at Haji's cafe on the evening of November 14. This was because Sherali had told him that Maherali wanted to see him for some purpose unknown to Sherali. At the cafe Maherali asked if Khan was making inquiries into illegal coffee, to which Khan replied no, and asked for Khan's help in finding out if his coffee had been stopped at Tororo. Khan replied that he could not help him. Then Maherali volunteered the information that he had agreed to pay Sherali Shs. 6,000/-. There the conversation ended. On November 16 Maherali telephoned inviting Khan to

see him in Kampala with Sherali. Khan refused. Later Sherali telephoned him and "asked me what I had decided", to which Khan replied that he had refused Maherali's invitation to go to Kampala. Nevertheless he (Khan) did go to Kampala that evening, though it was to see his parents, not Maherali. And he did happen to go with Sherali and also with Haji, and he dropped them at Maherali's shop, after arranging to pick them up at 9.30 p.m. at a particular restaurant near that shop. He returned at 10 o'clock, but did not find them in the restaurant. He walked to Maherali's shop and, hearing voices, thought they might be inside. He entered to find they had just been arrested by the police.

The learned magistrate rejected Khan's story as untrue and accepted Maherali's version. I consider he was amply justified in doing so. The facts which I have recited undoubtedly constitute a formidable case against Khan. The only ground of fact in the petition of appeal relating to this part of the case is that the magistrate was

> "wrong in considering the evidence sufficient either in quality or extent to convict the appellant".

That ground fails.

Four questions of law which I have already dealt with in relation to counts 1 and 2 also apply to the second group of counts, and I need not say any more on those subjects. I refer to the meaning of the expression "with intent to steal" in s. 279, and of "conduct in such employment" in s. 78 (1) of the Penal Code; the supposed irreconcilability of counts under those two sections; and the question whether it is in law possible to aid or abet a principal offender in contravening s. 78 (1).

Maherali was manifestly not an accomplice, so the question of corroboration of an accomplice's evidence does not arise. Material parts of his evidence were, however, corroborated by his three sons (P. 8, P. 10 and P. 11).

It is necessary to consider whether the evidence supports each of the three counts, two of which are laid under s. 78 (1). Count 3 avers that Khan "offered to permit his conduct", etc., whereas count 5 avers that he "agreed to permit his conduct", etc. And the sum specified in count 3 is Shs. 10,000/-, whereas in count 5 it is Shs. 6,000/-. The purpose of including both these counts in the charge is not wholly clear. In each of the three counts the date of the offence is laid as November 14. I do not think there is any difficulty about count 4 (demanding with menaces). Khan, on November 14, revealed himself as Sherali's associate in what had gone before. Sherali had certainly uttered threats when he demanded Shs. 6,000/- on November 11, and I think the evidence shows that threats were also uttered when Sherali was speaking of Shs. 10,000/- on November 9, though the threats were perhaps less emphatic on that occasion. Khan added threats of his own when he spoke to Maherali on the 14th. It might have been better if the figure stated in count 4 had been Shs. 6,000/-, but I am certainly not saying that the count is bad.

Count 5 is supported by the evidence of what Khan said to Maherali on November 14 when following up Sherali's previous conversation with Maherali, and I think it can be fairly said that Khan was then "agreeing" to permit his conduct to be influenced. Count 3, however, seems to be left in the air. Did Khan, either personally or through Sherali, make an "offer" with reference to Shs. 10,000/-? I think this is at least doubtful, and that both appellants should have been given the benefit of the doubt with reference to that count. Consequently their conviction on count 3 is quashed.

The next point is whether s. 279 is contravened if the person threatened is not in fact alarmed by the threat. The appellants rely on *R. v. Walton and Ogden* (2), 9 Cox C.C. 268, which considered the construction to be put on

s. 45 of the Larceny Act, 1861, and which appears to have decided that the threat must

> "be of a nature and extent to unsettle the mind of the person on whom it operates".

In the instant case it is clear that Maherali's mind was not "unsettled", since he had a clear conscience and had enlisted the aid of the Criminal Investigation Department. The decision in *R. v. Walton and Ogden* (2) is criticised in Russell on Crime (11th Edn.), pp. 991-994, and the learned author's remarks provide cogent reasons for thinking that decision to be fallacious. I am not disposed to follow it in construing s. 279 of the Penal Code. It is sufficient, in my view, if the accused has the intent to unsettle his victim's mind and the threat is of a nature to operate on a person of ordinarily firm mind. Those conditions are satisfied in the instant case.

A further ground of appeal is that the trial magistrate misdirected himself as to the possibility of bias on the part of Maherali against Khan. It was put to Maherali in cross-examination that Khan had been associating with a married woman of the community to which Maherali belongs, and it was suggested that, as Maherali was a member of the committee of that community, he had fabricated the evidence implicating Khan. The witness denied having ever heard of the alleged association. The magistrate was fully entitled to reject this line of defence. It is true that he mistakenly says that Khan was himself a member of the same community, and that this mistake led him to say,

> "If the insinuation against Khan was true, surely a committee member of the Ishnashri sect could have been produced to give evidence of complaints against Khan concerning his behaviour as an Ishnashri. I regard it as significant that no attempt whatsoever was made to do this."

Although the magistrate was in error here, I do not think it can be said to have resulted in any wrong conclusion on the facts or to vitiate his opinion, which can certainly be supported on other grounds, that Maherali was a witness of truth.

Finally, it is urged on behalf of Khan that evidence of anything said or done before November 14 was inadmissible against Khan. I do not agree. Evidence of what Sherali had said and done was not only relevant but was essential to explain what Khan said on November 14, because he himself referred to it. The learned magistrate took a correct view.

The appeal by Khan in respect of his conviction on counts 4 and 5 is dismissed.

It remains to consider Haji's position. In addition to the facts which I have recited, Maherali's evidence implicates Haji in the following respects. At the discussion between Sherali and Maherali outside Haji's cafe on November 9 Haji joined them on two occasions, and on one of them he urged the others "to settle the matter". He had also been present when Sherali first demanded Shs. 10,000/-. And on November 14, when there was another discussion outside Haji's cafe between Maherali, Sherali and Khan, Haji came out twice and joined in the discussion.

Haji's defence was that he had never taken part in any of the conversations between Maherali and the other two accused. He explained his presence in Maherali's shop when the police arrested him by saying that Sherali owed him money and had told him that he (Sherali) would be getting some money from Maherali, out of which Haji would be paid.

I consider there was ample justification for the learned magistrate declining to believe Haji's defence, and the evidence relevant to Haji's part in the matter

suffices to establish that he was aiding and abetting the offences specified in counts 4 and 5.

It is true that a son (P. 8) of Maherali who accompanied his father to Haji's cafe on November 14 contradicts his father on one point, by saying that Haji took no part in the conversation between Maherali, Khan and Sherali. It is also true that the magistrate does not mention this discrepancy in the judgment. On the other hand, he does not make any express reference to Haji having participated in this particular discussion, and it is clear that he was not relying on that episode alone, if he was relying on it at all. In my opinion this is not a sufficient ground for saying that the magistrate's finding was not justified.

The only ground of appeal in Haji's petition relating to the second group of counts is that the evidence

> "was so flimsy and weak that it did not show any active participation by the appellant".

For the reasons I have given, that ground fails. And there are no questions of law in relation to Haji which I have not already dealt with in relation to Khan.

The sentences imposed were, in respect of Haji, one year's imprisonment on each count, and, in respect of Khan, two years' imprisonment on each count. The sentences were directed to run concurrently. Sherali received the same punishment as Khan. It is urged that Khan should have received a lesser sentence than Sherali, and that Khan's is excessive. I do not, however, see any sufficient reason for reducing it.

In the result the appeal is allowed to the following extent. The conviction of Haji on counts 1, 2 and 3 is quashed. The conviction of Khan on count 3 is quashed. The conviction of Haji on counts 4 and 5 is upheld, and the sentences thereon affirmed. The conviction of Khan on counts 1, 2, 4 and 5 is upheld, and the sentences thereon affirmed.

Appeals of H. on counts 1, 2 *and* 3 *and of K. on count* 3 *allowed. Conviction on other counts and sentences thereon affirmed.*

For the first appellant:
Wilkinson & Hunt, Kampala
P.J. Wilkinson Q.C. and *B.E. D'Silva*

For the second appellant:
S. R. Kapila & Kapila, Nairobi
A.R. Kapila

For the respondent:
The Attorney-General, Uganda
K.T. Fuad (Crown Counsel, Uganda)

The Attorney-General v Motor Mart and Exchange Limited

[1960] 1 EA 689 (HCT)

Division: HM High Court of Tanganyika at Dar-Es-Salaam

Date of judgment: 21 May 1960

Case Number: 2/1959

Before: Biron Ag J

Sourced by: LawAfrica

[1] Sale of land – Covenants running with land – Covenants imposed for benefit of German Government – British occupation of territory – Transfers of land after change of sovereignty without express reference to "German" covenants – Whether covenants still subsisting and enforceable by government – Whether covenants deemed to be embodied in Governor's sanction to transfers – Interpretation and General Clauses Ordinance (*Cap.* 1), *s.* 10 (2) (*T.*) – *Land Registration Ordinance* (*Cap.* 334), *s.* 24, *s.* 115 (*T.*) – *Land Registry Ordinance* (*Cap.* 116), *s.* 5, *s.* 7 (*T.*) – *Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114), *s.* 2 (1) (2) *and* (3), *s.* 3 (*T.*) – *Peace and Order Ordinance*, 1920 (*T.*) – *Ordinance of September* 1, 1891, *as amended by Ordinance of September* 15, 1891 (*T.*) – *Ordinance of November* 26, 1895, *s.* 10 (*T.*) – *Proclamation No.* 5 *of* 1917 (*T.*) – *Proclamation No.* 3 *of* 1920, *s.* 3 (*T.*) – *Interpretation Act*, 1889, *s.* 38 – *Agricultural Holdings Act*, 1908.

[2] Land registration – Covenant running with land – Covenant imposed for benefit of German Government – British occupation of territory – Application for first registration of land – Whether government entitled to have German covenants registered in Land Register – Interpretation and General Clauses Ordinance (*Cap.* 1), *s.* 10 (2) (*T.*) – *Land Registration Ordinance* (*Cap.* 334), *s.* 24, *s.* 115 (*T.*) – *Land Registry Ordinance*, (*Cap.* 116) *s.* 5, *s.* 7 (*T.*) – *Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114), *s.* 2 (1), (2) *and* (3), *s.* 3 (*T.*) – *Peace and Order Ordinance*, 1920 (*T.*) – *Ordinance of September* 1, 1891 *as amended by Ordinance of September* 15, 1891 (*T.*) – *Ordinance of November* 26, 1895, *s.* 10 (*T.*) – *Proclamation No.* 5 *of* 1917 (*T.*) – *Proclamation No.* 3 *of* 1920, *s.* 3 (*T.*) – *Interpretation Act*, 1889, *s.* 38 – *Agricultural Holdings Act*, 1908.

Editor's Summary

By a contract for sale made in 1913, one, Schlosser, obtained a grant of land at Dar-es-Salaam subject to certain covenants imposed in favour of the German Administration whereby the owner became liable to surrender the whole or part of the land to the Government at the original cost price plus compensation for any outlays enhancing the value of the land. Other conditions required the owner on demand by the Government to cause the opening of a "Grundbuch Folio" in respect of the land, to authorise the registration of a caution therein in favour of the Fiskus and Landgesellschaft respectively and, so long as there was no "Grundbuch Folio" established for the land, any transfer of the land would only be allowed if the purchaser accepted the restrictions mentioned. In 1917 the land passed into the hands of the Custodian of Enemy Property who in 1923 advertised it for sale by auction with "restricted ownership" stating in the notice that this usually meant that the land was held in full ownership subject to the right of Government to take such of the land and material as might be necessary for public purposes and to the reservation and upkeep of roads. The land was then acquired by one, Satchu, to whom it was conveyed by the Custodian. After Satchu's death the land passed through several hands and was eventually acquired by the respondents who in 1953 applied under s. 5 of the Land Registry Ordinance to be registered as freehold owners. None of the conveyances in respect of these transactions had referred to the German conditions but the Land Officer sought to have the German conditions registered

in favour of the Government as successor of the German Administration. The Registrar of Titles upheld an objection made by the respondents that the conditions were no longer subsisting and held that the respondents were entitled to be registered as freehold owners free from the conditions. On appeal.

Held –

(i) all grants of land under the German law were subject to the sanction of the Governor and no transfer was valid without such sanction and since sanction was given subject to the conditions imposed by the Government, the conditions would not need to be repeated in the sanction but were deemed to be incorporated therein; the conditions, therefore, ran with the land with or without notice to a transferee.

(ii) the conditions were expressly reserved by the Land (Law of Property and Conveyancing) Ordinance and by s. 7 of the Land Registry Ordinance and even when the latter was repealed by the Land Registration Ordinance the conditions were subsisting and entitled to be recorded in the Land Register.

(iii) when the respondents applied for registration of the land the Government became entitled to have the German conditions entered and recorded in the Land Register.

Decision of the Registrar of Titles set aside. Order that the respondents be registered as owners of the freehold estate subject to the German conditions in favour of the Government.

Cases referred to in judgment:

(1) *Land Officer v. The Motor Mart and Exchange* (1956), 2 T.L.R. (R.) 295.

(2) *Cooper v. Stuart* (1889), 14 App. Cas. 286.

(3) *Hamilton Gell v. White*, [1922] 2 K.B. 422.

(4) *Abbot v. Minister for Lands*, [1895] A.C. 425.

Judgment

Biron Ag J: This is an appeal from a decision of the Registrar of Titles on an application for first registration of a plot of land brought by the applicants, the Motor Mart and Exchange Limited, the respondents in this appeal. The plot in question forms part of a piece of land which was originally granted by the Ostafrikanische Landgesellschaft to one Otto Schlosser on July 10, 1913. In the original conveyance, or to be more correct, the contract of sale, certain conditions or covenants were imposed in favour of the German Government, including a liability to surrender the whole or any part of the land to the Government at the original cost price plus compensation for any outlays enhancing the value of the land. The Government, as the successor of the German Government sought to have these conditions or covenants entered in the land register on the grounds that the land is still subject to such conditions. The learned Registrar rejected the claim of the Government to have these conditions, which he has termed the German conditions and which terminology I propose to retain in this judgment, so registered on the grounds that they are no longer subsisting. It is from this decision rejecting the claim of the Government that this appeal has been brought.

The appeal falls to be decided under two main heads, a broad one entailing somewhat wide

propositions of law and tracing the history of the plot of land from the time the original grant was made, and following its travels through the several hands and the position in law of the conditions at the various stages, and a narrower one confined to the particular and intrinsic circumstances of the application. Although rulings on such wider issues of law may not be strictly necessary for the determination of the appeal, in case I am wrong in my rulings on the narrower issues, I feel myself constrained, albeit reluctantly, to deal with the wider aspect, although strictly speaking the rulings on such may be no more than obiter.

Various grounds of appeal have been set out in the Petition of Appeal and although it is not altogether possible to make a firm and clean-cut division between these grounds, I propose to deal with such grounds as near as possible under the two heads I have mentioned.

The grounds of appeal as set out in the petition of appeal are:

1. That the learned Registrar erred in that –

 (*a*) he held that a positive covenant or condition did not run with the land under the law of the former German East African Protectorate unless it was entered in a grundbuch;

 (*b*) he held that the covenants or conditions contained in the title to the land which was the subject of the application (in the said decision and hereinafter referred to as "the German conditions") were required, under the law of the former German East African Protectorate, to be taken over by each succeeding purchaser until such time as the land and the conditions were entered in a grundbuch;

 (*c*) he held that in the absence of any acknowledgment to the Government by the applicants that they were bound by the German conditions, the German conditions could not be said to be subsisting under the provisions of s. 24 of the Land Registration Ordinance (Cap. 334);

 (*d*) he held that the use of the word "subsisting" in s. 24 of the Land Registration Ordinance showed such a contrary intention as is mentioned in s. 10 (2) of the Interpretation and General Clauses Ordinance, namely that it showed an intention to exclude the conditions contained in the grants of land made by the former German Government;

 (*e*) he held that Motor Mart and Exchange Limited were entitled to be registered as owners of a freehold estate in Plot No. 171 in Regent Estate, Dar-es-Salaam, free from the German conditions.

2. That the learned Registrar should have held:

 (*a*) that the German conditions are subsisting and binding on the applicants on the grounds that such conditions were properly annexed to the grant of the title to the land and that no provision of either the law of the former German East African Protectorate or of Tanganyika is inconsistent with the annexure of such conditions and that the Government is entitled to the benefit thereof;

 (*b*) that the rule against perpetuities does not apply to reservations or defeasances in grants of land in Tanganyika to take effect on some contingency more or less remote and only when necessary for the public good, when such reservations or defeasances are not between subject and subject but between the Crown and its subjects, and that the German conditions do not constitute an exception repugnant to the grant;

 (*c*) that the German conditions under the law of the former German East African Protectorate ran with the land so as to bind any owner of the land for the time being without the need for registration and whether or not he knew they existed or acknowledged that he took the land subject to them;

 (*d*) that the Peace and Order Ordinance, 1920 preserved the German conditions in favour of the Government and that the German conditions were further preserved after the repeal of the Peace and Order Ordinance in 1928 by the operation of the Interpretation and General Clauses Ordinance;

(*e*) that with respect to grants of land made by the former German Government, conditions imposed by the former German Government still subsist, being expressly retained by the Ordinance which concern the law of real property in the territory;

(*f*) that Motor Mart and Exchange Limited are only entitled to be registered as the freehold owners of Plot 171 Regent Estate subject to the registration of the conditions imposed by the former German Government.

The grounds set out in sub-paras. (*a*), (*b*) and (*c*) can be taken together and are referable to what has been termed the broader aspect.

The particular condition with which the Government is concerned is that set out as cl. 4 in the contract of sale, referred to in the proceedings, as a resumption clause. This clause in the agreed translation reads:

> "The purchaser is under obligation to cede at cost price any land, which in the opinion of the Government, is required for public purposes (f.i. railways). Insofar as the value of the land is enhanced by any outlays in connection therewith, compensation will be paid. On demand of the competent authority the purchaser is under obligation to keep open for traffic existing roads and also roads constructed by him, and to bear the cost of the upkeep of such roads and of any public roads which may be constructed hereafter, and which may traverse his land. He shall bear only half of the cost, when such roads only border on his land, if the other half is borne by the owner of the land on the opposite side. This obligation of the upkeep of roads shall not extend to built-up roads. Not included are roads of Udongo. The District Officer may demand that roads reinforced by stones be kept clean of weeds.
>
> "On demand of the railway authorities the purchaser is under obligation to keep a strip of a width of three metres as a fire protection strip and to maintain it as such in order to avoid any danger of fire. He is further under obligation, without any claim for compensation, to permit that the railway authorities take any measures as they think necessary to promote the flow of water from higher to lower levels."

Clause 3 of the contract reads:

> "The purchaser is under obligation, on demand of the Government, to cause the opening of a Grundbuch Folio in respect of the acquired plot of land and to authorise the registration of a caution in favour of the Fiskus and Landgesellschaft respectively. As long as there is no Grundbuch Folio established an eventual transfer of ownership of the land is only allowed if the new acquirer undertakes the herein stipulated restrictions on his part."

It was submitted by the respondent applicants and so held by the learned Registrar that under German law as applied to what was then German East Africa, the conditions, including the resumption clause, were not binding on a purchaser unless specifically undertaken by him. For the Government it was contended that such conditions, particularly the resumption clause, are binding on purchasers whether or not expressly undertaken by the purchaser, or, in fact, whether or not such purchaser had notice of such conditions. It is therefore necessary to examine the position under German law as it prevailed in this territory during the German occupation. Both parties have referred to, and quoted extracts from, a book entitled Extracts from German Ordinances and Decrees, "published by authority", dated September, 1916 and issued by the General Headquarters of the East African Force. At p. 145 is set out a "Circular regarding sanction of agreements". The relevant parts of this circular, which it is conceded by all parties has the force of law, read:

"Under Ordinance of September 1, 1891, and Amendment of September 15, 1891, all agreements concerning acquisition of land within the territory defined by the German-British Treaty, are subject to the sanction of the Governor, the same applies to lease contracts, if the lease is agreed to continue for more than 15 years.

"This Ordinance referred not only to such agreements as between Europeans but also to those made between coloured persons. The Ordinance of September 1, 1891, is not repealed by that of July 24, 1894 (which by circular of December 12, 1894, in so far only applied to Dar-es-Salaam), but it is limited in so far as contracts between non-natives are concerned by s. 10 of Ordinance of November 26, 1895.

"It is requested that administration authorities make this publicly known from time to time and draw attention to the fact that contracts not sanctioned are not legally valid and can therefore not form a ground for complaint.

"In order to avoid delay in the obtaining of such sanctions, the Bezirk-samtmanner, etc., and their representatives are empowered to grant sanction in so far as contracts between coloured persons are concerned and provided that the object does not exceed the value of Rs. 1,000. Sanction must in all cases be granted only subject to the rights of third persons.

"To the sanction must be added the condition that the purchaser is bound to relinquish at cost price and on demand, sufficient land for public works, roads, railways etc., but expenditure incurred must be taken into consideration."

At p. 137 is set out the form of a "Contract of Sale of Crown Land". Clause 4 reads:

"4. The seller has the right, against repayment of the proportionate part of the purchase price and in return for compensation for improvements which have raised the value of the land, to:

(*a*) Demand the return of those portions of the land which he requires for the laying of railways, streets, roads, ditches, canals, telegraphs, together with the requisite protecting strips of land, and for other public purposes, especially the regulating of floods.

(*b*) To obtain on the land materials necessary for such public works, as for instance, earth, stone, etc., even if the works are only on the boundaries of the land, and to heap them there or to heap such material obtained from elsewhere and to make such roads over the land as may be necessary to this end."

Clause 7 reads:

"7. The purchaser binds himself to see that any new acquirer of the piece of land or part of the same undertakes the above obligations towards the Government as laid down in s. 3, s. 4, s. 5 and s. 6, with the condition that he will only transfer the possession on an undertaking from the third acquirer to carry out the same duties."

Clause 8 reads:

"8. The purchaser binds himself, on the institution of a register of private lands for the district on the order of the administration, to allow the piece of land to be entered in the register at his expense.

"The seller reserves to himself the right to demand that a note be made in the register of his rights under s. 3, s. 4, and s. 5, of this contract in order to secure these."

It is therefore submitted that because both in a grant by the Government of public land and also in a contract of purchase which requires the sanction of the Governor, an express undertaking must be obtained from the purchaser to observe these conditions, such conditions are not binding on a purchaser unless so expressly undertaken by him. In other words, these conditions are only binding and only affect purchasers who expressly undertake to observe them. They are thus the creatures of contract, and in the absence of a specific contract for their fulfilment, they do not run with the land and bind subsequent purchasers. For the Government it was submitted that these conditions are not the creations of, and subject to, contract, but run with the land and can be enforced against any purchaser even without notice of such conditions, let alone in the absence of an express undertaking to be bound by such conditions.

It was submitted in argument that under German law, although the Government was not a party to the contract between the Ostafrikanische Landgesellschaft and Schlosser, the Government is entitled in contract to claim the benefit of the conditions or covenants made for its benefit. For this submission we are indebted to Dr. Weidmann, who in his address gave a learned exposition on the German law. This submission is founded on the proposition that under German law a third party may sue for a benefit in a contract although not a party to such contract. As against this submission learned counsel for the respondent has contended that even if under German law a third party can claim such benefit, it has not been put forward that such benefit would bind the assignees of a contract between the original parties, so that a third party could claim the benefit from an assignee of the contract. Although under English law it has been established and repeatedly affirmed that a third party cannot claim such a benefit, I am quite prepared to accept this proposition that under German law a third party can sue on a contract to which he was not a party. In fact, there are many Indian cases to the same effect and it has even been argued that the law in this territory would follow such Indian cases and not the English decisions. However, I do not consider myself constrained to give a ruling on this particular aspect of the case.

In support of the proposition that these conditions are independent of obligations based on contract but run with the land irrespective of whether expressly undertaken by any subsequent purchaser and whether or not registered, learned counsel for the appellant has quoted for his authority from a German textbook entitled “The Land Law in German Protectorates” by Dr. L. Pink and Dr. G. Hirschberg. The first of the relevant passages cited, for the translation of which we are indebted to Dr. Weidmann, is an except from chapter D headed

> “The legal nature of encumbrances imposed on the acquirer of land and the legal procedure for enforcing them.”

The particular passage (at p. 42) runs as follows:

> “The Governor’s consent is prescribed in the public interest. As to the conditions imposed there must be made a distinction between those that serve the public and those that serve an individual . . . The former are to be considered encumbrances on land of a public juridical nature which do not need to be registered and are binding on every landowner (for the time being) even if he neither knew that they existed nor took them over; they, as it were, are the equivalent in favour of the state to the ‘liberation’ of land which was up to then extra commercium . . . Compliance with such conditions is, since they are public encumbrances, to be enforced by administrative action; any other action is excluded for the reason that the beneficiary is the public and not an individual who would be able to enforce them at law, if needed, . . . Vis-à-Vis the successor in title

> to the first acquirer one will again have to distinguish, whether the encumbrance is in favour of the public at large or in favour of an individual. In the former case, any successor in title is bound without further ado whether or not he had notice of them, whether they are registered in the Grundbuch or not; in the case of such encumbrances, therefore, it does not make any difference whether or not the land subject to them is entered in any public register."

The other passage quoted is from p. 101 and runs:

> "Perpetual land charges created for the benefit of the public at large (public taxes and encumbrances), are not dealt with by the Civil Code. They are, however, of great importance in the Protectorates; they exist even if they are not expressly codified; they are real rights of a public juridical nature and run with the land even if not registered; such charges are imposed as a matter of principle on purchasers of Crown land in Kamerun (compare below s. 36 II) in South West Africa (compare below s. 64) in Kioutshou (compare below s. 82); for the rest they being real rights of a public juridical nature are to be dealt with in conformity with the Civil Code (Ordinance of May 5, 1872, s. 12 Civil Code, Article 114)."

The learned Registrar rejected the submission of learned counsel for the Government and upheld that of the respondents. In his decision he referred to and cited several excerpts from the book, Extracts from German Ordinance and Decrees as above quoted, and went on to say:

> "From these quotations it appears to me that the German Government did not consider that the conditions ran with the land but that they had to be taken over by each succeeding purchaser until such time as the land and the conditions were entered in the Grundbuch."

With respect, I do not think that such inference is necessarily conclusive. The specific requirement of a purchaser to undertake to observe the conditions could, I think, also be construed as a form of notice and acknowledgment of such notice, and although it may well be argued, as indeed it has been argued, that it seems to be an extravagant manner of ensuring that a purchaser acquires the land with the notice of the conditions, the German Government may well have been at pains to ensure that any subsequent purchasers were well aware of such conditions with, I think, particular reference to the fact that the land could revert to, or be taken over by, the German Government at the original purchase price (plus compensation for improvements, etc.) in order to obviate complaints and claims by such purchasers who, if not aware of such conditions, could well have a genuine grievance if they had paid some inflated price for the land. It is common ground and has also been expressly stated by the learned Registrar that such conditions would run with the land if registered in the Grundbuch. If the basis of these conditions is in contract and for such conditions to be enforceable they must be expressly undertaken by a purchaser in contract, I fail to see how or why a purchaser would be bound by such conditions if entered in the Grundbuch although he had not expressly undertaken to observe them. In other words, how could an entry in the Grundbuch without more ado have the effect of an express contractual undertaking by a purchaser to be bound by the conditions? To my mind, an entry in the Grundbuch merely has the effect of giving notice to purchasers of the conditions attached to, or binding the land. It cannot, to my mind, be equated to a contractual undertaking.

Of the authority relied on in support of its submission by the Government, the learned Registrar had this to say:

> "It is well settled that in English Law as applicable to this territory a positive covenant or condition cannot run with land. The position however

> is more obscure with regard to the German Law as applied to the territory under their administration. I am obliged to Dr. Weidmann for his learned exposition on German Law and his references to 'The Principles of German Civil Law' by Schuster and 'The Land Law in German Protectorates' by Drs. Pink and Herschberg, but nowhere can I find a direct authority that in Tanganyika under German administration a positive covenant or condition ran with the land, except when such covenant or condition was entered in the Grundbuch. (There is no question of there being such an entry in this case because a Grundbuch had not been opened for the area concerned.)
>
> "The extract from 'The Land Law in German Protectorates' cited by Dr. Weidmann in para. 35 of his address would seem to be an authority, to which due weight must be given, that 'conditions which serve the public do not need to be registered and are binding on every landowner (for the time being) even if he neither knew that they existed nor took them over'. The book, however, does not deal specifically with German East Africa, and the extract which is quoted does not seem to me to be compatible with German circulars regarding purchase contracts of Crown land and the sanction of agreements."

The pages quoted are taken from the first part of the book which deals generally with the German Protectorates. It is therefore not surprising that there is no specific reference to German East Africa. I therefore do not consider the absence of such specific reference at all fatal to the authority cited, though I ought to add that the second passage cited would afford some support to the learned Registrar's proposition as reference is specifically made to the Cameroons, South West Africa, and Kioutchou. On the maxim expressio unius est exclusio alterius it may be argued that such provision was not in force in German East Africa. However, I consider that these protectorates were merely cited as examples and it was not intended to exclude German East Africa; nor should such exclusion be read into the passage limiting the general statement that such provisions are in force in the protectorates. However, I find myself unable to agree with the proposition advanced on behalf of the Government that the German Government was entitled to the benefit of these conditions as a third party to the contract between the vendor and purchaser. I do not consider that the rights of the German Government were founded on contract at all. These conditions were imposed by the German Government on all grants and transfers of Crown land. Where the German Government itself was the grantor these conditions were embodied in the grant. All other grants or transfers of property were subject to the consent or, to use the expression of the German Government, to the sanction of the Governor. No transfer was valid without such sanction. And by law the sanction was given subject to these conditions. Therefore, to my mind, these conditions were binding on purchasers not by reason of any contractual obligation, but because they were imposed by the Government in power and were therefore binding on all purchasers. With regard to this particular grant to Schlosser by the Ostafrikanische Landgesells-chaft, the consent of the Governor was given to such grant, but the consent was expressed in one word to the effect that the Governor agreed. The conditions were not expressed or even referred to in such consent, or rather sanction. However, all grants or transfers had to contain such conditions; in grants by the Government they would be set out in the grant itself and in other transfers they would be contained in the sanction. As in this particular grant, which was by a quasi-government department, the conditions were already set out in the grant itself, they would not need to be repeated in the sanction but are, as it were, embodied and incorporated in such sanction. On this aspect I therefore find that under German law these conditions ran with the land whether expressly

undertaken by a purchaser or not, and I would add, they would run with the land even without notice.

It is now necessary to follow the plot of land in its passage from hand to hand. The next change in ownership of the land was in 1917 when on the occupation of the British forces the land in question, by virtue of Proclamation No. 5 of 1917, was vested in the Custodian of Enemy Property, and as stated by the learned Registrar in his decision:

> "The disposal of enemy property by the Custodian was governed by Proclamation No. 3 of 1920, s. 3 (i) of which is as follows:
>
> 'Subject to the directions of the Administrator the Custodian shall from time to time by public auction, tender or private treaty, as a whole or in lots, sell or offer for sale the respective rights, titles and interests specified in the third column of the first schedule hereto in the immovable properties in the second column of that schedule subject to any existing rights of way or apparent easements affecting the same but otherwise free from encumbrances . . .'
>
> Sub-section (3) provides:
>
> 'Every right, title or interest of any person other than the late German Government or the public and other than subsisting rights of way or apparent easements and in any immovable property described in the said schedule which is derogatory or counter to the right, title and interest specified in the third column of the said schedule, and the benefit of any covenant, agreement or reservation in support of any such right, title or interest shall be absolutely extinguished . . .'
>
> "In accordance with Proclamation No. 3 of 1920 the Custodian duly advertised Estate No. 15 as Lot No. 905 for an auction sale to take place on October 8, 1923. The right, title and interest was given as: 'restricted ownership'. A note at the end of the notice reads: 'Note. "Restricted ownership" usually means that the land is held in full ownership subject to the right of the Government to take such land and material as may be necessary for public purposes and to the reservation and upkeep of roads.'
>
> "The estate was purchased by one Abdulrasul Satchu, to whom a conveyance was eventually made by the Custodian of Enemy Property. It seems to me, therefore, that in view of s. 3 of Proclamation No. 3 of 1920 Abdulrasul Satchu was bound by the German conditions and they could be enforced by the Government against him."

One is tempted to pause at this stage and speculate on the position of nonenemy property in respect of the German conditions. According to the learned Registrar such conditions subsist in the case of enemy property sold by the Custodian by virtue of s. 3 of Proclamation No. 3 of 1920. This proclamation obviously would not apply to non-enemy property. Would the German conditions subsist in the case of such land, or would they only subsist if expressly undertaken by purchasers? If I am right in my view, such conditions would subsist in all cases by virtue of German law, that is, if German law still prevailed. On this issue, reference was made in argument to an earlier ruling of mine on a preliminary point raised (*Land Officer v. The Motor Mart and Exchange* (1) (1956), 2 T.L.R. (R.) 295) wherein I held (at p. 298) that the Tanganyika Order in Council, 1920

> "neither expels nor repeals German law, but retains it in so far as it is not repugnant to the other laws expressly proclaimed".

Although I have been invited by learned counsel for the respondents to reconsider my views on this aspect, I see no reason to change or depart from such views.

The next relevant legislation is that contained in the Land (Law of Property and Conveyancing) Ordinance (Cap. 114 Laws) which came into force on January 19, 1923, s. 2 of which reads:

> "2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the territory.
>
> "(2) Such English law and practice shall be in force so far only as the circumstances of the territory and its inhabitants, and the limits of His Majesty's jurisdiction permit.
>
> "(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act or Indian Act for the time being in force in the territory, such last mentioned provision shall prevail."

In so far as the law of property is concerned, by this section German law would appear to be ousted by English law unless such law is saved, as contended by learned counsel for the appellant, by sub-s. (3) of the section. Whether or not German law is thus saved, I am still open to persuasion that these conditions would not be valid under English law. Admittedly they infringe the rule against perpetuities, but no authority has been cited that such rule would affect grants by the Crown. In *Cooper v. Stuart* (2) (1889), 14 App. Cas. 286), a Privy Council case, this question was left open. The headnote to the case reads:

> "Held, that a reservation in a Crown grant made in 1823 of land in New South Wales of a right to resume any quantity thereof not exceeding ten acres, as may be required for public purposes, does not constitute an exception repugnant to the grant and therefore void. Such resumption when carried into effect operates as a defeasance.
>
> "Held further, that whether or not the Crown in England would be affected by the rule against perpetuities, such rule was nevertheless inapplicable in 1823 to Crown grants of land in the Colony or to reservations or defeasances in such grants to take effect on some contingency more or less remote and only when necessary for the public good."

In delivering the judgment of the Judicial Committee Lord Watson stated (at p. 290):

> "It does not appear to their Lordships to be necessary, for the purposes of the present case, to decide whether the Crown, in attaching such reservations to grants of land in England, would be affected by the rule against perpetuities. In order to succeed in this appeal, it is not enough for the appellant to establish that the Crown would be within the rule here; he must also show that the rule, in so far as it affects the Crown, was operative in the Colony of New South Wales at the time when his land was originally granted to William Hutchinson; and that, in the opinion of their Lordships, he has failed to do."

Section 3 of the Land (Law of Property and Conveyancing) Ordinance (above quoted) reads:

> "For the purposes of this Ordinance, any court may construe any provision of the English law with such modification not affecting the substance

> as may be necessary or proper to adapt the same to the circumstances of the territory, . . .”

This is on a par with their lordships’ remark that even if in England grants by the Crown would be affected by the rule against perpetuities, it would still be open to argument whether such rule would apply here. However, I know of no authority for holding that the rule would apply even in England to grants by the Crown or to conditions imposed by the Crown. Nor, in principle, do I find anything repugnant in such concept. There is little to distinguish in principle between such rights in the Government and compulsory powers of purchase vested in authorities, which is so commonplace nowadays. I am therefore not persuaded that the German law that these conditions would run with the land is repugnant to English law, but rather the reverse. Although the original grant to Schlosser was not made by the German Government, by sub-s. (6) of s. 7 of the Land Registry Ordinance (Cap. 116 Laws) which reads:

> “This section shall apply to a grant or lease from the Deutsche Ostafrikanische Gesellschaft, the Ostafrikanische Eisenbahn Gesellschaft, the Ostafrikanische Land Gesellschaft, or any Kommunal Verbande or Stadt Gemeinde in like manner as it applies to a grant or lease from the former German Government, and any exception, reservation, covenant restriction, rent, right, or provision in favour of the granter or lessor reserved by or contained in any such grant or lease shall inure for the benefit of and may be enforced by the Government”,

grants by the Ostafrikanische Gesellschaft are, in so far as the conditions are concerned, equated to grants by the German Government. Nor, I think, could the rule against perpetuities be held to apply to conditions imposed by the German Government when giving its sanction to a transfer of land, nor need there be any requirement that such conditions need to be tied to, and for the benefit, of land held by the Government. I therefore hold that these conditions were subsisting at the time of and after the coming into force of the Land (Law of Property and Conveyancing) Ordinance.

These conditions are also expressly preserved in s. 7 of the Land Registry Ordinance (Cap. 116 Laws) which came into force on April 20, 1923. In his decision, the learned Registrar has referred to this section as preserving these conditions, but held that the section would not apply to this instant case. I shall deal with that issue when considering the second head referred to above.

To revert to the history of the land, I again quote from the decision:

> “Abdulrasul Satchu died and his personal representatives conveyed the land to one Ficai in 1934. No mention of the German conditions was made in the Conveyance. In 1935 Ficai conveyed to Ursino and again no reference was made in the Conveyance to the conditions. The subsequent Conveyance in 1949 to Regent Estates Limited and in 1952 to the applicants likewise bear no reference to the conditions.”

The learned Registrar went on to say:

> “It seems to me therefore that in the absence of any acknowledgment to the Government by the applicants that they are bound by the conditions, such conditions cannot be said to be subsisting.”

With respect however, I do not agree with the learned Registrar, but consider for the reasons I have given that such conditions do run with the land even in the absence of an express undertaking or acknowledgment by the applicants.

We now come to the consideration of the other head. As already noted, the learned Registrar in his decision quoted s. 7 of the Land Registry Ordinance. He said:

> "Cap. 116, which was brought into operation on April 20, 1923, provided by s. 7 for the registration of conditions contained in German grants and for the enforcement thereof by the Government against the owners or occupiers of the land for the time being. In my opinion therefore if the land had been registered under that Ordinance I would have been obliged to enter the German conditions in the Land Register and they would then be binding at the present day. The land was not so registered, however, and in what might be called the corresponding provision in Cap. 334 (s. 24) provision is merely made for recording such conditions if they are still subsisting at the time of registration."

In his Petition of Appeal the appellant submitted that the learned Registrar erred in that:

> "(*d*) he held that the use of the word 'subsisting' in s. 24 of the Land Registration Ordinance showed such a contrary intention as is mentioned in s. 10 (2) of the Interpretation and General Clauses Ordinance, namely that it showed an intention to exclude the conditions contained in the grants of land made by the former German Government."

This application for first registration was brought on April 4, 1953. It was therefore brought under s. 5 of the Land Registry Ordinance. This Ordinance was repealed and replaced by the Land Registration Ordinance (Cap. 334) which came into force on June 1, 1954. By section 115 (6):

> "All applications made under the repealed Ordinance which are pending under date of the coming into force of this Ordinance shall be deemed to be applications made under this Ordinance."

With respect, I fully agree with the learned Registrar that had the land been registered under the repealed Ordinance he

> "would have been obliged to enter the German conditions in the Land Register and they would then be binding at the present day".

The learned Registrar, however, went on to hold that in view of the wording of s. 24 of the new Ordinance these conditions were not registerable as they were no longer subsisting. Section 24 reads:

> "Any subsisting covenants or conditions contained in any grant of land made by the former German Government or imposed by that Government at the time of any disposition in land under any law formerly in force shall, on first registration be recorded in the Land Register and when so recorded shall be deemed to run with the land so registered."

In construing this section the learned Registrar stated:

> "I was referred by Mr. Thornton on behalf of the Land Officer to the Interpretation and General Clauses Ordinance (Cap. 1) s. 10 to show that the repeal of Cap. 116 and the replacement by Cap. 334 could not affect rights, privileges, obligations or liabilities acquired, accrued or incurred under the repealed enactment. Although s. 115 (8) of Cap. 334 states that the provisions of that section shall be construed as in addition to and not in derogation of the provisions of s. 10 of Cap. 1, I consider that, in the words of s. 10 (2) of Cap. 1, a 'contrary intention' appears in Cap. 334, in so far as the German conditions are concerned, by the inclusion of s. 24, and the use therein of the word 'subsisting'."

Section 10 (2) (*c*) of the Interpretation and General Clauses Ordinance (Cap. 1) reads:

> "10(2) Where an Ordinance repeals any other enactment, then, unless the contrary intention appears, the repeal shall not:
>
> (*c*) affect any right, privilege, or obligation or liability acquired, accrued, or incurred under any enactment so repealed"

This corresponds to s. 38 of the English Interpretation Act, 1889, which reads:

> "Where this Act or any Act passed after the commencement of this Act repeals any other enactment, then unless a contrary intention appears the repeal shall not . . . affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed."

This Act was considered and applied in *Hamilton Gell v. White* (3), [1922] 2 K.B. 422, where it was held that where a landlord had given a tenant notice to quit the tenant "acquired a right" to compensation for disturbance under s. 11 of the Agricultural Holdings Act, 1908, although that Act had been repealed after the notice had been given but before the tenant lodged his claim for compensation. The relevant part of the headnote reads:

> "Held, that notwithstanding the repeal he was entitled to claim compensation under that section by virtue of s. 38 of the Interpretation Act, 1889, which provides that 'where . . . any Act . . . repeals any other enactment . . . the repeal shall not affect any right . . . acquired . . . under any enactment so repealed'. As soon as the landlord in view of a sale of the property gave the tenant notice to quit the tenant 'acquired a right' to compensation for disturbance under s. 11 subject to his satisfying the conditions of that section."

Likewise I consider that in this instant case on the application for first registration being made, the applicants were entitled to have the land registered and at the same time the Government was entitled to have entered in the register these German conditions in their favour. This case can be distinguished from the other case cited by learned counsel for the respondents, *Abbot v. Minister for Lands* (4), [1895] A.C. 425, where it was held, and I quote the relevant part of the headnote:

> "The mere right, existing at the date of a repealing statute, to take advantage of provisions of the statute repealed is not a 'right accrued' within the meaning of the usual saving clause."

That case really turned on the particular wording of the several statutes, but it is not irrelevant to quote from the judgment of the Judicial Committee delivered by the Lord Chancellor (at p. 431):

> "It has been very common in the case of repealing statutes to save all rights accrued. If it were held that the effect of this was to leave it open to any one who could have taken advantage of any of the repealed enactments still to take advantage of them, the result would be very farreaching.
>
> "It may be, as Windeyer, J., observes, that the power to take advantage of an enactment may without impropriety be termed a 'right'. But the question is whether it is a 'right accrued' within the meaning of the enactment which has to be construed. Their Lordships think not."

This instant case is to my mind on all fours with *Hamilton Gell v. White* (3), where Bankes, L.J., distinguishing that case from that of *Abbot v. Minister for Lands* (4), said (at p. 428):

> "This is not like the case which was cited to us in argument where the tenant's right depended upon some act of his own. Here it depends upon

> the act of the landlord – namely, the giving of a notice to quit in view of a sale in which event the section itself confers a right to compensation subject to the tenant complying with the conditions therein specified."

Likewise in our case, when the applicants applied for the registration of the land, the Government was entitled by sub-s. (5) of s. 7 of the Land Registry Ordinance to have its rights in the land ascertained, and on being ascertained, by sub-s. (6) of the same section, as already quoted, such rights "shall inure for the benefit of and may be enforced by the Government". The learned Registrar held that by the inclusion of the word "subsisting" in s. 24 of the new Land Registration Ordinance (Cap. 334) the Legislature had expressed such contrary intention as is provided for in s. 10 (2) of the interpretation and General Clauses Ordinance. With respect, I fail to see why. If, as I have found, the German conditions were a "right accrued" when the application for registration was made under the repealed Ordinance, then such conditions are still subsisting at the time of the coming into force of the repealing Ordinance. And it is not irrelevant to note that in the section repealing the old Ordinance – s.115 – at sub-s. (8) it is expressly laid down that:

> "The provisions of this sections shall be construed as in addition to and not in derogation of the provisions of s. 9 and s. 10 of the Interpretation and General Clauses Ordinance."

I would therefore hold that even apart from my finding that the German conditions have continued to run with the land throughout its changes of ownership, on the narrower issue – the construction of the several relevant Ordinances – such conditions were subsisting at the time of the coming into force of the current Land Registration Ordinance and therefore entitled to be recorded in the Land Register.

In order to keep this judgment within reasonable bounds I have confined myself to dealing with what I have considered to be relevant and material issues and have refrained from dealing with numerous other issues raised and argued as being incidental or collateral, although I ought to add that I have considered them all. However, I may well be wrong in my evaluation of what issues are material and relevant and what are incidental and collateral.

For the reasons I have given this appeal is allowed, the decision of the learned Registrar of Titles is set aside, and it is ordered that the respondents be registered as the owners of the freehold estate subject to the German conditions in favour of the Government. It has been agreed between the parties that whatever the outcome of this appeal, no award of costs should be made. Accordingly I make no order as to costs.

Decision of the Registrar of Titles set aside. Order that the respondents be registered as owners of the freehold estate subject to the German conditions in favour of the Government.

For the appellant:
The Attorney-General, Tanganyika
G. C. Thornton (Crown Counsel, Tanganyika)

For the respondents:
Fraser Murray, Thornton and Co., Dar-es-Salaam
R. S. Thornton

Nyali Limited v Twentsche Overseas Trading Company Limited

[1960] 1 EA.703 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	1 July 1960
Case Number:	185/1960
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Landlord and tenant – Lease – Construction – Private building estate – Roads constructed by lessor – Clause requiring lessees to meet cost of making and maintaining roads – Cost restricted to sum assessable on and payable by lessor – Whether lessee liable for cost of roads incurred voluntarily by lessor – Meaning of cost of roads "assessable on and payable by" lessor.

Editor's Summary

The plaintiff company, as owner of a building estate known as Nyali Estate, leased to the defendant company by four separate leases four plots for a term of 9,999 years from April 1, 1947. All the leases were in the same terms save for the amount of premium paid for each. By cl. 2 of the special conditions set out in the leases the defendant company was to "bear, pay and discharge all existing and future rates, taxes and assessments, duties, impositions, outgoings and burdens whatsoever assessed, charged or imposed upon the demised premises or upon the owner or occupier thereof." By cl. 3 the defendant company was "to pay to or reimburse the (plaintiff) company the costs of making, repairing and maintaining all roads or streets that may now or in the future bound, abut upon, or give access to the said piece of land hereby demised", but it was also provided that "such costs shall be restricted to the proportion of the said costs assessable on and payable by the company (as certified by the auditors of the company) . . ." The plaintiff company expended monies in making, repairing and maintaining roads at Nyali Estate and used its unfettered discretion in deciding what roads should be made up, repaired or maintained. No part of the monies so expended were expended pursuant to or in consequence of any order, direction, requirement, request or payment of government or any local or other authority or any third party or in performance of any legal duty or obligation owed to any such authority or person, nor was there any obligation upon the plaintiff company under the leases to construct or maintain any roads. On January 19, 1956, the plaintiff company's auditors purported, pursuant to cl. 3, to certify the proportion payable in respect of each of the four plots as being Shs. 12,806/36. The plaintiff company alternatively claimed this sum under cl. 2. The defendant company denied liability and contended that cl. 2 related to assessments by a statutory or local authority upon individual plots or the owners or occupiers thereof, while cl. 3 made provision whereby, in the event of a local authority making an assessment for road charges upon the estate as a whole, the plaintiff company could recover proportionately from the lessees.

Held –

(i) clause 2 related only to charges recoverable under the provisions of some legislative Act, Decree or Ordinance.

(ii) the decision as to the construction of cl. 3 depended upon the meaning and effect of the words

"assessable on and payable by" and in the context used these words implied that the charges were assessable upon the company by some third person, that is to say, a statutory authority.

(iii) the provisions of cl. 2 and cl. 3 were not contradictory nor on the face of the document were there grounds affording proof that the intention of the parties was other than what the words in their ordinary and literal meaning implied.

(iv) the proper and only construction to be placed on cl. 3 is that the plaintiff company is permitted to apportion the costs of road construction and maintenance among the lessees only in the event of a charge for such costs being assessed upon it by a statutory authority.

Judgment for the defendant.

Cases referred to in judgment:

(1) *London and Lancashire Fire Insurance Co. v. Bolands Ltd.*, [1924] A.C. 836.

(2) *In re Floyd: Floyd v. J. Lyons & Co.*, [1897] 1 Ch. 633.

(3) *Adamastos Shipping Co. v. Anglo-Saxon Petroleum Co. Ltd.*, [1959] A.C. 133; [1958] 1 All E.R. 725.

(4) *Neill v. Devonshire* (*Duke of*) (1882), 8 App. Cas. 135.

Judgment

Edmonds J: The plaintiff company is the registered owner in fee simple of a building estate known as Nyali Estate situated at Nyali in the Coast Province of Kenya. The estate is some 2,500 acres in extent, and as to part has been subdivided into plots many of which have been leased as building leases of 9,999 years duration. Unleased plots and the unsubdivided land are retained by the plaintiff company. By each of four separate leases all dated March 27, 1947, the plaintiff company (to which I shall hereinafter refer as the company) leased to the defendant company (to which I shall hereinafter refer as the lessee) four of the subdivided plots, numbered respectively 549, 550, 551 and 552, for the term of 9,999 years from April 1, 1947 subject to the modifications and special conditions in the leases. All leases are in the same terms, save that there is a slight variation as to the amount of premium paid. Clause 2 and cl. 3 of the special conditions are set out in the leases as follows:

> "2. The lessee will bear, pay and discharge all existing and future rates, taxes and assessments, duties, impositions, outgoings and burdens whatsoever assessed, charged or imposed upon the demised premises or upon the owner or occupier thereof.
>
> "3. The lessee will pay to, or reimburse the company the costs of making, repairing and maintaining all roads or streets that may now or in the future bound, abut upon, or give access to the said piece of land hereby demised, but such costs shall be restricted to the proportion of the said costs, assessable on and payable by the company (as certified by the auditors of the company) in respect of such portion or portions of the said roads or streets as are, or shall be actually contiguous to the said demised premises."

On January 19, 1956, the company's auditors purported to certify, pursuant to cl. 3, the proportion payable by the lessee in respect of each plot of the costs incurred by the company in respect of the roads or streets contiguous to those plots. The proportion certified as payable was the sum of Shs. 12,806/36 which is claimed by the company in para. 8 of their plaint under the provisions of cl. 3. In the alternative, the company claims that the amount is due under the provisions of cl. 2. In its defence, the lessee denies that it is under any obligation to pay to the company the amount claimed, and further denies the accuracy of the auditor's certificate. The latter issue was not pursued at the hearing as it was agreed that if it be held that the lessee is under a legal obligation to pay a proportion of the costs incurred by the company in making, repairing and maintaining the roads, such proportion will be the sum claimed by the company.

The following are the agreed facts:

"1. The plaintiff has expended monies in making, repairing and maintaining the roads at Nyali Estate: some of such roads or part of such roads bound, abut upon or give access to the plots leased to the defendant and referred to in para. 3 of the plaint.

"2. Nyali Estate is a building estate of approximately 2,500 acres and the title in fee simple of all land on such estate is vested in the plaintiff. The estate as to part has been subdivided into plots and many of the said plots, amounting to approximately 400 acres, including inter alia the plots referred to in para. 3 of the plaint, have been leased on building leases of 9,999 years to sundry lesses. Unleased plots and the unsubdivided land are retained by Nyali Limited.

"3. The roads referred to in para. 1 hereof, being the roads made, repaired and maintained by the plaintiff, are private roads of which the fee simple is vested in Nyali Limited, and the said roads and the area occupied thereby have not been leased to the lessees of the building plots or any of them.

"4. Monies expended by the plaintiff and referred to in para. 1 hereof were expended as to part on the making, reparation or maintenance of roads by the utilisation of labour employed direct by the plaintiff and supervised by the plaintiff, and as to part as to payments made under contracts entered into by the plaintiff with sundry independent contractors.

"5 (*a*) The plaintiff in its unfettered discretion decided what roads should be made up, repaired or maintained; the standard to which such roads should be made up, repaired or maintained; the time and manner in which such work was to be done; by whom such work was to be done; the amount which should be paid and expended and the manner in which such sums were to be paid and expended:

(*b*) The defendant was not nor was any lessee consulted as to any matter or thing referred to in para. 5 (*a*) hereof:

(*c*) The monies expended by the plaintiff and referred to in para. 1 hereof were expended after a decision or decisions made by the plaintiff itself and in its discretion, and the said monies were not nor were any part of the said monies expended pursuant to or in consequence of any order, direction, requirement, request or payment of any local government, or governmental body, or any other authority or any third party nor was the said sum or any part thereof paid or expended in performance of any legal duty or obligation owed to any local company or governmental body or other authority or third party;

(*d*) The making, reparation and maintenance of the roads are a benefit to the unsubdivided land held by the plaintiff as well as to the leased plots.

"6. On the supposition that Special Condition 3 of the lease imposes a legal obligation on the defendant to pay to the plaintiff a proportion of the said costs incurred in making and repairing and maintaining such roads, such proportion has been agreed, as being Shs. 12,806/36."

The issues are two:

"1. Does Special Condition 2 of the lease impose any obligation binding in law upon the defendant to pay to the plaintiff the whole or any part of the sums expended by the plaintiff pursuant to the agreed facts?

"2. Does Special Condition 3 of the lease impose upon the defendant any obligation to pay the whole or any part of the said monies expended by the plaintiff pursuant to the agreed facts?"

Mr. Harris for the company took his principal stand upon the provisions of cl. 3 and contended that, whereas cl. 2 made provision for the recovery of road and other charges incurred by a statutory authority, cl. 3 clearly made provision for recovery of road charges incurred by the company. Alternatively, in the event of it being held that cl. 3 did not have the effect for which he contends, Mr. Harris relied upon the provisions of cl. 2 as being wide enough to entitle the company to recover such charges from the lessee. For the lessee, Mr. Cleasby contended that there should be no difficulty whatsoever in interpreting the provisions of the two clauses; that cl. 2 relates to assessments by a statutory or local authority upon individual plots or the owners or occupiers thereof, while cl. 3 makes provision whereby, in the event of a local authority making an assessment for road charges upon the estate as a whole, the company in that event can recover proportionately from the lessees.

This is in the nature of a test case and the decision on the issues is of course of considerable moment both to the company and to its lessees.

I will deal firstly with the second issue which relates to cl. 3 of the lease and I think the decision as to the construction of the clause must depend upon the meaning and effect of the words "assessable on and payable by". It is contended for the company that the words must be taken to mean "incurred by" as only by such an interpretation can effect be given to the intention of the contracting parties. I do not think it could be gainsaid that if the words

> "the lessee will pay to or reimburse the company the costs of making, repairing and maintaining all roads or streets that may now or in the future bound, abut upon or give access to such piece of land hereby demised"

stood alone, their only effect would be to impose upon the lessee the burden of reimbursing the company for all costs incurred by it on the construction and maintenance of the roads. But as these words cannot be considered in isolation, and as the clause must be read as a whole, it is necessary to consider what effect the subsequent words have and what meaning is to be assigned to the clause as a whole.

> ". . . the construction [of a document] must be as near to the minds and apparent intention of the parties as possible, and as the law will permit. The intention must be gathered from the written instrument. The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument, not of what was intended to have been written; . . . It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention." (Halsbury's Laws of England, Vol. II (3rd Edn.) pp. 381-382).

It is contended for the company that in arriving at a conclusion as to the intention of the parties, certain factors must be taken into consideration, namely, the length of the term of the lease, the nominal amount of the reserved rent, the absence of any provision in the lease for a sinking fund whereby road charges could be met, the inclusion within the lease of a right of way over all roads constructed by the company, and the right of the company to close any roads and substitute other roads therefore.

I do not think I can properly consider the absence of any provision in the lease for a sinking fund, for there is no evidence before me as to whether or not a sinking fund does in fact exist, but in any event even if there were no sinking fund, I do not think that that is a factor which I can allow to influence me in interpreting the lease.

It is not contested that up to this date, no statutory authority has undertaken or imposed upon the company the construction or maintenance of any road or street within the estate, and, of course, it is unknown when, or if ever, such

an authority will take such a step, and until it does, all work of construction and maintenance will fall upon the company. It would not therefore have been unreasonable for the company to have made some provision in the lease to cover the cost to them of such work. On the other hand, it must not be overlooked that the decision as to what, the standard to which, and the time and manner in which roads should be constructed was entirely within the unfettered discretion of the company, the lessees not being consulted, and indeed, there being no obligation upon the company under the lease to construct or maintain any roads. Nor must cl. (*b*) of the Exceptions and Reservations be overlooked whereby the company reserved the right to close any road at any time and substitute another road therefore. If this right were exercised, and the plan duly approved by the authority concerned, the lessee would be faced, upon the interpretation of cl. 3 as suggested by the company, with the obligation of having to pay twice over for the cost of road works. On the other hand, it is urged by Mr. Harris that that reservation evidences the contemplation by the company of complete control of all roads and road works, unfettered by any statutory authority, and it is pointed out that any reference to power to the company to transfer road works to such an authority, a clause usually to be found in building estate deeds, is omitted from the lease. However, the provisions of cl. 2 of the Special Conditions make it clear that the company did not overlook the possibility of such an authority ultimately assuming control of road works, and, indeed, it is Mr. Harris's initial contention that, while cl. 3 refers to the company's road charges, cl. 2 refers to those of a statutory authority.

However, all those considerations apart, let me turn now to an examination of cl. 3. To find that cl. 3 is to be construed in the manner contended by the lessees would have the effect of placing the whole burden of the cost of road works upon the company until such time as responsibility therefore was assumed by a statutory authority. On the other hand, to find that the proper construction is that contended for by the company would place a costly burden upon the lessees. It is contended for the company that if the lessees' contention is the correct one, then cl. 3 is repugnant to and inconsistent with cl. 2 in that, if cl. 3 relates to charges by a statutory authority, it is inconsistent with the provisions of cl. 2 which covers the same charges. I do not follow this submission. Assuming that the contention for the lessee is correct, the effect of cl. 3 is to allow the company to apportion among the lessees any road charges assessed on the estate as a whole by a statutory authority. In other words, cl. 3 deals with the case where the estate as a whole is assessed to road charges, while cl. 2, on the other hand, clearly relates to the case of assessments upon individual plots. I can see no repugnance or inconsistency. It is then contended that there is an inconsistency between the first and second parts of cl. 3. But again I cannot see it. The second part does no more than explain and restrict the operation of the first part and is in favour of the lessees. If these two parts were to be held to be repugnant to each other, then the first part would, according to Sarkar on Evidence (9th Edn.), 739 stand, and the second would be rejected – a result which would redound to the serious disadvantage of the lessees. Again, it is contended for the company that if cl. 3 is capable of two meanings, the object with which it was inserted may be looked at in order to arrive at the sense in which it was used, and it is urged that the only reasonable conclusion as to the object of inserting cl. 3 is that the company thereby sought to make provision for reimbursement by the lessees of the costs incurred by it on road works.

This brings me back, shall I say, to essentials – what is the meaning to be assigned to the words "assessable on and payable by"? Much argument was addressed on the precise meaning and implication of the word, "assessed", and I think it emerged quite clearly that it is not a word which can be said to be "emphatically a term of legal art". I draw that expression from the speech by Lord Sumner

when discussing the meaning of the word "riot" in *London & Lancashire Fire Insurance Co. v. Bolands Ltd*. (1), [1924] A.C. 836 at p. 848. Mr. Harris relied strongly on the case of *In re Floyd: Floyd v. J. Lyons & Co*. (2), [1897] 1 Ch. 633, in which Rigby, L.J., at p. 640 said that the word "assessed" meant "reckoned on the value". He was considering the use of the word in the following context:

> "All rates, taxes and assessments, water rate, and other outgoings . . . now or hereafter to be imposed or assessed upon the said premises or on the lessor or lessees in respect thereof."

The learned Lord Justice said:

> "It is not accurate to say 'assessed on the premises'; but it is not very far from accurate to say that a water rate is a rate assessed upon the lessees in respect of the house. That is very nearly accurate."

Reference was had to various dictionaries and they all gave similar meanings to the word "assess", that is to say, to fix the amount of, to determine the amount, to value. I do not think there is any difficulty in understanding the meaning of the word in its simple use, for example, in a phrase such as "I have assessed your share at so much", but the word is not used in quite that simple form in an instrument of the nature with which the learned Lord Justice was dealing and I am dealing in this case. If any difficulty arises, it arises when the word is used in conjunction with the preposition "on"; that is why, I think, Rigby, L.J., said that, when using the expression "assessed on"; it is more accurate to relate it to the person rather than to the premises – "a rate assessed upon the lessees in respect of the house", or "a rate reckoned upon the lessees on the value of the house". Now, I think the meaning of the words is clear. But there still remains the question of the implication of the words in the particular context in which they are used in the lease between the company and the lessee in this case, namely, "costs assessable on and payable by the company". It is contended for the defendant company that a payment voluntarily made or expenses voluntarily incurred by a landlord cannot be termed an assessment on the landlord. When a charge is assessed upon a person, the reasonable assumption is that it has been so assessed by someone other than that person, and surely it is carrying fiction a little far to suggest that a company or any body corporate that voluntarily incurs a charge or expense, that is to say, incurs such of its own volition, can then assess upon itself that same charge or expense as though incurred involuntarily. To assess a charge upon a person connotes an obligation upon that person to pay the charge – it connotes an obligatory and not a voluntary payment. Furthermore, there are the words "payable by" and they too, to my mind, imply an involuntary payment, the necessity for making which has arisen as a result of an obligation. Mr. Harris seeks to draw a parallel between the circumstances of this case and those in the *Floyd* case (2). He draws attention to the fact that in the latter case there was no statutory authority concerned, and that the covenants were between a private concern and the persons whom it was serving, that the company there was entitled to charge for water supplied, such a charge being assessed by the company on the person supplied. But I do not think the cases are parallel. And I would note, in parenthesis that the water company in that case was empowered by a special Act of Parliament to levy rates for water supplied, and to that extent that company can be said to have been a statutory authority. But the question before me is not whether the company in this case could have given itself the power to levy a charge upon its lessees in respect of the cost of road works undertaken by it – I have no doubt it could have done – the question before me is whether by the terms of the lease it has in fact given itself that power. In *Floyd's* case (2), the covenant was clear and distinct. It was covenant by the lessor

> "to pay all rates, taxes, assessments, water rate, . . . now or hereafter to be imposed or assessed upon the said premises or upon the lessor or lessee in respect thereof".

There are the clear words obliging the payment by the lessor of the water rate assessed upon the occupier of the premises. There is no provision similar to cl. 3 where the costs are assessed upon the supplier, that is to say, the company. It would have been a simple matter, if such was the intention, to say in clear and unambiguous words that the lessees of plots on the Nyali Estate would be obliged on of course a proportionate basis, to reimbure the company for all costs incurred by it in the construction of roads undertaken by the company of its own volition.

It may be of assistance to see which of the two interpretations for which the parties contend fit the law as to the construction of documents. Let me quote again from Halsbury's Laws of England, Vol. II, (3rd Edn.) p. 384, para. 632:

> "The words of a written instrument must in general be taken in their ordinary sense notwithstanding the fact that such a construction may appear not to carry out the view which it may be supposed the parties intended to carry out; but if the provisions and expressions are contradictory, and there are grounds, appearing on the face of the instrument, affording proof of the real intention of the parties, that intent will prevail against the obvious and ordinary meaning of the words; where the literal construction would lead to an absurd result, and the words used are capable of being interpreted so as to avoid this result, the literal construction will be abandoned. So, too, considerations of inconvenience may be admitted when the construction of the document is ambiguous. If, however, the intention is clearly and unequivocally expressed, then, however capricious it may be, the court is bound by it, unless it is plainly controlled by other parts of the instrument.
>
> "The rule is that in construing all written instruments the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther. The instrument must be construed according to its literal import, unless there is something in the subject or context which shows that this cannot be the meaning of the words."

It is my view that the grammatical and ordinary sense of the words "assessable on and payable by the company" imply that the charges are assessable upon the company by some third person, that is to say, a statutory authority. Can it be said that this leads to an absurdity, or to some repugnance or to inconsistency with the rest of the instrument? Clearly not. That is, I think, their literal import, the obvious and ordinary meaning of the words. It cannot be said that the provisions of cl. 2 and cl. 3 are contradictory, nor that on the face of the document there are grounds affording proof that the intention of the parties was other than what the words in their ordinary and literal meaning imply. If a statutory authority were to assume control of road works on the estate and chose to assess the charges as one sum upon the company, then cl. 3 would operate to permit of the company apportioning the costs among its lessees. There is nothing contradictory in this interpretation. It does not contradict cl. 2. Indeed, it does no more than make provision for the case where the company and not the individual lessees are assessed to read charges. The primary source of determining the intention of a deed is the language used by a deed, and a court cannot make a new bargain by rewriting a contract. There is a corollary to this rule, however, and it was expressed by Lord Reid in *Adamastos Shipping*

Co. v. Anglo-Saxon Petroleum Co. Ltd. (3), A.C. 133 at p. 174, in these words:

> "A court is often entitled to add to a written contract by implying a term if it is satisfied that any reasonable men in the position of the parties would have agreed to it if their attention had been directed to the point and that the term should be implied. But that is supplementing the words which the parties have used – not contradicting them."

That proposition, however, presupposes that the implied term is one which would be acceptable in its terms by the parties to the contract. It cannot, therefore, be applied in the instant case as the lessees rigorously oppose the company's contention as to the intention and purpose of cl. 3. If the words "assessable on and payable by" are to be interpreted as meaning "incurred by", then the former words would be given a meaning which does not accord in my view with their ordinary and grammatical sense. It is contended that the words "such costs" in the second part of c1. 3 refer to the words "the costs" used in the first part in the context,

> "The lessee will pay to and reimburse the company the costs of making, repairing and maintaining all roads",

and that "the costs" in that context must refer to costs incurred by the company itself of its own volition. But I do not agree that this is necessarily the only interpretation. The words could equally imply "the costs imposed upon the company by a statutory authority". The ambiguity, however, is resolved by the words "the said costs assessable on and payable by" which I cannot suppose mean anything other than costs assessed by a statutory authority on the company and thereby becoming payable by the company.

I think it must follow from the foregoing that I cannot accept Mr. Harris's further contention that, if the words "assessable on and payable by" are read disjunctively and the word "or" substituted for "and", the effect of the words "payable by" will be to render the meaning of cl. 3 in the terms for which he contends. As I have already intimated, the words "payable by" connote a payment that is not voluntary one that is made or is to be made under an obligation. In any event, I do not think there is any justification in law for the substitution of the word "or" for "and" in the circumstances appertaining to this case. That would be justifiable only if the effect of cl. 3 as contended by the lessees was repugnant to the rest of the deed and the object contemplated by it. If the word "or" was substituted and if the words "or payable by" were then to have the effect contended for by the company, then in my view that would be a construction of the covenant which cannot be said to have been in the intention of both parties.

While I do not think there are grounds appearing on the face of the document affording proof of the suggested intention of the company or making provision for the situation for which it contends, I believe it may well have been the intention of the company, when contemplating and planning their building estate scheme, to make provision for its reimbursement by lessees or purchasers of the cost to the company of its direct efforts in respect of the work of road construction and maintenance. But in my view that intention is not expressed by the terms of cl. 3 of the special condition. I think that that clause carries a clear and precise provision, and, as is stated in Halsbury, however capricious the resulting intention may be from the point of view of the company, this court is bound by it. I would add a further word and it is this. I have thus far dealt principally with the question of what the intention of the Company was. The intention of the lessees must not be overlooked. It is contended for the company that the words "assessable on and payable by" mean and were intended to mean "incurred by". Can it be said that such a construction or intention

was equally understood by the lessees? The consideration or premium paid by them under the terms of the lease was for

> "a lease of the plots together with a right of way or passage whether on foot or in light vehicles for the lessees and all persons resorting to and from the dwelling house to be erected on the said piece of land over the said road or roads and any other streets or roads constructed by the company communicating therewith".

May it not be said on the part of the lessees that their comprehension of the terms of the lease was that the premium included the facility, without extra charge by the company, of all roads and road maintenance? In the result, therefore, I conclude that the proper and only construction to be placed on cl. 3 is that the company thereunder is permitted to apportion the costs of road construction and maintenance among the lessees only in the event of a charge for such costs being assessed upon it by a statutory authority.

Mr. Harris then contends that, if this view as to cl. 3 is taken by the court, he would fall back upon cl. 2 which he submits is wide enough to include road work charges both by the company and by any statutory authority. This clause provides that the lessees will pay:

> "All existing and future rates, taxes and assessments, duties, impositions, outgoings and burdens whatsoever assessed, charged or imposed upon the demised premises or upon the owner or occupier thereof."

I agree with Mr. Harris that the provisions of this clause by the use of the additional words "duties, impositions, outgoings and burdens" have made its effect just about as wide as it is possible to do. The lessee is clearly and certainly made liable thereunder for any charges by a statutory authority. The question is, however, whether the clause covers the charges sought to be made by the company, that is to say, whether the clause permits the company to recover its own costs and expenses in road works on the estate. There is nothing against a building estate company making precise provision for the reimbursement to it of its costs and expenses upon road works. Can it be said that the wording of cl. 2 necessarily applies only to such charges and outgoings as are assessed by a statutory authority? Is a non-statutory authority such as the company deprived in law of reliance upon such words from recovering its own legitimate charges? I will confess to difficulty in deciding this issue. It is stated in Halsbury's Laws of England (3rd Edn.), Vol. 23, p. 613, para. 1313:

> "If the covenant on the part of the tenant to pay rates and taxes includes any of the words 'duties', 'outgoings', 'impositions' or 'burdens', the effect is to carry the tenant's liability beyond annual assessments, and to make him liable to pay all sums of money payable in respect of the demised premises under the above and similar statutes, notwithstanding that they are expenses of permanent improvements."

Throughout the statement of the law following that quotation reference is made to the various Acts under which, by virtue of the use of such words as "duties", "outgoings", "impositions", "burdens", a tenant may be made liable for charges provided by those Acts. The case of the charges of a private concern is not dealt with. If it were to be held that cl. 2 cannot be said to entitle or make provision for the recovery by the company of its road charges, then the situation arises that, whereas there is provision for the payment by the lessees of road maintenance and construction charges in the event of such being assessed by a statutory authority, they are not obliged under the terms of the lease to reimburse the company, nor is the company entitled to recover from the lessees, any costs for road works incurred by the company of its own volition. In other words,

the effect of the lease as to road works would be this: until such time as responsibility for road works is assumed by a statutory authority, the cost of such will be borne entirely by the company; once the authority assumes responsibility, the costs will be apportioned among the lessees of the company. Such a situation may well be contrary to the intention of the company; on the other hand, that may well be the situation as understood by the lessees. After much consideration I feel bound to conclude that cl. 2 can be held to relate only to charges recoverable under the provisions of some legislative Act, decree or ordinance. In coming to this conclusion I feel fortified by the well-settled rule of construction that in case of ambiguity an instrument shall be construed against the grantor. As Lord Selborne said in *Neill v. Devonshire* (*Duke of*) (4) (1882), 8 App. Cas. 135, at p. 149:

> "It is well settled that the words of a deed, executed for valuable consideration, ought to be construed, as far as they properly may, in favour of the grantee".

If it can be said that there is ambiguity as to the provisions of cl. 2, read by itself or read with cl.3, then that ambiguity must, I think, be resolved in favour of the lessee.

In the result, therefore, this action must fail, and is dismissed. All costs of the lessee in connection with this suit, party and party and solicitor and client, will, by consent, be borne by the company.

Judgment for the defendant.

For the plaintiff:
Hamilton Harrison & Mathews, Nairobi
Gerald Harris

For the defendant:
Atkinson, Cleasby & Co., Mombasa
Richard P. Cleasby

Aisha Binti Hamed Bin Rashid and Four Others v Mohamed Bin Essa El Mandry and Another

[1960] 1 EA 713 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	8 July 1960
Case Number:	136/1960
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Mohamedan law – Wakf – Failure of primary objects – Primary objects not valid for wakf – Charitable intention expressed in favour of secondary objects – Benefit to secondary objects conditional on surplus income being available after providing for primary objects – Whether cy-pres doctrine

applies – Whether wakf void.

[2] Mohamedan law – Wakf – Object of wakf – Reading of Koran upon grave of deceased – Whether object of wakf valid.

Editor's Summary

By a deed of wakf the deceased dedicator transferred all her right, title and interest to certain property to herself as trustee, and after her death to certain named trustees upon certain conditions and trusts. The expressed purposes of the wakf were that out of the income of the property a reasonable amount should be spent on reading the Koran daily for the souls of her late mother and her late aunt and "also on my grave when I die" and any surplus income was to be utilised for the relief of poor Muslims of Mombasa and also for light and water if necessary for the El-Mandry Mosque in Mombasa. The plaintiffs, who were the natural heirs of the dedicator, sought a declaration that the wakf was void ab initio on the grounds that the place where the Koran was to be read was not specified, that the reading of the Koran on the grave of a deceased person was not a valid object, that there was no provision for the performance of any rites or ceremonies recognised by Muslim law, that the dedication was contingent on the death of the dedicator and that the dedication to charity was contingent on a surplus being available after expending the sums necessary for reading of the Koran.

Held –

(i) the reading of the Koran on a private grave is not a valid object of a wakf.

(ii) the intention of the dedicator was that the Koran should be read daily upon the graves of the mother and aunt as well as upon the grave of the dedicator; the objects therefore, were invalid.

(iii) the property, the subject of the wakf, was specifically dedicated to objects which had failed, and since the evidence showed that there would have been no surplus income of the wakf property there was no clear charitable intention expressed in the wakf and it must be declared void ab initio.

Order accordingly.

Cases referred to in judgment:

(1) *Mazhar Husain Khan v. Abdul Hadi* (1911), 33 All. 400.

(2) *Abdul Sattar Ismail v. Abdul Hamid Said* (1944), A.I.R. Mad. 504.

(3) *Mt. Ruquia Begam & Others v. L. Suraj Mal and Others* (1936), A.I.R. All 404.

(4) *Said bin Abdulla Shikely and Another v. The Wakf Commissioner and the Registrar of Titles, Mombasa* (1949), 23 K.L.R. (Pt. 2) 39.

Judgment

Edmonds J: In this suit the plaintiffs, who are the natural heirs of Khadija binti Salim bin Essa deceased (to whom I shall hereinafter refer as the dedicator) seek an order of the court declaring that a Wakf created by the dedicator is void ab initio. By the deed of Wakf the dedicator transferred all her right title and interest to certain property therein described to herself as trustee (and after her death to certain trustees therein named) upon certain trusts and subject to certain conditions. Paragraph 4 expresses the purpose of the deed of Wakf as follows:

> "(4) Out of the said income my trustees shall spend reasonable amount for reading Koran daily for the souls of my late mother Salima binti Mohamed bin Khamis and my late aunt Rukiya binti Mohamed bin Khamis and also on my grave when I die. After providing for these expenses if there remains any surplus, the same shall (be) utilised for the relief of poor Muslims of Mombasa and also for light and water if necessary for the El-Mandry Mosque in Mombasa."

It is contended for the plaintiffs that the Wakf is void ab initio on the following grounds:

(1) That it does not specify the place where the Koran is to be read;

(2) That the reading of the Koran on the grave of a deceased person is not a valid object;

(3) That it does not provide for the performance of any rites or ceremonies recognised by Muslim law;

(4) That the dedication is contingent on the death of the dedicator, and

(5) That the dedication to charity is contingent on there being any surplus available after the expenditure of such sums as are necessary for the reading of the Koran as provided in the first part of para. (4) of the deed.

Mr. Inamdar, who, at the invitation of the court, appeared as amicus curiae, does not contest that the reading of the Koran on a private grave is not a valid object of a Wakf, and I am satisfied from the authorities cited that this is the case. He contends, however, that the provision for the reading of the Koran generally or in public places or at private houses, is a valid one, and that if one of the objects of a Wakf is invalid, the income from the property will be devoted to those objects which are valid. Clause (4) of the deed makes as the principal objects of the Wakf the reading of the Koran daily for the souls of the dedicator's late mother and late aunt, and "also on my grave when I die". Mr. Gautama for the plaintiffs contends that the word "also" must be interpreted as meaning that the reading of the Koran is to be carried out on the graves of the dedicator's mother and aunt as well as upon the grave of the dedicator, and hence that these objects are invalid. Mr. Inamdar, on the other hand, contends that the word "also" refers only to the reading of the Koran daily, and that in respect of the deceased mother and aunt the object is valid. I have had some difficulty in determining the intention of the dedicator by the use of these words, but have in the result concluded that the intention and the only reasonable grammatical construction to be assigned to the context in which those words are used is that the Koran should be read daily upon the graves of the mother and the aunt as well as upon the grave of the dedicator. I think it must be held that the intention of the dedicator was that the reading of the Koran was to be for the souls of all three named persons and that for this purpose the reading should be on their individual graves. Having come to this conclusion, it must follow that these objects are invalid.

The question then arises whether the Wakf fails as a whole or whether the income which would have been utilised to cover the cost of the reading of the Koran on the graves may be devoted to the object provided for by the second

part of cl. (4), namely, the utilisation of the income for the relief of poor Muslims of Mombasa and also for light and water for the El-Mandry Mosque. It is stated in Mulla's Principles of Mahomedan Law (14th Edn.), p. 168 under paras. 180 and 181 as follows:

> "180. *Objects partly valid and partly invalid.* – Where a Wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the Wakf (dedicator). Where the property is not specifically dedicated to an object which fails, the whole amount will be devoted to the valid objects of charity.
>
> "181. *Doctrine of cy-pres.* – Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed."

I was referred by Mr. Inamdar to the case of *Mazhar Husain Khan v. Abdul Hadi Khan* (1) (1911), 33 All 400 where Banerji, J., said at p. 413:

> "Furthermore, the deed of waqf in this case gives full power to the *mutawalli* to defray 'other necessary charitable expenses if the income of the endowed property permits the same to be done'. If, therefore, the objects referred to above are not proper objects of waqf, the *mutawalli* has the power to devote the income to other charitable objects which are not open to objection. I have pointed out above that the total amount of expenses mentioned in the deed of waqf is Rs. 527, out of which exception is taken to items amounting to Rs. 212 only. There was therefore a substantial dedication of the property to religious or charitable purposes within the meaning of the rulings of their Lordships of the Privy Council and the waqf is valid."

Sir John Stanley, C.J., in the same case gave a different view. He said at p. 406:

> "Income to the extent of about Rs. 200 a year has been, as I am disposed to hold, directed to be applied for purposes which are not valid. The provision in the document that the *mutawallis* shall be competent to apply the income on other charitable expenses if the income of the endowed property permit the same to be done, would not, I think, allow of their so applying the income expressly devoted to the expenses of *fatiha* and salary of *Hafiz* and readers. This provision appears to me to be intended only to meet a case in which the annual income exceeds the amount required for the expenses specifically mentioned in the waqfinama. If the dedication of the property for the *fatiha* and other ceremonies in question are valid, then the *mutawalli* is bound to apply the income to meet these expenses and not other expenses. If my view as to this be correct, so much of the property as represents the income directed to be applied for objects which are not legal, should be treated as unendowed property."

In *Abdul Sattar Ismail v. Abdul Hamid Sait* (2) (1944), A.I.R. Mad. 504, Leach, C.J., giving the judgment of the court, said at p. 511:

> "But even supposing that the last three objects are invalid, this would be no ground for holding that the wakf failed. Ameer Ali points out that the cypres doctrine is carried to the utmost limit in the Mussalman system. In 1936 A.I.R. 404, the Allahabad High Court expressly held that if one of the objects was good and one bad, the whole of the income could be devoted to the good object. With this opinion we are in agreement."

In that case cl. 21 of the Wakf made the following provisions:

> "In the event of the descendants both male and female of my said grandchildren becoming extinct the wakf trustees for the time being shall hold the wakf estate and the investments for the time being representing the same in trust for the following charities in such proportion as my wakf trustees shall think fit: (1) Mosques and provision for imams to conduct worship therein; (2) Distribution of alms to poor persons and assistance to the poor to enable them to perform the pilgrimage to Mecca, (3) Celebrating the death anniversaries of myself and of the members of my family, (4) Reading the Koran in public places and also at private houses, (5) Maintenance of my poor relations and dependants."

In both the above cases there was a clear charitable intention expressed in the instrument of wakf. In both cases, however, the opinions of the learned judges were expressed obiter. Similar opinions, though also obiter, were expressed by the court in *Mt. Ruqia Begam and Others v. L. Suraj Mal and Others* (3) (1936), A.I.R. All. 404 and in *Said bin Abdulla Shikely and Another v. The Wakf Commissioners and the Registrar of Titles, Mombasa* (4) (1949), 23 K.L.R. (Pt. 2) 39.

From a study of these cases it appears to me that the majority opinion as regards the income dedicated to invalid objects is as follows:

(1) Where a specific sum is dedicated to a specific object, then if that object is invalid, that sum will be devoted to such objects as are valid.

(2) Where no specific sum is dedicated to any specific object, but the general income is dedicated to a number of objects, some of which are invalid, then the whole income will be devoted to those objects which are valid.

(3) But, both (1) and (2) are subject to the proviso that such sums that become available consequent upon certain objects being invalid will be devoted to other objects only if those other objects are charitable and a clear charitable intention is expressed in the deed of Wakf.

In all the Indian cases to which I have been referred, clear charitable intentions were expressed in the instruments of Wakf and, if they were not made subject to a specific or general sum from the income, there were at least sufficient funds available for them, after making provision for the other objects. In the Wakf with which I am dealing in this case, the charitable intention is as it were a second thought and conditional upon there being funds available therefore after meeting the costs and expenses necessary for carrying out the three primary objects mentioned in the first part of cl. (4). In other words, if no surplus was available after meeting those expenses, then charity would not benefit under the deed of Wakf. Had the deed provided that the income in the Wakf was to be utilised for the reading of the Koran on the graves of the mother and aunt and on the dedicator's grave after her death, *and* for the relief of poor Muslims in Mombasa, *and* also for light and water, if necessary, for the Mosque, then I would have held that the deed expressed a clear charitable intention and that, on the failure of the first two objects on the grounds of invalidity, it would have been proper to apply the cy-pres doctrine. The evidence before me clearly establishes that in fact there would have been no surplus from the income of the Wakf property, and hence the charitable objects mentioned would not have benefited. It cannot, therefore, be held that a clear charitable intention is expressed in the deed. The property the subject of the Wakf was specifically dedicated to objects which have failed, and in the absence of a clear charitable intention the Wakf must in my opinion be declared void ab initio. There will be an order accordingly, with a further declaration that the property the subject

matter of the Wakf forms part of the estate of the deceased Khadija binti Salim, and a further order that this declaration be registered against the relevant title.

I wish to add that I am beholden to Mr. Inamdar for his assistance and learned exposition of the law without which my task in this matter would have been difficult.

Order accordingly.

For the plaintiffs:
S.R. Gautama, Mombasa

The defendants did not appear and were not represented.
I.T. Inamdar as amicus curiae.

K v K
[1960] 1 EA 717 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	3 September 1960
Case Number:	31/1960
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Pelly Murphy, J

[1] Nullity – Wilful refusal to consummate marriage – Incapacity of wife – Vera copula incomplete – Whether marriage consummated.

[2] Nullity – Intervention – Queen's Proctor – Intervention after decree nisi – Undefended petition – Information for intervention from respondent wife.

Editor's Summary

The appellant petitioned for a decree of nullity of marriage on the ground that the respondent had wilfully refused to consummate the marriage. The respondent entered an appearance but filed no answer and a decree nisi was pronounced ex parte. The respondent had not defended the suit as she wished the marriage dissoved whilst maintaining that in fact the marriage had been consummated; she also admitted that the appellant's agreement to pay certain mortgage debts due by to her had "partially influenced" her in not defending. Following information received from the respondent the Queen's Proctor intervened before decree absolute on the grounds that the marriage had in fact been consummated and of collusion between the parties. The judge found that, whilst there had been no collusion, the appellant had not discharged the onus upon him of proving "continued, wilful refusal to consummate" and rescinded the

decree nisi. The appellant then appealed and the substantial questions at the hearing were whether the marriage had ever been consummated and, if not, had there been wilful refusal. It was submitted for the appellant that vera copula was never full, normal and complete and therefore there was no consummation, while the Queen's Proctor argued that the test of consummation was not the degree of penetration.

Held –

(i) there was no wilful refusal by the respondent to consummate the marriage.

(ii) (per O'Connor, P. and Gould, Ag. V.-P., Crawshaw, J.A., dissenting) the marriage was consummated and there was evidence to support that view.

Appeal dismissed.

Cases referred to in judgment:

(1) *D-E v. A-G.*, 163 E.R. 1039.

(2) *Baxter v. Baxter*, [1947] 2 All E.R. 886.

(3) *L. v. L.* (1922), 38 T.L.R. 697.

(4) *Grimes v. Grimes*, [1948] 2 All E.R. 147.

(5) *White v. White*, [1948] 2 All E.R. 151.

(6) *Snowman v. Snowman*, [1934] P. 186.

(7) *B. v. B.*, [1955] P. 42; [1955] 2 All E.R. 158.

(8) *G. v. G.* (1908), 25 T.L.R. 328.

(9) *Horton v. Horton*, [1947] 2 All E.R. 871.

(10) *S. v. S.*, [1956] P. 1.

(11) *G. v. G.* (1871), L.R. 2 P. & D. 287.

(12) *G. v. G.*, [1924] A.C. 349.

The following judgments were read:

Judgment

Crawshaw JA: On January 9, 1959, the appellant/petitioner filed a petition in the Supreme Court, Nairobi, asking that his marriage to the respondent be declared null and void on the ground of wilful refusal by the repondent to consummate the marriage. Appearance was duly entered by the respondent but she failed to file an answer and, ex parte, a decree nisi was pronounced on March 6, 1959. The respondent says she did not defend the suit as she wished the marriage dissolved, although she maintains that in fact the marriage had been consummated; she admits that the appellant's agreement to pay certain mortgage debts due be her also "partially influenced" her in agreeing not to defend. On June 1, 1959, and before the decree had been made absolute, the Queen's Proctor entered an appearance on information supplied by the respondent, his grounds of intervention being –

(*a*) that the marriage had in fact been consummated and

(*b*) collusion between the parties.

The appellant denied these allegations, and on the matter coming before the court, Pelly Murphy, J. found that there had been no collusive agreement in relation to the presentation or prosecution of the proceedings but that, the onus being on the appellant, he had "not made out his case of continued, wilful refusal to consummate". In pursuance of this the learned judge rescinded the decree nisi, and it is against this order that the appellant has now appealed. It should be mentioned that on May 28, 1959, the respondent filed a notice of appeal against the decree nisi, and in support of an application for leave to appeal out of time she filed an affidavit in which, inter alia, she said

> "My marriage was fully consummated but there were sexual difficulties between myself and my husband which, among other things, caused friction and quarrels between my said husband and myself,"

and

> “I submitted to all my said husband’s sexual demands although they seemed to be very excessive and became repulsive to me.”

The learned judge broadly set out the facts as follows:

> “The parties were married in Nairobi on June 6, 1958. At the time of the marriage the petitioner was a bachelor aged 52. The respondent, then aged 40, had been previously married but had been divorced by the husband of

> that marriage on the ground of desertion in 1955. She has one grown-up son by that marriage. They had known each other for many years but, as the petitioner lived in Nairobi and the respondent lived in Salisbury, Southern Rhodesia, they saw each other infrequently.
>
> "In December, 1957, the petitioner visited Salisbury and stayed in a hotel. During the course of his stay, which lasted for three days, he proposed to the respondent who agreed to marry him. The respondent was at that time employed in a responsible position with a Salisbury company. She owned a house but this property was the subject of two mortgages securing the sums of £1,500 (which fell due for repayment on December 31, 1958) and £3,000. The question of the repayment of these moneys was discussed between the parties at various times. There is a conflict in the evidence as to what precisely was agreed between them; but I am satisfied that, before they were married, the petitioner had promised that he would be responsible for the repayment of the sums secured by both the mortgages and that the respondent consented to this.
>
> "It is common ground that, at the end of October, 1958, both parties had come to the conclusion that the marriage was a failure. I am satisfied that the marriage had, indeed by that time proved to be a failure and that the reason why it had failed was incompatibility in the matter of their sex life. It will be necessary to deal with this question more fully later. For the present, it is sufficient to say that the petitioner was not getting satisfaction from the sexual intercourse which took place between him and the respondent. The respondent considered that the petitioner was unreasonable in relation to the frequency of intercourse and the degree of penetration which he demanded.
>
> "The parties then discussed between themselves the question of divorce. I have come to the conclusion that neither of them then knew that, because of the short duration of the marriage, divorce was not possible. I am satisfied that at this time the respondent's financial affairs were again discussed by the parties and that the petitioner reiterated his intention of paying off the amounts due on both mortgages on the respondent's house property, saying that he would honour his promise in the matter and declaring his wish that the respondent should have a home (free of encumbrances). The respondent suggested a separation but the petitioner would not agree to anything that would not give him his complete freedom."

The main grounds of appeal may perhaps be briefly summarised as follows: (*a*) that the learned judge misdirected himself as to what amounts to consummation in law and as to there having been consummation; (*b*) that, having disbelieved the respondent in certain material matters he was wrong to accept her version of the sexual acts between her husband and herself, and (*c*) that he failed to give due consideration and weight to certain evidence and circumstances which were before him, which resulted, inter alia, in his unjustifiably finding that there was no wilful refusal. There are two questions. Was the marriage ever consummated; if not, was there wilful refusal? It will perhaps be convenient to deal with the evidence first, before considering the legal meaning of "consummation" and whether, if there was no consummation, there was wilful refusal. It will I am afraid be necessary to go into the evidence at some length and in unpleasant detail.

Much has been made of the difference in evidence between the parties as to the particulars of their sexual relationship. But so far as is relative to this appeal I am not sure that there is in fact, on the finding of the learned judge, any very material difference. Each party agrees that there was penetration, at any rate on occasions. Admittedly the respondent alleges that intercourse took place

between them prior to marriage, first in Salisbury, after he arrived there in December, 1957, when she says he was very much in love with her, and also after her arrival in Nairobi in February, 1958. The appellant denies pre-marital intercourse of any kind with her. She says that before marriage they had discussed sex and that she had told him of certain operations she had had, consisting of a hysterectomy, which had affected her sex life, and the removal of her ovaries; it would seem, however, that these operations had not caused any actual shortening of the vagina. She said she told him that she was not sure that she would be able to give him all the sex he might want, and that she was not very sexually inclined, and could not bear him any children, and that she was not very strong. She says she was "nervous of the sexual side from the start". Her evidence does not specify the degree of penetration during the intercourse which she claimed prior to marriage, and no point has been taken that as a result of such intercourse the appellant had any special knowledge of her condition; either that the intercourse was unobstructed in any way or, on the other hand, that it was partial only.

The respondent's evidence is that on their honeymoon "full intercourse" took place more than once and that the honeymoon was a "happy one". She says that shortly afterwards, when on safari (the respondent is a professional hunter), intercourse took place. She then visited Rhodesia. The appellant again went on safari, unaccompanied by her, returning at the beginning of August when she said they still got on well together and that there was further intercourse between them, although she says that he spoke a lot about a girl on the safari who had got into bed with him in the nude. She later accompanied him on safari once again, but she became unwell and asked him not sleep in her tent, at which he took umbrage. On returning to Nairobi the appellant was unwell and slept in a separate bedroom, but she says that when he recovered they again had intercourse. She says that later he told her she

> "was not adequate, and did not give him the sexual satisfaction he wanted."

This she says was at the beginning of October, 1958. He told her he was miserable because of her, and she became nervous and upset, and in mid-October she stayed at the coast for a fortnight. On return they slept in separate rooms and she suggested that they separate as the marriage was not a success. He again went on safari, she not accompanying him, and returned with a girl towards whom he appeared very friendly whilst being antagonistic to the respondent. The respondent became suspicious of their relationship and employed a private detective to watch the house. The respondent went away for two days, returned and again discussed separation with the appellant, the girl, presumably, by then having left. They agreed not to do anything about it for a week and she says that during that week they had intercourse frequently. At the end of the week she says she told him she could not go on with it, and they decided to break up the marriage. The appellant went to his advocate in this connection. Even after this she said that intercourse again took place on December 18, 1957, which, however, the appellant denies. On December 20, she left him for good.

When asked what consummation meant, the respondent said "It means that there had been intercourse – penetration"; she did not specify the degree of penetration. In what appears to be an explanation of what she meant by "full intercourse" she said:

> "Several inches' penetration. I did not obstruct petitioner in any way. I am sure that he had satisfaction – that he had an orgasm I felt the penetration uncomfortable – it seemed to me very high up. I tried not to show my discomfort. On subsequent occasions when intercourse took

> place, there was always several inches penetration. He was very ardent and I had to ask him not to go so far because it hurt me."

Elsewhere she said "Sexual intercourse, if penetration was too high, caused me discomfort and pain". It would certainly be consistent with these conditions if she did make it difficult, if not impossible, for the appellant to penetrate more than a certain way. I might observe here that the appellant has never, so far as is known, sought a medical inspection of the respondent. A complete lack of medical evidence adds difficulty to the case.

The appellant says that on their honeymoon the respondent had told him that on account of her operations intercourse was painful and harmful to her and that sex appalled her, and she deliberately made it impossible for him to have "proper penetration", and that he had an orgasm in the "extreme part" of her vagina only. Referring to subsequent attempts at intercourse he says the

> "procedure was always the same; she prevented full intercourse by same means. I had orgasms inside her vagina but without full penetration."

When the question of an annulment of the marriage was discussed he says she agreed that he had grounds for annulment.

The respondent's evidence as to the number of occasions intercourse took place after marriage was not the subject of adverse questioning in cross-examination, except as to the honeymoon when she contradicted her evidence in chief as to what occurred on the third night. Nor was the appellant cross-examined as to the manner of intercourse as described by him. The learned judge said that notwithstanding his disbelief of certain averments made by the respondent in her affidavit (to which I have already referred), which averments however did not relate to the manner of intercourse, "I have come to the conclusion" (although he gave no reasons)

> "that the respondent's evidence as to the manner in which sexual intercourse took place between her and the petitioner is true."

The question is what was the learned judge's interpretation of that evidence? He went on to say:

> "The only question for decision is whether or not that intercourse was such that it should be held that the marriage was consummated. The petitioner himself has said that on one occasion at least, his penis having penetrated to a depth of two inches, he had an orgasm and emitted semen into the interior of the respondent's vagina.
>
> "As I understand it, Mr. Salter's argument is that such intercourse as took place was only partial intercourse and that there was not true coitus – vera copula. I am unable to find any authority for this proposition. I can find nothing on the authorities cited to me to suggest that, merely because the husband does not obtain the degree of penetration which he desires, there is no coitus. All the cases suggest the contrary. The intercourse may have been imperfect from the petitioner's point of view. But the petitioner has not satisfied me that the marriage was not consummated. I believe that it was consummated.
>
> "Moreover, in order to succeed in his petition the petitioner must establish that the respondent wilfully refused to consummate the marriage. I am completely satisfied on all the evidence that the respondent, in spite of the physical disabilities from which she suffered and which were known to the petitioner, endeavoured to afford the petitioner the fullest degree of sexual intercourse of which she was capable. She said, and I believe her, that she used lubricating jelly in an attempt to ease the pain which the petitioner's penetration caused her."

It will be seen therefore that the learned judge was prepared to believe that the respondent did suffer from certain physical disabilities which he held were known to the appellant, but that in spite of them she endeavoured to afford the appellant the fullest degree of sexual intercourse of which she was capable. This suggests that he regarded her as partially incapable due to her disabilities, and actually says "the intercourse may have been imperfect . . .". In other words it seems to me that the learned judge, in spite of saying that he accepted the respondent's evidence as to the manner of intercourse, put a qualified interpretation on that part of it which alleged "full intercourse". Again, when setting out the general facts in the early part of his judgment, he said in relation to their sex life,

> "It will be necessary to deal with this question more fully later. For the present, it is sufficient that the petitioner was not getting satisfaction from the sexual intercourse which took place between him and the respondent."

He nowhere mentions that he believed intercourse to be "full" or penetration complete. What he is saying is, as I read his judgment, that the respondent afforded the appellant the fullest degree of intercourse of which she was capable, but that this was limited, due to certain disabilities which caused her pain, but that partial penetration (and he refers to the respondent's admission that this was as much as two inches) was sufficient to constitute consummation. The evidence as a whole would fully entitle the learned judge in my opinion to come to these conclusions of fact.

The question is whether partial penetration such as would appear to have taken place can be said to have been consummation in the legal sense. The most important case on this point is *D.-E. v. A.-G.* (1), 163 E.R. 1039, where a suit was brought by the husband for a declaration that the marriage was null and void on the ground of impossibility of consummation. In that case the wife had a defective vagina which prevented conception and enabled only partial penetration of two inches as against the normal four to four and a half inches. Dr. Lushington in his judgment said at p. 1045:

> "It is no easy matter to discover and define a safe principle to act upon: perhaps it is impossible affirmatively to lay down any principle which, if carried to either extreme, might not be mischievous . . .
>
> "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all."

And:

> "If there be a reasonable probability that the lady can be made capable of vera copula – of the natural sort of coitus, though without power of conception – I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void."

The reasons of the learned Doctor in setting out these principles are interesting. He says:

> "But when the coitus itself is absolutely imperfect, and I must call it unnatural, there is not a natural indulgence of natural desire; almost of necessity disgust is generated, and the probable consequences of other connexions with men of ordinary self control become almost certain. I

> am of opinion that no man ought to be reduced to this state of quasi unnatural connexion and consequent temptation, and, therefore, I should hold the marriage void."

In the circumstances he pronounced the marriage null and void. The principles contained in Dr. Lushington's judgment still appear to be approved by the courts, and cases have been cited to us in which they have been considered, although no case is as nearly in line with the instant case as that of *D.-E. v. A.-G.* itself.

In *Baxter v. Baxter* (2), [1947] 2 All E.R. 886, the parties had been married for ten years when the husband petitioned for a decree of nullity on the grounds of non-consummation by virtue of his wife having wilfully refused him intercourse unless he used a contraceptive sheath. It was held by the House of Lords that the use of a contraceptive did not prevent the consummation of the marriage. The case has nothing in common with the instant case, but Lord Jowitt, L.C., in considering Dr. Lushington's judgment said,

> "He held that a natural malformation having precisely the same result in relation to conception as a sheath, would not be a ground of nullity provided the vagina could be penetrated to the usual depth before encountering malformation."

For the present purposes the important words in Lord Jowitt's appreciation of what Dr. Lushington said are "usual depth". In *L. v. L.* (3) (1922), 38 T.L.R. 697, cited with approval by Lord Jowitt, Horridge, J., referred to Dr. Lushington's judgment said:

> "The question whether the possibility of partial penetration was a ground for refusing relief was very exhaustively considered, and the decision turned on the impossibility of complete penetration."

Horridge, J., went on to say that he could not regard Dr. Lushington's opinion as obiter. It will be observed that Horridge, J., read Dr. Lushington's expression "complete intercourse" as meaning "complete penetration". Lord Jowitt, at the end of his judgment said:

> "I take the view that in this legislation (s. 7 (1) (*a*) of the Matrimonial Causes Act, 1937, similar to our s. 13 (1) (*f*) of the Matrimonial Causes Ordinance, Cap. 145, which provides that wilful refusal to consummate shall be a ground for a decree of nullity) Parliament used the word 'consummate' as that word is understood in common parlance and in the light of social conditions known to exist."

Grimes v. Grimes (4), [1948] 2 All E.R. 147 was a case where the husband practised coitus interruptus and his wife petitioned for a decree of nullity on the ground of non-consummation. The petition was granted on this ground, but the decision has not been followed in subsequent cases. The case has, however, been referred to us on account of certain general remarks in the judgment of Finnemore, J. At p. 148 he said

> "it has always been held from the earliest days that, to establish consummation of marriage, intercourse must be natural and complete."

White v. White (5), [1948] 2 All E.R. 151, was another case of coitus interruptus; where the court differed from that in *Grimes v. Grimes* (4) and held that the practice did not prevent consummation, although granting dissolution of the ground of cruelty. Wilmer, J., at p. 155, said

> "It is contended that there is a complete conjunction of bodies, a vera copula – which means literally 'true conjunction' – as soon as full entry and penetration has been achieved",

and expressed his view that this contention must be correct, and that it followed "from the reasoning of the House of Lords in *Baxter v. Baxter* (2)", *Snowman v. Snowman* (6), [1934] P. 186 has been referred to, but I do not think that there is anything in it which helps us. There the husband was unable to effect penetration at all, although conception was accomplished by emission ab extra. The court goes no further than saying it was unable to differentiate between that case and the "partial and imperfect intercourse" in the *D.-E. v. A.-G.* case (1). The headnote seems to go rather further than the judgment justified. Similarly *B. v. B.* (7), [1955] P. 42, is of no help, the decision in which turned on the artificiality of the wife's organ.

Mr. Salter's submission is that in the instant case the vera copula was never full, normal and complete and that therefore there was no consummation. Mr. Davies, whilst observing that the law is not clear as to what amounts to consummation submits that,

> "full entry and penetration is effected as soon as the male organ enters the female organ, and that when entry is sufficient to produce an orgasm there is consummation."

With respect I do not think the question of orgasm is relevant, and that mere incipient entry is certainly insufficient (the *D.-E.* case (1)). Mr. Davies has also observed that if the degree of penetration is a test of consummation, it would give rise to great difficulties involving nullity proceedings where the organ of one marital party is disproportionate to that of the other party, of which he said there must be numerous instances. I do not think, however, that the principles stated by Dr. Lushington would normally have this result. There would be nothing abnormal in their intercourse in the sense that I read Dr. Lushington's judgment, and penetration would be complete within their degree of normality. There was the case of *G. v. G.* (8) (1908), 25 T.L.R. 328 where a decree of nullity was passed on the ground of husband's incapacity caused by his generative organ being unusually large, whilst that of his wife was somewhat small. This however resulted in total inability to consummate, and was described by the Master of the Rolls as an appeal "without precedent in the English Courts".

The learned judge did not refer to any authorities on the question of vera copula. He says,

> "I can find nothing in the authorities cited to me to suggest that merely because the husband does not obtain the degree of penetration which he desires there is no coitus. All the cases suggest the contrary."

I do not think that the record shows that he was referred specifically to *D.-E. v. A.-G.* (1), but he was referred to authorities in which that case was cited and Dr. Lushington's judgment in part quoted, and it must be assumed that he gave them his consideration. I agree that there is little in the cases other than *D.-E. v. A.-G.* (1), which is in point, and one must be careful when considering those cases to realise that the references to Dr. Lushington's judgment were made in the light of the particular circumstances of the case in question.

In my opinion, however, the learned judge has taken a wrong view of the law. On the facts as he appears to have found them there can be little doubt that the respondent was "not getting satisfaction from the sexual intercourse", to use the learned judge's own words. The intercourse was not "ordinary and complete" but was "partial and imperfect", in the terms of Dr. Lushington. The question is whether the degree of imperfection deprived the intercourse of its essential character. Bearing in mind Dr. Lushington's reasons for the principles he sets out, I think it did. Not only was penetration only partial, but it was accompanied by pain in the respondent which the appellant must have been aware of,

and which alone must have seriously affected the character of the act, and by her not unnatural disinclination to suffer the act; there could have been little of the "solace and satisfaction of man", which in Lord Stair's Institutions, 1832, were, perhaps rather one-sidedly as one might think these days, regarded as "the general end of the constitution of marriage". The result is clear. From being "very much in love with her", as the respondent described the appellant's original feeling towards her, the marriage foundered within a few months, and the learned judge says,

> "the reason why it failed was incompatibility in the matter of their sex life".

By "incompatibility" it would seem, from what he later said, he meant the difficulty of intercourse accompanied, presumably, by the respondent's disinclination. It seems to me that this is the very type of intercourse which Dr. Lushington would have described as so imperfect as to be "not a natural indulgence of natural desire", giving rise as it did to the very frustrations and, possibly, temptations which Dr. Lushington foresaw. In all the circumstances I do not think it can be said that there was consummation of the marriage, and I would reverse the learned judge's decision on that issue.

There is still the question whether the failure of the respondent to permit consummation by full entry could constitute wilful refusal.

> "In determining whether there has been such a refusal, the judge should have regard to the whole history of the marriage",

to use the words of the headnote in *Horton v. Horton* (9), [1947] 2 All E.R. 871. As to the facts, I will repeat the learned judge's words,

> "I am completely satisfied on all the evidence that the respondent in spite of the physical disabilities from which she suffered and which were known to the petitioner, endeavoured to afford the petitioner the fullest degree of sexual intercourse of which she was capable. She said, and I believe her, that she used lubricating jelly in an attempt to ease the pain which the petitioner's penetration caused her".

Here again, the learned judge did not refer to any authorities and one must conclude, I think, that his decision was based on a finding that the respondent did not in the circumstances act unreasonably. He clearly accepted her evidence that she suffered pain if full penetration was attempted, and that the pain resulted from some defect in the upper part of her vagina. In coming to his conclusion it cannot in my opinion be said that, having regard to the whole history of the marriage, his finding was unjustified.

In *Horton v. Horton* (9), Lord Jowitt, L.C., said that he thought it undesirable to attempt any definition of the phrase "wilful refusal to consummate the marriage but that "the words connote, I think, a settled decision come to without just excuse". The facts of that case provide no assistance to us.

In *S. v. S.* (10), [1956] P. 1, the parties attempted intercourse but owing to a structural defect in the wife, consummation was not possible without an operation. The husband filed a petition on the grounds of non-consummation or, alternatively wilful refusal, but failed on both grounds. The husband had suggested, and more than once, that she should consult a doctor but he did nothing more positive about it. She did not comply until some five years later. The husband filed his petition, and she then underwent a minor operation, before the conclusion of the case, which successfully removed any impediment to full consummation. It was held she was able and willing then to consummate the marriage, and it could not therefore be said that consummation was practically impossible. As to wilful refusal, the learned judge took the view that

the wife's failure to see a doctor earlier was more consistent with a state of indecision than with a settled or definite decision, and held wilful refusal had not been proved. A fortiori, had the wife never been asked to go to a doctor the court would no doubt have found its decision the easier.

Incapacity has not, of course, been pleaded in the instant case, and I hasten to say that no point has been made of the failure of the respondent to seek medical advice, or of the appellant's failure to persuade her to do so. If it is accepted, however, that the respondent did suffer pain when full intercourse was attempted, the fact that the appellant did not encourage her to consult a doctor does, I think, weaken his case. The practical impossibility in the *S. v. S.* case (10), up to the time of the operation, was a structural blockage in the form of a particularly thick hymen, although the parties did not apparently realise the nature of the trouble until she went to the doctor. In the instant case there has been no medical explanation, but the trial judge clearly held that there was a disability and, that being so, I see no real difference between the two cases in that respect. The disability, so far as one knows, might be easily curable, but whilst it is there it cannot, I think, be said that the respondent has resisted full intercourse without just cause.

Practical impossibility need not depend on structural impossibility, as is shown in *G. v. G.* (11) (1871), L.R. 2, P & D. 287, referred to in *S. v. S.* (10). There, the learned Judge Ordinary said

> "The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that it is possible only under conditions to which the husband would not be justified in resorting."

And *G. v. G.* (12), [1924] A.C. 349, was a case where mere repugnance to the act of intercourse so affected the mind of the wife as to amount in the finding of the House of Lords to incapacity.

To my mind there was no wilful refusal by the respondent to consummate, and I would dismiss the appeal on that ground, with costs.

Sir Kenneth O'Connor P: I have had the advantage of reading the judgment of the learned Justice of Appeal. I agree with him that the appeal should be dismissed; but I would dismiss it not only on the ground that there was no wilful refusal by the respondent to consummate the marriage, but also because I am not prepared to differ from the finding of the learned trial judge that the marriage was consummated.

I do not think that any of the more recent cases on what amounts to consummation have weakened the authority of what was said by Dr. Lushington in *D.-E. v. A.-G.* (1), 163 E.R. 1039 at p. 1045:

> "Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse: yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that, legally speaking, it is no intercourse at all."

Dr. Lushington goes on to say of the lady in that case:

> "If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect, and unnatural coitus, I would pronounce the marriage void."

The ministrant in *D.-E. v. A.-G.* (1), was in fact, suffering from a malformation of the vagina which rendered anything more than "incipient, imperfect and

unnatural coitus" impossible. To descend to unpleasant detail the evidence was that

> "the vagina, instead of being, as it ought naturally to have been, of the depth of four inches, or thereabouts, was in the said Maria D. of the depth of only one inch and a quarter . . . and was so constructed as to form a perfect cul de sac, without any apparent means of communication with any internal organ."

Per contra in the present case although the respondent had had a hysterectomy and had had her ovaries removed, there was no evidence that her vagina had been shortened, or was abnormally short or that she was physically incapable, (as was the ministrant in *D.-E. v. A.-G.* (1)), of admitting the male organ to its full extent. The learned trial judge preferred her evidence on the manner of the intercourse which had taken place, to that of the appellant and she swore that intercourse with the appellant had, in fact, taken place on various occasions, when several inches of penetration had been achieved; and that she had not obstructed the appellant in any way and that he had had satisfaction. The fact that too high a penetration gave her pain and discomfort did not prove that sexual intercourse with complete penetration had not taken place. As Dr. Lushington said:

> "I cannot go the length of saying that every degree of imperfection would deprive it"

(i.e. intercourse) "of its essential character". The learned trial judge did not find that the petitioner had not ever obtained the degree of penetration which he desired. He said that he could find nothing in the authorities cited to him to suggest that if that were so, there was no coitus. However that may be, I think that the learned judge was entitled to say

> "The intercourse may have been imperfect from the petitioner's point of view. But the petitioner has not satisfied me that the marriage was not consummated. I believe that it was consummated."

The learned judge believed that the marriage was consummated and he had evidence to justify that belief. I am not prepared to differ from him. The appeal is dismissed with costs.

Gould Ag VP: I have had the advantage of reading the judgments of the learned President and the learned Justice of Appeal. I respectfully agree with both, that, for the reasons given by the learned Justice of Appeal, the appeal should be dismissed with costs on the ground that there was no wilful refusal by the respondent to consummate the marriage. I also agree with the view of the learned President, for the reasons set out in his judgment, that the appeal should be dismissed also upon the ground that the finding of the learned trial judge that the marriage was consummated ought not to be disturbed.

Although the learned trial judge's preference for the evidence of the respondent as to the details of the intercourse was attacked upon appeal, I am unable to see any ground, within the ordinary principles regulating the approach of a Court of Appeal to the findings of fact of a judge of first instance, for dissenting from his view. With all deference to the opinion of the learned Justice of Appeal on this point, for the learned trial judge to have held that intercourse of the nature and degree described by the respondent did not amount to consummation, would have been in my view, to make a finding with little or no support from authority, to disregard the generally accepted view of what constitutes consummation, which I conceive to be the completion of

marriage by sexual intercourse, and to open wide a door leading to facile evasion of the requirements of the law as to dissolution of marriage.

Appeal dismissed.

For the appellant:
Robson, Harris & Co., Nairobi
Clive Salter, Q.C. and *J.P.G. Harris*

For the respondent:
Geoffrey White & Co., Nakuru
C.S. Rawlins

For Queen's Proctor:
The Attorney-General, Kenya
Stephen Davies (Crown Counsel, Kenya)

Paul Gardette v R
[1960] 1 EA 728 (CAN)

Division:	Court of Appeal at Nairobi
Date of ruling:	13 September 1960
Case Number:	203/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Gould JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Seychelles – Coombes, J.

[1] Evidence – Whether Code Napoleon applies to evidence in criminal cases in Seychelles – Penal Code, s. 4, *s.* 253, *s.* 268 *and s.* 316 (*S.*) *– French Code Napoleon, articles* 1315, 1316, 1320, 1322, 1329, 1330, 1341, 1347, 1348, 1349, 1353, 1354 *and* 1355 *– Penal Code*, 1904, *s.* 214, *s.* 216 *and s.* 268 (*S.*) *– Criminal Procedure Code, s.* 3 (3), *s.* 121 (*c*) (*ii*) (*S.*) *– Evidence Ordinance, s.* 12 (*S.*) *– French Penal Code, art.* 169 *– Penal Code, s.* 122 (*K.*).

[2] Company – Whether company "unauthorised" by government has legal existence – Colonial Laws Validity Act, 1865 *– French Code de Commerce, art.* 37.

Editor's Summary

The appellant was convicted by the Supreme Court of Seychelles on two counts of stealing by an agent

and on three counts of fraudulent false accounting whilst employed as an accountant by Cable and Wireless Ltd., Mahe, and sentenced to two years imprisonment. On appeal against conviction and sentence the principal grounds of appeal were that certain oral evidence had been admitted which under the provisions of the Code Napoleon relating to evidence were not admissible, that since Cable and Wireless Ltd. had not been "authorised" by the Government within art. 37 of the Code de Commerce it had no legal existence and could not own property in Seychelles, and that the judge had erred in comparing certain signatures and afterwards drawing conclusions from his comparison without calling for the assistance of an expert in handwriting.

Held –

(i) the law of evidence in criminal trials in Seychelles is the English law of evidence and applying English law to the instant case there was no wrongful admission of evidence.

(ii) an unauthorised foreign limited company has no legal existence and can enforce no rights in Seychelles but since, as a matter of public policy, a citizen can nevertheless enforce rights against such a company, it would also be contrary to public policy to allow its assets which would otherwise be available to satisfy legitimate claims to be embezzled or stolen with impunity.

(iii) there was a beneficial ownership (of the company's property) in the shareholders of the company and by virtue of s. 121 (*c*) (ii) of the Criminal

Procedure Code such shareholders would be sufficiently described in a charge or information by their collective name, in this case, Cable and Wireless Ltd., even if the company as such had no legal existence in Seychelles.

(iv) Mr. James described in the particulars of the counts as "Manager, Cable and Wireless Ltd.," was special owner of the sums in question, and, for the purposes of the charges relating to theft by an agent, the question whether Cable and Wireless Ltd. could be described as owners or not was irrelevant.

(v) since on the case for the prosecution no question of any comparison of writing arose, and the defence had called no expert witness, the court was entitled to make its own comparison and draw what conclusion it could; in any event the appellate court had given the appellant's advisers the opportunity before the hearing of obtaining advice from an expert and had noted that although two experts had inspected the exhibits no application was subsequently made for leave to adduce fresh evidence.

(vi) there was no ground for saying that the sentence was manifestly excessive.

Appeal dismissed.

Cases referred to in judgment:

(1) *Procureur General v. District Magistrate of Port Louis* (1885), Mauritius L.R. 76.

(2) *R. v. Edmond* (1916), Seychelles Digest of Cases 1870-1933, p. 3.

(3) *Chaverny v. R.* (1949), Mauritius L.R. 205.

(4) *Geegah v. R.* (1866), Mauritius L.R. 129.

(5) *R. v. Christie*, [1914] A.C. 545.

(6) *R. v. Tankard*, [1894] 1 Q.B. 548.

(7) *R. v. Laurence Edward Harding*, 21 Cr. App. R. 166.

(8) *R. v. Wilbain and Ryan*, 9 Cox C.C. 448.

(9) *R. v. Harvey*, 11 Cox C.C. 546.

(10) *Makin v. Attorney-General for New South Wales*, [1894] A.C. 57.

(11) *Harris v. Director of Public Prosecutions*, [1952] 1 All E.R. 1044.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant was convicted by the Supreme Court of the Seychelles on two counts of stealing by an agent contrary to s. 268 of the Penal Code of the Seychelles and on three counts of fraudulent false accounting contrary to s. 316 of the Penal Code. He was charged in the alternative on certain other counts, which, in the event, were dismissed. The first count of fraudulent false accounting of which the appellant was convicted relates to the same transaction as the first count of stealing by an agent, the sum of money involved, namely Rs. 2413.15 cts., being the same in each case. The other two counts of fraudulent false accounting relate to the

transactions giving rise to the second count of stealing by an agent, the total of the amounts involved in those counts of fraudulent false accounting being the same as that mentioned in the second count charging stealing by an agent. The appellant was sentenced to two years' imprisonment on each of the counts of stealing by an agent, the sentences to run concurrently; and to four months' imprisonment on each of the counts of fraudulent false accounting, such sentences to run concurrently with each other and with the sentences imposed in respect of the convictions of stealing as an agent. The appellant was further ordered to pay the costs of the case not exceeding Rs. 300, and in default of payment to undergo three more months imprisonment. He has appealed against conviction and sentence.

At the hearing of the appeal the Crown was represented by the attorney-general of the Seychelles, Mr. Sauzier, and the appellant was represented by Mrs. Collet, and the court had the benefit of a very full argument on the legal points which arise. In addition to the argument before the court, Mrs. Collet had filed a written case for the appellant under r. 39 of the Eastern African Court of Appeal Rules, 1954, and she referred to and relied on this written case in the course of her argument. It may be mentioned in passing that part of the written case is concerned with a challenge of the learned trial judge which was apparently made by the appellant on the ground that he learned judge had, before the trial, improperly discussed certain aspects of the case at a party at which both he and the attorney-general were present; and a series of affidavits in support of and against the allegations made were included in the record put before us. Just why counsel for the appellant saw fit to raise this matter in the written case and to put forward the affidavits in support of it is not clear to us, since it is irrelevant to the grounds of appeal set out in the memorandum of appeal; and when counsel referred to it at the hearing and was asked whether she wished to pursue it as a ground of appeal she stated that she did not wish to do so. In the circumstances we have ignored this aspect of the matter, and would only remark that we were not impressed by the allegations of misconduct made against the learned trial judge and the attorney-general.

The counts on which the appellant was convicted are as follows:

"Count 1. Statement of Offence.

Stealing by agents etc.: Contrary to s. 268 of the Penal Code.

Particulars of Offence.

Paul Gardette, an accountant, residing at Anse des Genets Mahe, on or about October 20, 1958, at Victoria Mahe, stole Rs. 2413.15 cts. which had been entrusted to him by the manager, Cable and Wireless Ltd. for him the said Paul Gardette to pay bills, accounts, wages and any other debt or liability for and on behalf of Cable and Wireless Ltd.

"Count 3. Statement of Offence.

Stealing by agents etc.: Contrary to s. 268 of the Penal Code.

Particulars of Offence.

Paul Gardette, an accountant, residing at Anse des Genets Mahe, on or about October 30, 1958, at Victoria Mahe, stole Rs. 950.40 cts. which had been entrusted to him by the Manager, Cable and Wireless Ltd. for him the said Paul Gardette to pay bills, accounts, wages and any other debt or liability for and on behalf of Cable and Wireless Ltd.

"Count 5. Statement of Offence.

Fraudulent false accounting: Contrary to s. 316 of the Penal Code.

Particulars of Offence.

Paul Gardette, an accountant, residing at Anse des Genets Mahe, on or about October 20, 1958, at Victoria Mahe, being a clerk or servant to Cable and Wireless Ltd. with intent to defraud, made a false entry in an account belonging to the said Cable and Wireless Ltd., his employer, purporting to show that on October 20, 1958, Rs. 2413.15 cts. had been paid to Union Lighterage Company Ltd.

"Count 6. Statement of Offence.

Fraudulent false accounting: Contrary to s. 316 of the Penal Code.

Particulars of Offence.

Paul Gardette, an accountant, residing at Anse des Genets, Mahe, on or about October 30, 1958, at Victoria Mahe, being a clerk or servant to Cable and Wireless Ltd. with intent to defraud, made a false entry in an account belonging to the said Cable and Wireless Ltd. his employer purporting to show that on October 30, 1958, Rs. 633.60 cts. had been paid to Union Lighterage Company Ltd.

"COUNT 7. Statement of Offence.

Fraudulent false accounting: Contrary to s. 316 of the Penal Code.

Particulars of Offence.

Paul Gardette, an accountant, residing at Anse des Genets, Mahe, on or about October 30, 1958, at Victoria Mahe, being a clerk or servant to Cable and Wireless Ltd. with intent to defraud, made a false entry in an account belonging to the said Cable and Wireless Ltd. his employer, purporting to show that on October 30, 1958, Rs. 316.80 cts. had been paid to Union Lighterage Company Ltd."

The appellant's first ground of appeal raises an important question of law. It reads as follows:

"1. The corpus of the Seychelles Law of Evidence, includes in both criminal and civil cases, the rules set down in the Code Napoleon, which is the substantive law of the Colony, and the appellant was convicted on count 1 and hence on count 5 on a mass of 'evidence' admitted against the express and peremptory provisions of the law."

Mrs. Collet has argued that certain evidence, vital to the Crown case, was improperly admitted by the learned judge because such evidence was oral evidence which was not admissible under the provisions of the Code Napoleon. This, of course, involves the proposition that the provisions of the Code Napoleon which relate to evidence apply in criminal prosecutions as well as in civil cases in the Seychelles. The attorney-general has argued that the Code Napoleon is a code of law which regulates the civil rights of the subject and has no application to criminal matters in the Seychelles, the law and procedure in relation to which are essentially English; and that it is the English law of evidence which applies in criminal matters. The learned trial judge considered the matter on the basis that the relevant provisions of the Code Napoleon were applicable in criminal matters, and based his ruling that the evidence in question was admissible on a consideration of the provisions of the Code and relevant French authorities. However, the first matter for our consideration is whether the provisions of the Code Napoleon which relate to evidence apply in criminal prosecutions.

The principal article of the Code Napoleon which is in issue is art. 1341, but a number of other articles in the Code which relate to evidence must be taken into account. Mrs. Collet, in deference to the fact that the language of this court is English, supplied the court with translations of the articles in question. These translations were not challenged by the attorney-general, and it is convenient to set out the translations in this judgment rather than the original French. The relevant articles, as translated, are as follows:

"*Article* 1315. – A party claiming the fulfilment of an obligation must prove it. In the same manner he who claims that he is free from the obligation must prove the payment or the fact which has produced the extinction of the obligation.

"*Article* 1316. – The rules which concern written evidence, testimonial

evidence, presumptions, admission of a party and the oath, are explained in the following sections.

"*Article* 1320. – A deed, authentic or under private signatures is evidence between the parties even of what is expressed as recitals provided the recital has a direct connection with the disposition (convention, agreement). The recitals foreign to the disposition can only be used as beginning of proof (writing forming basis of oral evidence).

"*Article* 1322. – A deed under private signatures, acknowledged by the party to whom it is opposed, or legally taken as acknowledged, has, between those who signed it and their heirs and assigns, the same faith as an authentic deed.

"*Article* 1329. – The books of traders are not, against persons who are not merchants, evidence of the entries written in them, except what will be said as regards the oath (art. 1357).

"*Article* 1330. – Books of traders are evidence against them but anyone who relies on these books cannot divide the entries as regards their contents against his allegations.

"*Article* 1341. – There must be a document before a notary or under private signatures of all things (anything) exceeding the sum or value of one hundred and fifty francs, even for voluntary deposits, and no testimonial evidence shall be admitted against and beyond the contents of deeds, not as regards what is alleged to have been said before, at the time of, or since the deeds even if the sum or value in question is less than 150 francs.

"*Article* 1347. – To the above rules there is an exception when a beginning of proof in writing exists. This means any written document which emanates from the party against whom the claim is made, or the person whom he represents and which renders the fact alleged vraisemblable (likely).

"*Article* 1348. – There is also an exception every time that it has not been possible for the creditor to obtain written evidence of the obligation towards him.

"This second exception applies:

1. To obligations which arise from quasi-contracts and torts and quasi-torts.
2. To the urgent deposits made in case of fire, ruin, riot or wreck, and to those made by travellers in an inn, the whole according to the status of the travellers and the circumstances.
3. To the obligations contracted in cases of unforeseen accidents, when no written documents could be made.
4. To the case where the creditor has lost the title which was his documentary evidence in consequence of a fortuitous event, unforeseen and resulting from force majeure.

"*Article* 1349. – Presumptions are the inferences which the law or the judge draws from a known fact to an unknown fact.

"*Article* 1353. – The presumptions which are not established by law are left to the wisdom and the prudence of the judge, who shall not admit any but grave, precise and concordant presumptions and this only in cases where the law admits oral testimony, except if the deed is attacked on grounds of dol and fraud.

> "*Article* 1354. – The admission opposed to a party is either judicial or extra-judicial.
>
> "*Article* 1355. – The allegation of a purely verbal extra-judicial admission is useless every time when the claim is one in which oral testimony is not admissible."

Article 1341 has been amended by local Ordinance to read Rs. 60 instead of one hundred and fifty francs.

The Code Napoleon was applied to the Seychelles in 1808 (see Cap. 100 of the 1952 edition of the Laws of the Seychelles). The Seychelles were then French territory. They became British territory in 1810, and from that time up to 1903 were administered from Mauritius. The Code Napoleon, as modified from time to time by local Ordinances, has continued in force ever since. French penal law and procedure originally applied in the Seychelles as well as the Code Napoleon, but, we were informed, ceased to apply about 1832. A Penal Code then introduced was based largely on the French Penal Code though, we understand (the relevant legislation not being available to us) that French Criminal Procedure was abandoned in favour of a Criminal Procedure akin to the English. French influence on the penal law was still very evident in the Penal Code of 1904, many sections of which derived from French law. The Penal Code of 1904, as amended from time to time, continued in force until the present Penal Code (Cap. 93) enacted in 1952, came into force on February 1, 1955. The present Penal Code follows closely the Penal Codes in force in East Africa which derive from English law. At the same time as the present Penal Code was introduced, a Criminal Procedure Code (Cap. 77), also based on the East African Criminal Procedure Codes, was enacted and brought into force in the Seychelles. Subsection (3) of s. 3 of the present Criminal Procedure Code provides:

> "(3) Provided, however, and notwithstanding anything in this Code contained, the Supreme Court may, subject to the provisions of any law for the time being in force in the Colony, in exercising its criminal jurisdiction in respect of any matter or thing to which the procedure prescribed by this Code is inapplicable, exercise such jurisdiction according to the course of procedure observed by and before Her Majesty's High Court of Justice in England at the date of the coming into operation of this Code."

In the mean time, an Evidence Ordinance (now Cap. 81) had come into force in 1882 when the Seychelles were still administered from Mauritius, and contained, inter alia, the following provision:

> "12. In cases not provided for by this Ordinance or by any other law in force in the Colony, the law of England and the practice of the High Court of Justice with regard to evidence and witnesses at trials and to perpetuating testimony shall be taken and held to be, so far as such law and practice are applicable, the law of this Colony and the practice of the Supreme Court."

That provision still remains in force, but is, in effect, superseded in regard to evidence by s. 21 of the Seychelles Judicature Order-in-Council, 1903, which reads as follows:

> "21. Except where it is otherwise provided by special laws now in force in the Colony or hereafter enacted, the English law of Evidence for the time being shall prevail."

Mrs. Collet has argued that in France the provisions of the Code Napoleon relating to evidence, and in particular art. 1341, apply in criminal cases; that

it has been held in cases arising in Mauritius and the Seychelles that art. 1341 applies in criminal cases; and that the provisions of that article should be applied in the instant case. The cases relied on by Mrs. Collet are the *Procureur General v. District Magistrate of Port Louis* (1) (1885), Mauritius L.R. 76; *R. v. Edmond* (2) (1916), Seychelles Digest of Cases, 1870-1933, p. 3; and *Chaverny v. R.* (3) (1949), Mauritius L.R. 205.

In *Procureur General v. District Magistrate of Port Louis* (1) the Mauritius Supreme Court was considering a charge of embezzlement brought before the court on a writ of certiorari. Mure, J., in his judgment in that case said:

> "It was said that this is a question to be determined by the English law and that the French law does not apply to it. I scarcely follow that mode of argument. It is perfectly true that the Penal Code of this Colony has been borrowed in most of its clauses from the French Penal Code but there is no doubt that it is a Mauritius law and that every point that arises for decision under it must be determined by the law of this Colony. The question arises, what did the legislators of 1838 mean when they passed this article containing the words 'the property must be delivered to the accused in pursuance of a trust'? To what did they refer? There can be no doubt that they referred to the common law of this Colony as it existed at the time. No doubt that common law is contained in the French Civil Code, but it is still the common law of this Colony and it must have been that law to which the legislators referred. Is there then to be a different mode of proof of this contract of trust in this Colony, accordingly as the case may arise on the Civil or on the Criminal side of the magistrate's court? We think not. Lord Chancellor Erskine, in the famous case of Lord Melville as quoted by Taylor (Taylor's Evidence art. 724 – 7th Edn.) lays down the principle which we think should guide us in this matter, he says 'this first step in the proof (namely the receipt of the money by the agent) must be evidence applicable alike to civil as to criminal cases; for a fact must be established by the same evidence whether it is to be followed by a criminal or by a civil consequence'; this principle commends itself to our minds by its good sense, because it is perfectly clear that the question which the magistrate has to decide is a question which depends on the kind of contract which is to be proved and not upon the jurisdiction which he is exercising at the time. Now our common law in the Civil Code rejects the proof of contracts by witnesses if the sum involved be more than fcs. 150, and therefore the ordinary proof of this contract both in the civil and in the criminal court must be the same; if the amount is above 150 francs, the proof must proceed by written evidence, in terms of art. 1341 of the Code."

R. v. Edmond (2) a decision of the Supreme Court of the Seychelles, followed the decision in *Procureur General v. District Magistrate of Port Louis* (1). *Chaverny v. R.* (3) was a Mauritius case in which, in the course of his judgment, Espitalier-Noel, J., said:

> "It is trite law that in a case of embezzlement the civil contract in virtue of which the thing embezzled has been delivered to the accused must be proved before the criminal court in the same way as it would have to be established before a court of civil jurisdiction; oral evidence not being admissible de plano when the subject matter of the contract exceeds Rs. 60. This rule applies equally to embezzlement of public monies by public depositary and accountant."

The learned judge then refers to

> "art. 169 of the French Penal Code, which corresponds to s. 122 of our Code."

The attorney-general attacked the decision in *Procureur General v. District Magistrate of Port Louis* (1) on the basis that that decision proceeded on a supposed rule of English law which did not exist, namely that

> "a fact must be established by the same evidence whether it is to be followed by a criminal or by a civil consequence";

and he submitted that reference to the report of Lord Melville's case showed that that was not the substance of the decision in that case.

The attorney-general also attacked the decision in *Procureur General v. District Magistrate of Port Louis* (1) on the basis of French law, and referred to *Geegah v. R.* (4) (1866), Mauritius L.R. 129. There may well be force in the learned attorney-general's submissions on this aspect of the case, but it does not affect the immediate problem. The difficulty as we see it in this case arises from the combination in the Seychelles of the English criminal law with the French civil law.

As regards Lord Melville's case, the principles obtaining in England are stated by Lord Reading in *R. v. Christie* (5), [1914] A.C. 545 at p. 564 as follows:

> "The principles of the laws of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offence as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which apply only to criminal trials. . ."

It is to be noted that even in English law certain differences exist between civil and criminal trials as regards admissibility of evidence. But in any case the principles stated in *R. v. Christie* (5) relate to a homogeneous system of law, that is, English civil and criminal law. In the instant case we are considering two systems of law which cannot be combined without effecting material changes in one of them, that is, the English criminal law.

At the time of the decision in *Procureur General v. District Magistrate of Port Louis* (1) the relevant sections of the then Penal Code were, as stated in the judgment, borrowed from the French Penal Code. Again, as stated in the judgment, at the time of the enactment of the then Penal Code, in 1838, the common law of Mauritius as regards evidence was contained, at least in part, in the French Civil Code. Aside from argument that can be based on *Geegah v. R.* (4), it seems to us that the learned judge's approach in *Procureur General v. District Magistrate of Port Louis* (1) was sound, namely, that the governing factor was the intention of the legislators when they enacted the Penal Code; and on the basis of the law as it stood at the date of the enactment of the Penal Code, his conclusion appears logical. It is true that s. 12 of the Evidence Ordinance (Cap. 81) had been recently enacted, but it was not in force at the date of enactment of the Penal Code, and its terms were not such as to effect changes in existing laws. In 1903, however, s. 21 of the Seychelles Judicature Order-in-Council, 1903, came into force. That section is in much stronger terms than s. 12 of the Evidence Ordinance, and the intention is obviously that the English law of evidence should henceforth, to use the terms used by the learned judge in *Procureur General v. District Magistrate of Port Louis* (1), be the common law of the Seychelles; subject, of course, to the provisions of "special laws".

In view of this provision, followed as it was, by the Penal Code of 1904, it could well have been argued that the legislators intended that the basic law of evidence in criminal matters should be the English law, unless there was some special law in force applicable to a particular offence. In fact we think this was the position. What then is to be regarded as a special law? It cannot

be that all the provisions of the Code Napoleon relating to evidence are to be so regarded – if that were so the approach adopted in s. 21 of the 1903 Order-in-Council would have been the opposite; the basic French law of evidence would have been maintained, subject to special laws. The rules in art. 1341 and following rules are described as being of general application, in a passage quoted from Fuzier Herman: Code Civil Annote Vol. IV No. 71, of which the following is the translation supplied to us:

> "Apart from the exceptions which arise in commercial matters . . . the rules set down by art. 1341 and following are of general application. Thus when an offence presupposes a previous convention (contract) between the complainant and the accused, the correctional tribunals cannot, in order to establish the offence, admit other than civil law evidence; in consequence they cannot, if the amount of the obligation is above 150 francs, authorise testimonial evidence . . .; the crime can only be established by written evidence, or by the confession of the accused, or lastly by a beginning of proof in writing completed either by testimonial evidence or by presumptions. The reason is that the law which prohibits testimonial evidence of civil contracts, extends its empire over the criminal procedure (for the purpose (in the present case)) of establishing the falsity of an oath sworn by a party in a civil matter when the sum exceeds 150 frs. or is part of a larger sum."

The approach indicated by that passage is, of course, divergent from the approach under English rules of evidence and we would have thought that the effect of s. 21 of the 1903 Order-in-Council would have been to substitute English rules for those in art. 1341 et seq., were it not for a specific legislative indication that the latter are to be treated as special laws. We refer to s. 216 (5) of the Penal Code of 1904. The first subsection of s. 216 provides that – "Whoever embezzles squanders away or destroys" goods, money, securities etc. shall be punished with imprisonment and a fine. Subsection 5, which was enacted in 1920, reads:

> "(5) Provided further that in prosecutions under this section documentary proof of matters involving a sum not exceeding one hundred and fifty Rupees (Rs. 150) may be dispensed with."

That sub-section makes it clear that the legislature regarded art. 1341 as continuing to apply in cases of embezzlement. It could be said also that it was an indication that the whole of the provisions of the Code Napoleon relating to evidence were regarded as being in force but, as we have observed, that would appear to deny effect to s. 21 of the 1903 Order-in-Council.

We would refer also to another section of the Penal Code of 1904 which appears to have its origin peculiarly in the French law. Section 214 is as follows:

> "(1) Whoever, taking advantage of a blank signature entrusted to him, shall fraudulently write before such signature any obligation, discharge or other words calculated to prejudice the property or reputation of the party whose signature is affixed thereunto, shall be punished with penal servitude not exceeding five years and fine.
>
> "(2) In case such blank signature shall not have been entrusted to the offender he shall be deemed guilty of forgery."

This section has no counterpart in English law though a number of the acts which it envisages are crimes under various heads of the English law. The following extract from Planiol et Ripert: Traite de Droit Civil Francais,

No. 1459, as translated to this court, illustrates the approach to a charge laid under the section under the rules of the Code Napoleon:

> "Continuation. Blanc-seings. The signature can be given in advance; it then constitutes a blanc-seing because the paper which bears the signature remains blanc until the writing it should contain is drawn up. Generally the blank part of the document is filled in by another than the signatory; it is thus a mark of great confidence and often a grave imprudence to give a blanc-seing. (4)
>
> "The document signed in blank and later filled in by the signatory or upon his order is evidence of its contents. The fact of the voluntary giving of a blanc-seing to a person who is alleged to have wrongfully used it, is assimilable to a voluntary deposit, and can be proved only according to the provisions of art. 1341 and following, unless dolosive manoeuvres had been used to obtain this giving (1). The signatory is not allowed to prove the falsity of the statements in the document unless there is a beginning of proof in writing against them;. . .
>
> "It would be otherwise if the blanc-seing had been stolen, etc."

It may be that in considering a charge under this section, which is drawn from the French Penal Code and has no counterpart in English law, courts might well have held that by reason of the peculiar nature and origin of the offence it was right to apply to it the evidential law under which it had been evolved. If so, to that extent only, the provisions of the Code Napoleon would be special laws. No other section of the 1904 Penal Code drawn from the French Penal Code and being so markedly different from English law, was brought to our attention.

What we have said indicates our opinion, that, during the currency of the 1904 Penal Code the English law of evidence was the general law in criminal cases but that the legislature had by s. 216 (5) evinced an intention that the provisions of the Code Napoleon were to apply to offences under that section, and that there might be other offences to which, by reason of their particular nature and origin it might be right to apply those provisions as special laws. In those circumstances the case of *R. v. Edmond* (2) was rightly decided in 1916 for it was a case of embezzlement (Penal Code: s. 216).

In 1955, as we have seen, a major change was effected by the bringing into force of the present Penal Code and Criminal Procedure Code, by which, in our opinion, the legislature abandoned all traces of French law so far as criminal offences and procedure are concerned, and adopted English law as embodied in the East African Penal and Criminal Procedure Codes. Section 214 of the 1904 Code, relating to the blanc-seing was not reproduced. Section 216 did not reappear as such but was embodied in the numerous sections dealing with stealing, none of which contains any re-enactment of s. 216 (5). The significance of that omission is that the legislature must have intended either that there should be a reversion to the limit of Rs. 60 over which documentary evidence was required, or that it considered that, by the enactment of a complete penal and procedural code based on English law any necessity for the continued application of any provision of the Code Napoleon relating to evidence was terminated. The former alternative appears to us to be an unlikely one. The raising of the limit from Rs. 60 to Rs. 150 was itself a step towards the abolition of the rule of evidence in question, and therefore towards the full adoption of the English rule – it is unlikely that the legislature intended to revert to Rs. 60, the more so as such an intention could only have been formed deliberately and would therefore almost certainly have been declared expressly. Again, it would be difficult to apply the rule as to proof by documentary evidence to the present Penal Code in all cases without doing violence to its language. For

example, s. 268 (*d*) relating to theft of the proceeds of a valuable security received by the offender "with a direction" that the proceeds be applied in a certain way, would have to be construed as

> "with a direction in writing (unless the amount involved did not exceed Rs. 60, or a 'beginning of proof in writing' was proved)".

It is our opinion, therefore, on this part of the case, that by s. 21 of the 1903 Order-in-Council the English law of evidence was to prevail in the Colony, except where special laws existed; that in criminal matters the provisions as to evidence contained in the Code Napoleon were general and not special provisions, and were superseded by English law except where, and to the extent, that a contrary indication could be gathered from legislation and, possibly, where the offence in question was one peculiar to the French Penal Code; that by the repeal of the 1904 Penal Code and its replacement by the present penal and criminal procedure codes, the legislature eliminated the only such contrary indication and enacted codes which were English in substance and approach. There is therefore (so far as criminal evidence is concerned) no reason or necessity to regard the law of evidence as laid down by the Code Napoleon as a special law, or as anything but a general code which has now given way before s. 21 of the 1903 Order-in-Council. We emphasize that we are dealing only with the law of evidence in criminal matters and not in civil; that is not within our province.

For these reasons we are of opinion that it is the English law of evidence that applies in criminal trials in the Seychelles. The recent Mauritius decision in *Chaverny v. R.* (3) is not relevant to our conclusion since, so far as we are aware, Mauritius laws have not undergone the same changes as the Seychelles laws, and the position in Mauritius today is substantially the same as it was when *Procureur General v. District Magistrate of Port Louis* (1) was decided.

In view of our conclusion, it is unnecessary to consider whether *Procureur General v. District Magistrate of Port Louis* (1) was or was not wrongly decided under the French law applicable.

Applying the English law of evidence to the instant case we do not think there was any wrongful admission of evidence, and the first ground of appeal accordingly fails.

The second ground of appeal is as follows:

> "2. The Cable and Wireless Company Limited was not a legal personality in the Colony of Seychelles, and could not therein hold property, have a 'manager', enter into or enforce any contract whatsoever, or have servants or agents."

This ground of appeal is based on art. 37 of the Code de Commerce (which is in force in the Seychelles – v. Cap. 98) the translation of which reads as follows:

> "37. A limited company (Societe Anonyme) can exist only with the authorisation of the Government and the approval of the Government for the deed constituting it; this approval shall be given in the manner provided by administrative regulations."

It was common ground that Cable and Wireless Ltd., a company incorporated in England, had not been "authorised" by the Government of the Seychelles within the meaning of art. 37.

We were informed that the point raised is of importance only in relation to the instant case, since amending legislation has now been enacted exempting foreign companies from the provisions of art. 37. The point does, however, require consideration in relation to the instant case.

Mrs. Collet relied on a ruling, delivered by the learned Chief Justice of the Seychelles in the course of an earlier prosecution of the appellant which failed, which ruling was made an exhibit (exhibit 53) in this case. The conclusion reached by the learned Chief Justice in that ruling is as follows:

> "Bearing in mind therefore that the law in France before the passing of the decree of 1857 was identical to the law obtaining now in Seychelles, that before 1857 Foreign Limited Companies had to comply with art. 37 of the Code of Commerce in order to have a legal existence in France, that the language of art. 37 of the Code of Commerce being clear and unequivocal the article has to be given effect to by this court and that English Company Law has not been extended to the Colony by the Colonial Laws Validity Act, 1865, I have no hesitation in holding that before a Limited Liability Company, foreign or local, can have a legal existence in Seychelles and be recognised by the court here it must receive the authorisation of His Excellency the Governor in terms of art. 37 of the Code of Commerce."

Mrs. Collet argued that this ruling is binding on the Crown since there had been no appeal from it, and that the status of Cable and Wireless Ltd. in the Seychelles was, in effect, res judicata so far as the Crown were concerned. If it was intended to suggest that this court is bound by the ruling we are unable to accept the argument as valid, but in fact see no reason to differ from the learned Chief Justice's ruling so far as it goes. In our view, however, it by no means covers the whole issue now before the court. While we agree that a limited liability company, foreign or local, could not, under the law as it stood at the date of this prosecution, have a legal existence without "authorisation", yet Mrs. Collet herself, in her argument, concedes that such companies will, for certain purposes, be recognised by the courts in France and so, no doubt, also in the Seychelles. In her written case Mrs. Collet says:

> "They are 'societes de fait'. . .
>
> "As societes de fait they can be sued in their corporate name and the courts allow them, when sued thus, to defend, because the actual action entered against them in their corporate name is recognition by the plaintiff for the purpose of the matter in issue.
>
> "In other words the French courts will not allow an unincorporated illegal societe anonyme to get away with it on the ground that it does not exist in law."

This aspect of the matter was not considered by the learned Chief Justice and we certainly do not think the learned Chief Justice's ruling is to be read as indicating that such a "societe de fait" could not be sued in the Seychelles. We accept the proposition that a "societe de fait" can be sued in the Seychelles, and to this extent an "unauthorised" foreign limited company is recognised by the courts. The proposition seems necessarily to involve some recognition of rights of property in a "societe de fait", since otherwise it is difficult to see how such a company could discharge a debt or other liability under a judgment against it. Mrs. Collet, while maintaining that, as under French law, the state could close down a foreign company operating in the Seychelles and appropriate its property, conceded that the property of such a company would not belong to the state till the state did appropriate it. Does it follow that until such appropriation by the state, property ostensibly belonging to an "unauthorised" foreign company in fact, to use the words of Lord Coleridge, C.J., in *R. v. Tankard* (6), [1894] 1 Q.B. 548 at p. 551, "belonged to nobody, and could, so to speak, be scrambled for?" We think not. The rule is that an unauthorised foreign limited company has no existence and can enforce no rights, but, as a

matter of public policy (Niboyet: Droit International Prive Vol. II, p. 338 and p. 339) the citizen can enforce rights against it. By no stretch of the imagination could it be said that it was not contrary to public policy to allow the assets of the company, which would be available to satisfy legitimate claims, to be embezzled or stolen with impunity. When a wrongdoer is prosecuted, it is not a question of the enforcement of a right by the company, but by the Crown. We think that, at the least, there is a beneficial ownership in the shareholders of the company; and by virtue of para. (*c*) (ii) of s. 121 of the Criminal Procedure Code we think that such shareholders are sufficiently described in a charge or information by their collective name, in this case, Cable and Wireless Ltd., even though Cable and Wireless Ltd., as such has no legal existence in the Seychelles. Paragraph (*c*) (ii) of s. 121 of the Criminal Procedure Code reads as follows:

> "(*c*)(ii) where the property is vested in more than one person, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the property as owned by one of those persons by name with the others, and if the persons owning the property are a body of persons with a collective name, such as a joint stock company or 'inhabitants', 'trustees', 'commissioners', or 'club' or other such name, it shall be sufficient to use the collective name without naming any individual";

Apart from this aspect of the matter, it was argued by the learned attorney-general that in the instant case, so far as the counts relating to stealing by an agent were concerned, the "Manager, Cable and Wireless Ltd." was "special owner" of the money involved within the meaning of s. 253 of the Penal Code. It was contended by Mrs. Collet that oral evidence could not be given that the individual concerned, Mr. James, was manager of Cable and Wireless Ltd. This argument, however, was based on the French law of evidence, and, in view of our decision on the first ground of appeal, does not arise. It was proved that Cable and Wireless Ltd. was a limited company incorporated in England. Although Cable and Wireless Ltd. may have had no legal existence in the Seychelles, this would not prevent the English company employing Mr. James as its manager, whether in the Seychelles or elsewhere. Legal existence of the company in the Seychelles appears irrelevant in relation to Mr. James' employment by the English company, which was duly established. Although the company may have had no legal existence in the Seychelles, that is no reason why the Seychelles courts should not recognise the fact of the legal existence of the company in another part of the world. We think the description "Manager, Cable and Wireless Ltd." sufficiently identified Mr. James.

The question remains whether Mr. James was the "special owner" of the money referred to in the counts charging theft by an agent. Subsection (2) of s. 253 of the Penal Code defines "special owner" as follows:

> "The term 'special owner' includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question."

It is to be noted that the definition is not exhaustive. Section 4 of the Penal Code provides:

> "4. This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith."

In view of this provision and the fact that the definition of "special owner" is not exhaustive, we think we must have regard to the meaning attached to the word "owner" in English criminal law; and for this purpose we rely on the decision of the English Court of Criminal Appeal in *R. v. Laurence Edward Harding* (7), 21 Cr. App. R. 166. There the court applied the principle of an earlier case which is referred to as follows at p. 170 of the report:

> "Counsel on behalf of the prosecution has directed the attention of the court to a useful case in 2 East's Pleas of the Crown, at p. 653. The case is very short and as it is very important it may be well to read it. It is a case of the year 1800. The report says this: 'James Deakin and William Smith were indicted for stealing spoons and other articles, laid in the second count (on which alone they were convicted) to be the property of one Markham. The goods had been sent by a tradesman in London to Mr. Broderick at Spalding by the Spalding coach and were stolen by the prisoners at Ponders End, out of the boot behind the coach. The question was, whether they were properly laid to be the property of Markham, who was not the owner but only the driver of the coach, there being no contract between him and the proprietors that he should be liable for anything stolen; and it not appearing that he had been guilty of any laches. The case being referred to the judges, it stood over for some time, but finally the conviction was holden right, the coachman having the possession and a special property in the goods committed to his charge'."

Applying the same principle in the instant case we have no doubt that Mr. James, described as the "Manager, Cable and Wireless Ltd." was "special owner" of the sums of money in question; and that, for the purposes of the charges relating to theft by an agent, the question whether or not Cable and Wireless Ltd. could be described as owner of any property is irrelevant. We think the second ground of appeal must fail in relation to those two counts.

The counts relating to fraudulent false accounting allege inter alia that the appellant was "a clerk or servant to Cable and Wireless Ltd.", and that he made a false entry in an account "belonging to the said Cable and Wireless Ltd., his employer."

For the reasons given above, and in view of para. (*c*) (ii) of s. 121 of the Criminal Procedure Code, we think the description "belonging to the said Cable and Wireless Ltd." is sufficient. Similarly, for reasons given above, we think it possible for a foreign company properly incorporated in its own country to have a clerk or servant within the Seychelles though the company may not itself have a legal existence in the Seychelles. We accordingly think the second ground of appeal must fail in relation to these counts also.

The third ground of appeal is as follows:

> "The appellant, on the evidence before the court, even on the evidence wrongly admitted, was not in the position of an agent, as agent is in law defined, and could not be convicted of stealing by agent. The convictions on counts 1, 3, 5, 6 and 7 cannot stand."

So far as this ground is concerned, it is sufficient to say we see no substance in it. There was evidence to support the finding that the appellant was the agent of Mr. James, "the Manager, Cable and Wireless Ltd." within the meaning of s. 268 (*b*) of the Penal Code.

Ground 4 of the memorandum of appeal is as follows:

> "4.(1) The learned judge ad hoc should not have determined the charges on count 3, ruled that there was a case to answer on the count, and adjudicated on the genuineness or not of the signature on exhibit 5 without before the said ruling careful consideration as was prayed of him, and

careful comparison of the signature with the writing and the signature of France de Charmoy Lablache in the Civil Status Registers and with the writing in the appellant's hands which was before the court on the exhibits;

"(2) The learned judge should not have convicted the appellant on that count without the assistance of an expert in handwriting."

We see no substance in para. (1) of this ground. We are certainly not prepared to say that the learned trial judge exercised his discretion wrongly in holding that there was a case for the appellant to answer.

As regards para. (2), Mrs. Collet relied on *R. v. Wilbain and Ryan* (8), 9 Cox C.C. 448 and *R. v. Harvey* (9), 11 Cox C.C. 546. In both those cases, however, the prosecution sought to prove that certain disputed writing was the prisoner's writing by comparison of the disputed writing with other writing alleged to be that of the prisoner. The court held that such comparison ought to be made by an expert. In the instant case a witness called by the prosecution stated that a certain signature on a document produced to him was not his signature. That evidence, if believed, was sufficient for the court to act upon. At that stage the question was one of credibility and no question of any comparison of writing arose on the prosecution case. The defence, however, sought to prove that the signature was in fact that of the witness by comparing that signature with other admittedly genuine signatures of the witness. In these circumstances we can see no duty on the prosecution or the court to produce or require an expert witness. The prosecution would not be aware until the cross-examination of the witness what signatures the defence intended to use for purposes of comparison. No doubt, if the defence had produced an expert witness who had carried out a comparison and had given it as his opinion that the disputed signature was indeed that of the witness, that evidence would have gone far to discredit the witness and might have been an end of the case. In the absence of such a witness, the court was entitled to make its own comparison of the signatures, and draw what conclusion it could from such comparison. Of course, the defence at the trial was not in a position to have a comparison of the handwritings of the various signatures made by an expert since there was not one available in the Seychelles. It may be mentioned, however, that Mrs. Collet made application to this court to have the signatures examined by an expert. The application was considered some six weeks before the hearing of the appeal and this court, while declining to carry out an investigation itself, adjourned the application sine die to give the appellant an opportunity of having the signatures examined by an expert with a view to having additional evidence adduced at the hearing of the appeal; and the court directed that the exhibits in the case were to be made available to any such expert upon application to the registrar. The exhibits were in fact made available to two different experts on Mrs. Collet's request, but Mrs. Collet did not subsequently pursue her application to adduce fresh evidence. In these circumstances this court is not inclined to attach much importance to the absence of an expert at the trial and in any case, as we have indicated, we do not see that there was any duty on the prosecution to call an expert. The prosecution case depended on the credibility of its witness. This ground of appeal accordingly also fails.

Ground 5 of the memorandum of appeal reads:

"5. The evidence of forgery was, on the ordinary principles of English Criminal Law, wrongly admitted."

There is no substance in this ground. It is sufficient to cite *Makin v. Attorney-General for New South Wales* (10), [1894] A.C. 57; and *Harris v. Director of Public Prosecutions* (11), [1952] 1 All E.R. 1044. A complaint that

the defence was taken by surprise by this evidence is really only relevant in relation to the next two grounds of appeal which complain that the defence was prejudiced by the witness Mr. James being allowed to leave the jurisdiction before the completion of the trial. As regards the fifth ground of appeal, it is sufficient to say that the trial took place in accordance with the procedure laid down by law in the Seychelles. If the defence had satisfied the learned trial judge that it had genuinely been taken by surprise by the evidence and that it required time to prepare the defence on this point adequately, no doubt the learned judge would have granted an appropriate adjournment. No application for such an adjournment was made; and in the circumstances of this case we very much doubt whether the appellant was in fact taken by surprise by the evidence.

Ground 6 and ground 7 of the memorandum of appeal may be considered together, and read as follows:

> "6. The learned judge:
>
> (1) on the opposition of counsel which he himself qualified as 'vehement', should not have allowed the witness James, for the prosecution, to leave the jurisdiction;
>
> (2) should have exercised his discretion to recall the prosecution witnesses for examination by the court as to the evidence of forgery;
>
> (3) if he thought that the witness Nageon (Georges Nageon de Lestang), who had been subpoeaned for the defence and was present in court, was able to give some useful evidence, the learned judge should have called him as a court witness, which it was in his absolute discretion to do, and not blame counsel for exercising her right as to the conduct of her case.
>
> "7. The learned judge should in his judgment:
>
> (1) have drawn the legal inference from the fact that the prosecution was in a hurry to allow the witness James to get out of the jurisdiction, and in fact, did apply for leave for him to go, without putting in evidence all the facts relative to the question of forgery, of which James was cognisant, and in particular without calling upon him to produce a document containing the spontaneous signatures of France de Charmoy Lablache;
>
> (2) have drawn the legal inference from the fact that the prosecution did not produce as a witness the handwriting expert who examined the above said document with exhibit 5, and who could have given essential evidence, in particular in examination-in-chief or in cross-examination on the comparison of the signature on exhibit 5 with the handwriting and the signatures of this Lablache on the Civil Status Registers, more specially as the Crown knew that there is in Seychelles no person who could be called as an expert by either party."

The witness Mr. James was permitted by the learned judge to leave the Seychelles after he had given evidence and been cross-examined despite objection by the defence. Very substantial delays in bringing the case to trial had taken place, and these had resulted in the trial being held just before Mr. James was due to leave the Seychelles on transfer. These delays had occurred at the instance and to meet the wishes of the appellant. In the circumstances it was not unreasonable for the court to release the witness. Nevertheless if it could be shown that prejudice had resulted to the appellant

as the result of the release of the witness, it might be a ground for allowing the appeal. However, the only additional evidence which it was suggested that Mr. James might have given was (*a*) to produce a paper which the witness France Lablache had signed at a meeting in December, 1958, at which the witness, the appellant and Messrs. James, Moore, Nageon, Lalanne and Coopoosamy were present; and (*b*) to tell the court what a handwriting expert, Mr. Thompson, had done with that paper. The meeting in question was for the purpose of investigation into apparent irregularities in the books and finances of Cable and Wireless Ltd., and at that meeting France Lablache was asked to sign a piece of paper for comparison there and then with the signature purporting to be his which appeared on the voucher which is now exhibit 5. There was reason to believe that the two signatures had been compared by a Mr. Thompson, a handwriting expert who was in the Seychelles at the time in connection with another case. Mr. Thompson left the Seychelles before the present proceedings were instituted.

We are unable to see what the evidence which Mr. James might have been able to give in respect of these matters could have added to the case. There were numbers of signatures of France Lablache available for comparison with the disputed signature on exhibit 5, from his signatures in the Civil Status Registers of 1949 and 1950 to signatures signed by him in court. The signature he had signed at the meeting for purposes of comparison was consequently of little or no importance; and since Mr. Thompson was not available to give evidence there was little to be learnt from the fact that he had made a comparison of the signatures. We do not think that an inference adverse to the Crown was necessarily to be drawn from the fact that the Crown had not made arrangements to bring him from East Africa to give evidence in the case. Mr. Thompson was not in the service of the Seychelles Government, and transport to and from the Seychelles from and to East Africa presents difficulties. We have already dealt at some length with the question of expert evidence, and do not propose to go into the matter again here. It may be mentioned, however, that we were informed by the learned attorney-general that he did during the course of the trial make available to Mrs. Collet the opinion which had been given by Mr. Thompson on the signatures. Had this opinion been favourable to the defence, an application might well have been made to the court to secure, if possible, the attendance of Mr. Thompson in the interests of justice. No such application was made.

We think these grounds of appeal also must fail.

Ground 8 and ground 9 relate to fact and read as follows:

> "8. In view of the principles of the Seychelles law of evidence, most of the cross-examination of the appellant was irrelevant and inadmissible, but even on that it is submitted that the appellant discharged the burden on disproving any relevant admissible evidence brought forward by the Crown.
>
> "9. On the facts:
>
> (*a*) The appellant did pay the sum expressed in exhibit 3 and exhibit 3 was signed by Coopoosamy at the time of receiving payment.
>
> (*b*) The appellant did pay the sum expressed in exhibit 5 and the signature on the exhibit is the signature of France de Charmoy Lablache."

We have already held that the Seychelles law of evidence in relation to criminal cases is the English law of evidence. As regards the facts, it is sufficient to say that there was evidence to support the learned judge's findings. The decision turned largely upon the credibility of witnesses, a matter upon which

the trial judge was in a far better position than this court to reach a conclusion. No ground has been shown which would justify us in interfering with his conclusion.

For these reasons the appeal against conviction is dismissed.

As regards ground 10 of the memorandum of appeal, this is an appeal against sentence on the ground that it is excessive. An appeal court will not interfere with a sentence which is not illegal unless it has been assessed on wrong principles or it is manifestly excessive. It is not suggested that the learned judge applied any wrong principle in this case, and we are unable to say that the sentence is manifestly excessive. The appeal against sentence must therefore also be dismissed.

Appeal dismissed.

For the appellant:
Mrs. MC Collet, Victoria, Seychelles

For the respondent:
The Attorney-General, Seychelles
Andre Sauzier (Attorney-General, Seychelles)

Lawrence Oguda v R
[1960] 1 EA 745 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	6 August 1960
Case Number:	35/1959
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Connell J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Pelly Murphy, J.

[1] Criminal law – Sedition – Consent of Attorney – General to prosecution – Whether Consent must specify all facts constituting offence – Penal Code, s. 57, *s.* 58 (1) (*b*) *and s.* 59 (*K.*).

[2] Criminal law – Sedition – Two counts preferred in respect of one speech – Whether improper to prefer two counts.

Editor's Summary

The appellant was convicted by a magistrate on two counts of sedition. The charges arose from a speech the appellant had made in South Nyanza of which a tape recording was made and from that a transcript. His appeal to the Supreme Court having been dismissed the appellant brought a second appeal at the

hearing of which it was contended, inter alia, that the Consent to prosecution required under s. 58 (1) (*b*) of the Penal Code was invalid or insufficient and that the first appellate court was not entitled to conclude that the acting attorney-general who had signed the Consent to prosecute had before him all the facts constituting the offences charged. The Consent to prosecute merely referred to two offences under s. 58 (1) of the Penal Code of uttering words with a seditious intention and specified the date and place of each offence but omitted to state the alleged seditious words. The appellant first objected to the sufficiency of the Consent at the hearing of the first appeal before the Supreme Court when leave to do so was granted. It was also submitted for the appellant that the speech was one actus reus and that, therefore, there should have been only one count of sedition and not two as charged, that seditious intention had not been established, and that the Supreme Court in holding that "the appellant himself gave no explanation as to his intentions" had thrown the burden of proving his innocence on the appellant.

Held –

(i) it would have been better if a copy of the proposed charges had been annexed to the Consent; the offences were, however, sufficiently indicated and the Consent itself recited that the sanctioning authority had considered all the relevant facts; the Consent was on the face of it sufficient.

(ii) as no objection to the Consent was taken by the defence before the prosecution closed its case, it was to be presumed until the contrary appeared that the trial magistrate did satisfy himself that the provisions of s. 59 of the Penal Code had been observed.

(iii) the sentence "The appellant himself gave no explanation as to his intentions" was not an attempt to cast the onus on the appellant of proving his innocence; it was a mere statement of fact as the appellant had not elected to give evidence or to make an unsworn statement.

(iv) one count of sedition could have been preferred, but it was not improper to prefer two counts.

(v) having considered the whole speech and all the surrounding circumstances as revealed in the evidence, the words complained of in both counts were uttered by the appellant with seditious intention.

Appeal dismissed.

Cases referred to in judgment:

(1) *Abdulla Suleiman el Harthi and Others v. R.* (1955), 22 E.A.C.A. 404.

(2) *Gokulch and Dwarkadas Morarka v. R.* (1948), 75 I.A. 30.

(3) *Abdul Aziz Suleman v. R.*, [1958] E.A. 31 (C.A.).

(4) *Price v. Humphries*, [1958] 2 All E.R. 725.

(5) *R. v. Sullivan and Another*, 11 Cox C.C. 44.

Judgment

Sir Kenneth O'Connor P, read the following judgment of the court: This is a second appeal from the judgment of the resident magistrate, Kericho, dated November 13, 1959, by which the appellant was convicted on two counts of sedition contrary to s. 58 (1) (*b*) of the Kenya Penal Code and was sentenced to imprisonment for one year on each count, the sentences to run concurrently. The appellant's first appeal was dismissed by the Supreme Court of Kenya on March 4, 1960.

The appellant is a Luo by tribe and at the material time was a member of the Legislative Council of Kenya. The charges arose out of a speech which the appellant made at a meeting at Awendo in the South Nyanza District of the Nyanza Province on May 24, 1959. The meeting, which took place under a tree, was licensed and was conducted in an orderly manner. It appears that it was attended by about thirty people.

The appellant spoke at some length in the Dholuo language and a tape recording was made of his speech. A transcript in Dholuo was made and then an English translation of the transcript. The trial magistrate accepted that translation as substantially accurate and its accuracy was not seriously impugned by the appellant in the lower courts, except as to the meaning of the word "adui" which will be referred

to later. No question of inaccuracy in translation was raised in the memorandum of appeal to this court and it is not suggested that the appellant did not make the speech of which complaint is made.

The provision of the Penal Code under which the appellant was prosecuted is s. 58 (1) (*b*) which, so far as is material, reads:

> "58(1) Any person who –
>
>

(*b*) utters any words with a seditious intention;

.

shall be guilty of an offence. . .”

Section 57 reads:

“A ‘seditious intention’ is an intention –

(i) to bring into hatred or contempt or to excite disaffection against the person of His Majesty, His heirs or successors, or the Government of the Colony as by law established; or

(ii) to excite His Majesty’s subjects or inhabitants of the Colony to attempt to procure the alteration, otherwise than by lawful means, of any other matter in the Colony as by law established; or

(iii) to bring into hatred or contempt or to excite disaffection against the administration of justice in the Colony; or

(iv) to raise discontent or disaffection amongst His Majesty’s subjects or inhabitants of the Colony; or

(v) to promote feelings of ill-will and hostility between different classes of the population of the Colony:

“But an act, speech or publication is not seditious by reason only that it intends –

(*a*) to show that His Majesty has been misled or mistaken in any of his measures; or

(*b*) to point out errors or defects in the Government or constitution of the Colony as by law established or in legislation or in the administration of justice with a view to the remedying of such errors or defects; or

(*c*) to persuade His Majesty’s subjects or inhabitants of the Colony to attempt to procure by lawful means the alteration of any matter in the Colony as by law established; or

(*d*) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will and enmity between different classes of the population of the Colony.

“(2) In determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.”

Section 59 (2) of the Code reads as follows:

“A person shall not be prosecuted for an offence under s. 58 of this Code without the written consent of the attorney-general.”

The charges against the appellant were:

“Count 1. Statement of Offence

“Sedition, contrary to s. 58 (1) (*b*) of the Penal Code.

Particulars of Offence.

“Lawrence Oguda, on or about the 24th day of May, 1959, at Awendo in the South Nyanza District of the Nyanza Province, uttered seditious words in the Luo language the purport of which was as follows:

> ‘Does such a Government (meaning the Government of Kenya) want the Europeans to get rich or the Africans to get rich? Is this a Government which wants to build up the people or which causes ill-feeling amongst the people? Is this Government not a smuggler? Is it not like the owner of a house who looks down upon a woman because he thinks she is an idiot and therefore does not worry about her and cares little about whatever she says? Is that not the Government which is led by the Governor, the Chief Native Commissioner, the Provincial Commissioner, the District Commissioner, the District Officer, followed by the Chiefs, by the Headman, then by the sub-headman? Is that your Government? Who appointed the Governor? Who appointed the Chief Native Commissioner? Who appointed the P.C.? Who appointed the D.C.? And who appointed the D.O.? And who are the people who appoint the Chiefs these days? Don’t you simply hear that they have been appointed and if you do not give two cattle the chieftainship goes to that man who gave two cattle and is told all right you so and so come and do your turn? And do you know when this clan elder gets employed? Yet when he comes to a beer party he claims to be the only one who knows the agricultural work and at the same time the best servant of the Government, when and where did he learn all these things? When the Government (meaning Government by Africans) will be achieved here, the first enemy of whom, when he goes, the people will be relieved, is that man called the Governor. The second enemy is the C.N.C., the third enemy is the P.C., the fourth enemy is the D.C., the fifth enemy is the D.O., the sixth is that Junior D.O., the D.O.’s pet animal known as District Assistant. The seventh enemy is the Chief.’

– with intent to bring into hatred and contempt and to excite disaffection against the Government of Kenya as by law established, and to raise disaffection against the Government of Kenya as by law established, and to raise disaffection amongst Her Majesty’s subjects in the Colony.

“Count 2. Statement of Offence.

Sedition contrary to s. 58 (1) (*b*) of the Penal Code.

Particulars of Offence.

Lawrence Oguda, on or about the 24th day of May, 1959, at Awendo in the South Nyanza District of the Nyanza Province, uttered seditious words in the Luo language the purport of which was as follows:

> ‘These British people can only be got rid of by making a lot of noise at them. I will tell you how they have been evicted from other countries. When the time will be near and they have refused to do what we want, then those who feel that the issue of this country is really affecting will sit down together will us whom you have elected and refuse to pay tax. Some will be afraid to refuse to pay tax. We whom you have elected will refuse and will be ready for imprisonment. We shall go to prison because of you cowards so that you shall and grandchildren may one day monopolise the land. Remember that what I am telling you today is not to be laughed at because the country is being spoilt and you should all feel pain. Why can’t you respond like the Japanese who believe that when you are killed in war you will go straight to heaven. Can’t you have that spirit, you Africans here in Kenya. Are you waiting for some day when the D.C. will tell you are fit to govern yourselves.
>
> These British at first had some of their people who emigrated to America, and then demanded their own Government. The people in

the United States were originally British, but when they realised they were fed up they got hold of guns and there was bloodshed. They fought against their own people. The British would not agree to give power, even to their own brothers. Do you think it would come easily to them to give your own Government.

The Irish also had a lot of trouble with the British, who arrested them and took them to their farms as you saw African salves were held in the past. When the Irish got aroused they said we do not want those people's Government, we want our own. Sinn Fein, they said, ourself alone. When they complained in that way they managed to get it.

Now take Cyprus. Did the British leave in peace? Did they not leave by force?

When war came to Burma the people asked the British for arms to fight the Japanese. But when the Japanese came they said "we are fed up with the British, let us help you to fight them". Their Governor was arrested before they (meaning the British) were aware of it. A big city like Nairobi had been surrounded and captured. Did they (meaning the Burmese) manage that in peace? And in India Nehru had to be imprisoned for several years. So also with Ghandi who fought for self-government for the Indians. And Nkrumah, to begin with, was he not also imprisoned? If politics is a bad thing why is it that those who have been imprisoned by the British and those who have fought hard against them are the ones given power? It is because they know that they have been speaking the truth. Therefore note that as we stand now we are in one battalion which fights for one common aim. We are fighting for our Government, for our land, and for the truth of this country.'

– with intent to excite disaffection against the Government of Kenya as by law established, and to excite Her Majesty's subjects to attempt to procure the overthrow of the said Government otherwise than by lawful means.

(Sgd.) W.M. Mackenzie, R.M.

3.10.59."

The Consent to Prosecute purporting to be given under s. 59 (2) of the Penal Code, signed by Mr. Conroy, the acting attorney-general, was in the following terms:

"THE PENAL CODE.

(Cap. 25 of the Laws of Kenya, Vol. 1)

Consent to Prosecute.

(Section 59 (2))

In exercise of the powers conferred by s. 59 (2) of the Penal Code, the acting attorney-general having considered all the relevant facts, hereby consents to the prosecution of –

Lawrence Oguda

for the following offences:

(i) an offence contrary to s. 58 (1) (*b*) of the Penal Code, namely, on or about the 24th day of May, 1959, at Awendo, in the South Nyanza District of the Nyanza Province, uttering words with a seditious intention;

(ii) an offence contrary to s. 58 (1) (*b*) of the Penal Code, namely on or about the 24th day of May, 1959, at Awendo in the South

Nyanza District, of the Nyanza Province, uttering words with a seditious intention.

Dated at Nairobi, this 9th day of September, 1959.

D.W. Conroy,

Acting Attorney-General."

The first five grounds of the memorandum of appeal to this court impugn the validity and sufficiency of the Consent to Prosecute. It is averred that the Consent was invalid; that, on a Consent in that form, the magistrate had no jurisdiction to entertain the complaint; that the Consent was on the face of it insufficient and did not set out the facts constituting the offences charged; and that the first appellate court should not have accepted a statement made from the bar by the deputy public prosecutor that the charges preferred against the appellant had been personally drafted by the acting attorney-general who had signed the Consent, that the case of *Abdulla Suleiman el Harthi and Others v. R.* (1) (1955), 22 E.A.C.A. 404, was distinguishable and that the first appellate court was not entitled to conclude that the acting attorney-general had before him all the facts constituting the offence charged.

Mr. Bali-Sharma, for the appellant, submitted that the sanction was on the face of it insufficient; and that, if insufficient, it was as bad as if it had never existed and that accordingly the magistrate had had no jurisdiction to entertain the complaint. It was conceded by the learned deputy public prosecutor who appeared for the Crown that if the sanction was insufficient, there was no jurisdiction to entertain the complaint; but he maintained that it was sufficient.

In *Gokulchand Dwarkadas Morarka v. R.* (2) (1948), 75 I.A. 30, their lordships of the Privy Council said at p. 38:

> "But if the facts constituting the offence charged are not shown on the face of the sanction, the prosecution must prove by extraneous evidence that those facts were placed before the sanctioning authority."

No such extraneous evidence was produced to the magistrate in this case.

The questions which arise are whether the facts constituting the offence charged were sufficiently shown on the Consent; whether it can be gathered from the Consent itself that the sanctioning authority knew the facts; and whether the magistrate had the Consent before him and considered it sufficient before he issued process. Their lordships in *Gokalchand's* case (2) said that the charge need not follow the exact terms of the sanction, though it must not relate to an offence essentially different from that to which the sanction relates. In the present case the Consent refers to the prosecution of Lawrence Oguda for two offences of uttering words with a seditious intention contrary to s. 58 (1) (*b*) of the Penal Code, each alleged to have been committed on May 24, 1959, at Awendo in the South Nayanza District. The police charge sheet dated September 21, 1959, contains the full particulars above set out of two offences of uttering words with a seditious intention contrary to s. 58 (1) (*b*) of the Penal Code each alleged to have been committed by the appellant on May 24, at Awendo in the South Nyanza District. We think that the inference is irresistible that the Consent referred to the charge sheets. It would have been better if a copy of the proposed charges had been annexed to the Consent. The Consent would then have been similar to the Consent which was held by this court in *Abdul Aziz Suleman v. R.* (3), [1958] E.A. 31 (C.A.), to be valid and sufficient. But even without this, the offences are, in our view, sufficiently indicated and the Consent itself recites that the sanctioning authority had considered all the relevant facts. We are of opinion that the Consent was (subject to objection by the defence) on the face of it sufficient. Then was it before the magistrate when he issued the summons on September 24, 1959?

It was held in *Abdul Aziz Suleman v. R.* (3) that provided a valid sanction is in existence, it is not fatal to a conviction that it has not been produced to the magistrate before he issues process. But of course it should be produced. In the present case the Consent and the police charge sheet are next each other on the original file of the proceedings in the magistrate's court. The charge sheet is marked "Date to Court 24.9.59.". The record shows that the matter came before the magistrate on that day when he made an order for a summons to issue for October 3, 1959. He should then have noted that he had the Consent before him and had satisfied himself of its sufficiency: *Abdul Aziz Suleman v. R.* (3). But as no objection to the Consent was taken by the defence before the prosecution closed its case, it is to be presumed until the contrary appears that the magistrate did satisfy himself that the provisions of s. 59 of the Penal Code had been observed: *Price v. Humphries* (4), [1958] 2 All E.R. 725.

On October 3 the appellant was present when his counsel and counsel for the Crown appeared. The charges were read over and explained to the appellant and his plea was taken to each. The charge sheet (which is the same as that which was before him on September 24) was signed by the magistrate on October 3.

No objection to the sufficiency of the Consent was taken by the defence, either during the trial or in the memorandum of appeal to the Supreme Court. The matter was first raised by leave during the hearing of that appeal. Mr. Bali-Sharma now suggests that the Consent gives the impression that there were two speeches at Awendo and not one. We do not think that there is anything in this contention. The appellant was certainly not misled into so thinking and we see no reason to suppose that anyone else was. *Gokalchand's* case (2) is clearly distinguishable from the present case. There the sanction gave no particulars of the date or place of the offence and did not recite that the sanctioning authority had considered all the relevant facts. Moreover, an objection to the sanction was taken at the outset of the trial. We are of opinion that in the present case the Consent was upon its face sufficient and valid and that if the defence wished to challenge its validity, they should have done so at the trial when oral evidence that the facts constituting the alleged offence had been placed before the sanctioning authority could have been called.

Since we agree with the learned judges of the Supreme Court that the Consent was valid and sufficient on its face, it is unnecessary to consider whether or not they were right in relying also upon a statement made by the deputy public prosecutor, who appeared for the Crown, that he was authorised to state that the acting attorney-general had personally drafted the charges which had been preferred against the appellant. In this connection Mr. Bali-Sharma distinguished the case of *Abdulla Suleiman el Harthi and Others v. R.* (1) on the ground that there the attorney-general, the sanctioning authority, had himself appeared and prosecuted the case. In a case where the sanction is insufficient on its face and it is desired by the prosecution to prove that the facts constituting the alleged offence were before the sanctioning authority, evidence to this effect should be called at the trial; and if this has not been done and it is sought to adduce fresh evidence on appeal, a proper application to adduce fresh evidence supported by affidavit should be made. Statements from the bar have, in certain cases, been accepted, but they are open to the objection that they are not subject to cross-examination. No doubt, if the defence had taken objection to the sufficiency of the Consent at the trial or even in their grounds of appeal to the Supreme Court, the Crown would have adduced, or applied to adduce, any necessary evidence in the proper manner. Owing, however, to the failure of the defence to take the objection at the proper time, the Crown had no opportunity of so doing. The matter is not, however, material as we have held that the Consent was sufficient on its face.

In our opinion, the first five grounds of appeal fail.

Ground 6 avers that the first appellate court erred in holding that the appellant was rightly charged and convicted of two similar offences in respect of one speech made at one time. On this the Supreme Court said:

> "The next point taken by Mr. Bali-Sharma was that the appellant should not have been charged with two offences of sedition in respect of the same speech. He submitted that the delivery of the speech was one actus reus, one offence of sedition, and therefore there should have been only one count. In our view there is no substance in this submission. We think that one count could have been preferred, but that it was not improper to prefer two counts."

We agree.

The seventh ground of appeal is to the effect that the first appellate court erred in holding that seditious intentions on the part of the appellant were established. Mr. Bali-Sharma strenuously contended that the whole speech (not merely the excerpts set out in the charges) and all the surrounding circumstances must be looked at. He alleged that the first appellate court had looked at the words and had come to the conclusion that the words showed a seditious intention and had then looked at the surrounding circumstances to see if there were circumstances which negatived that and he argued that this was a wrong approach and that the first appellate court should have looked at the whole speech and all the circumstances. He contended, in the eighth ground of appeal, that in saying "The appellant himself gave no explanation as to his intentions" the Supreme Court was throwing on the appellant the burden of proving his innocence. Mr. Bali-Sharma pointed out that the appellant was a member of the Legislative Council addressing his constituents at an orderly and licensed meeting in a country advancing from a state of emergency and that good humour had prevailed. He drew a distinction between words spoken in sudden heat and written words and relied on *R. v. Sullivan and Another* (5), 11 Cox C.C. 44 at pp. 46 and 50.

We think that in a case like the present the whole of the speech and the surrounding circumstances must be taken into account; and that, applying sub-s. (2) of s. 57 of the Penal Code, it must be determined whether the words complained of fall within para. (i) to para. (v) of sub-s. (1) of s. 57 or any of them, or merely within para. (*a*) to para. (*d*) of that sub-section or any of those paragraphs. If the former, there is a seditious intention: if the latter, there is no seditious intention. From their judgments it is apparent that both the magistrate and the learned judges of the Supreme Court considered the circumstances in which the speech was made at least to the extent that both judgments state that it was a speech by a member of the Legislative Council to a political meeting licensed and conducted in an orderly manner. There is no reason to suppose that the courts below did not also consider the state of the country and of public feeling at the time when the speech was made, the size and nature of the audience and any other relevant circumstance. It is to to be presumed that they did. The learned judges of the Supreme Court in their judgment pointed out that the magistrate was wrong in relying to the extent that he did on authorities which applied to offences of publishing seditious *publications* or writings and that the principles laid down in those authorities would not necessarily apply in all respects to a charge under s. 58 (1) (*b*) of uttering words with a seditious intention; and that it was not for the magistrate to decide whether the words were seditious publications. With this we agree. Their lordships continued:

> "Where words are spoken they are clearly evidence of the speaker's intention and if the words in themselves reveal a seditious intention as

> defined, that is evidence of a seditious intention on the part of the speaker. But, in our view, in order to determine whether or not the speaker in fact had a seditious intention, not only the words themselves but the whole of the evidence, including the surrounding circumstances, must be taken into consideration."

We think that this is unexceptionable; but we do not agree with the sentence which follows:

> "In arriving at his conclusion that the appellant had a seditious intention the magistrate looked only at the words themselves and not at the surrounding circumstances."

As we have already stated, the judgment of the magistrate indicates that he did consider some, if not all, of the circumstances in which the speech was made.

The judges of the Supreme Court having carefully considered, in the context of the whole speech made by the appellant, the words complained of and the submissions of counsel for the appellant, found that the words complained of in each count disclosed a seditious intention. They continued:

> "As we have said, the words themselves are therefore evidence that they were uttered with the seditious intentions alleged. Is there anything in the surrounding circumstances or in the evidence as a whole to negative or throw doubt on the seditious intentions of the appellant as expressed in his words? In our view there is nothing. The appellant himself gave no explanation as to his intentions. The fact that he was a politician addressing his constituents cannot alter the plain implication of his words or excuse him from liability. We agree with the magistrate that the words complained of do not come within the scope of any of the cases of intention which are expressly stated not to be seditious in s. 57 (1)."

This is the passage of which Mr. Bali-Sharma complains. But we think it is unobjectionable. Their lordships were merely considering whether there was anything in]the surrounding circumstances or in the evidence as a whole which would negative the seditious intention which the words themselves expressed. This was a legimate approach; and the sentence "The appellant himself gave no explanation as to his intentions" was not an attempt to cast the onus on the accused of proving his innocence: it was merely a statement of fact. The appellant did not elect to give evidence or make an unsworn statement. Accordingly there was no direct evidence of intention and the magistrate was left to gather the appellant's intention from the ordinary meaning of the words used in the context of the speech and the surrounding circumstances. The learned judges of the Supreme Court were fully entitled to state that fact. Their lordships concluded:

> "We are satisfied that the appellant was rightly convicted on the evidence and that, had the magistrate taken into consideration the surrounding circumstances and the totality of the evidence, he would still have reached the same conclusion as to the guilt of the appellant."

As we have already said, it is plain from his judgment that the magistrate did take into consideration some, if not all, of the surrounding circumstances and we see no reason to suppose that he did not consider the totality of the evidence.

Having considered the whole speech and all the surrounding circumstances as revealed in the evidence, we agree with the learned magistrate and with the Supreme Court that the words complained of in the first count were uttered by the appellant with the seditious intention there set out, namely an intention

> "to bring into hatred and contempt and to excite disaffection against the Government of Kenya as by law established, and to raise disaffection amongst Her Majesty's subjects in the Colony."

We see no reason to suppose that the magistrate was wrong in the interpretation of the word "adui" which he adopted as primarily signifying "enemy". He had evidence in support of his finding. We agree also that the words complained of in the second count were uttered by the appellant with the seditious intention there set out, namely an intent

> "to excite disaffection against the Government of Kenya as by law established, and to excite Her Majesty's subjects to attempt to procure the overthrow of the said Government otherwise than by lawful means."

It would not have been seditious to express an opinion that the British can "only be got rid of by making a lot of noise at them" and to support that opinion by a historical survey of events in America, Ireland, Cyprus, Burma, India and Ghana; but it is a different thing to use such examples for the purpose of exciting disaffection against the Government of the Colony as by law established. By the sentence

> "Why can't you respond like the Japanese who believe that when you are killed in war you will go straight to heaven?"

and by his reference to guns and bloodshed, to force, and to unlawful refusal to pay tax the appellant made it perfectly plain that he intended to excite his hearers to redress their alleged grievances by following these examples, and to procure the subversion, by force and otherwise than by lawful means, of the Government of Kenya as by law established. We think that he was rightly convicted.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
Bali-Sharma & Co., Nairobi
S. B. Bali-Sharma

For the respondent:
The Attorney-General, Kenya
J. P. Webber (Deputy Public Prosecutor, Kenya)

Reginald Ernest Vere Denning v David Geoffrey Edwardes and another
[1960] 1 EA 755 (PC)

Division:	Privy Council
Date of judgment:	10 October 1960
Case Number:	15/1959
Before:	Viscount Simonds, Lord Morris of Borth-y-Gest and Mr LMD De Silva
Sourced by:	LawAfrica

Appeal from: E.A.C.A. Civil Appeal No. 42 of 1958 on appeal from H.M. Supreme Court of Kenya – Pelly Murphy, J.

[1] Evidence – Agreement for sale of Crown land – Agreement not registered – Whether admissible in evidence – Indian Transfer of Property Act, 1882, *s.* 55 (6) (*b*) – *Crown Lands Ordinance* (*Cap.* 155), *s.* 127 *and s.* 129 (*K.*) – *Indian Registration Act*, 1908, *s.* 17 *and s.* 49.
[2] Sale of land – Agreement for sale of land in Highlands – Governor's consent not obtained before execution of agreement – Validity of agreement – Crown Lands Ordinance (Cap. 155) s. 88 (K.).

Editor's Summary

In an action by the respondents against the appellant for specific performance of an agreement for sale of land the trial judge held that by reason of the combined operation of s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882 and s. 127 (2) of the Crown Lands Ordinance the agreement was inadmissible in evidence and dismissed the respondents' claim. On first appeal the court held that the trial judge had erred in holding that the agreement was inadmissible and also rejected a submission that s. 88 (3) of the Crown Lands Ordinance rendered the agreement void because the Governor's consent had not been obtained prior to the execution of the agreement. On further appeal.

Held –

(i) the agreement was not tendered as evidence of a charge and therefore was not excluded by s. 127 (2) of the Crown Lands Ordinance from being received as evidence in the suit. *Dayal Singh v. Indar Singh* (1926), 53 I.A. 214 distinguished.

(ii) s. 88 (3) of the Crown Lands Ordinance is only applicable to an instrument which "purports to effect any of the transactions referred to in sub-s. (1)"; an agreement to sell does not "effect a transaction" and therefore s. 88 (3) was not applicable to the agreement in question.

(iii) there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained and the legal consequence that ensued was that the agreement was inchoate till that consent was obtained; once consent was obtained the agreement was complete and completely effective.

(iv) the agreement to sell was not void and was admissible in evidence.

Appeal dismissed.

[**Editorial Note**: see also *Edwardes and Another v. Denning*, [1958] E.A. 628 (C.A.).]

Case referred to:

(1) *Dayal Singh v. Indar Singh* (1926), 53 I.A. 214.

Judgment

Viscount Simonds: The respondents instituted this action in the Supreme Court of Kenya against the appellant claiming specific performance of an agreement dated April 17, 1954, whereby the appellant

agreed to sell to the respondents a certain parcel of land. The respondents also asked for other forms of relief. The appellant in his defence for stated reasons prayed that all the relief asked for by the respondents be refused. He also made a counterclaim. It will be seen from what follows that questions regarding the other relief asked for by the respondents and the counterclaim do not arise on this appeal. The Supreme Court held that by reason of the combined operation of s. 55 (6) (*b*) of the Indian Transfer of Property Act, 1882 (applicable in Kenya) and s. 127 (2) of the Crown Lands Ordinance the agreement was inadmissible in evidence and dismissed the respondents' action. On appeal the Court of Appeal for Eastern Africa held that the Supreme Court had erred in holding that the agreement was inadmissible. It rejected a further submission made at the hearing of the appeal that the provisions of s. 88 of the Crown Lands Ordinance rendered the agreement void. Setting aside the decree of the Supreme Court it ordered that the case be remitted to that court for further proceedings.

The question of admissibility arise in the following way. Section 55 (6) of the Indian Transfer of Property Act, 1882, is to the following effect:

> "(6) The buyer is entitled –
>
>
>
> (*b*) . . .to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount."

The rest of the sub-section deals with circumstances in which delivery of the property is refused and has no bearing on the present appeal. Sub-section 1 to sub-s. 5 are also irrelevant.

The appellant contends that money passed from buyer to seller in circumstances which gave rise to a charge and he argues that in consequence the agreement is inadmissible under s. 127 of the Crown Lands Ordinance which says:

> "127. No evidence shall be receivable in any civil court:
>
> (1) of the sale, lease, or other transfer inter-vivos of land registered under this Part, unless such sale, lease or other transfer is effected by an instrument in writing and such instrument has been registered under this Part.
>
> (2) of a lien, mortgage or charge (otherwise than such as may arise or be created in favour of the Crown or the Government under or by virtue of any Ordinance or other enactment) of or upon such land unless the mortgage or charge is created by an instrument in writing, and the instrument has been registered under this Part."

The land is situate in the Highlands of Kenya held by the appellant under a Crown lease registered under the Crown Lands Ordinance. It is not disputed that it is land to which s. 127 is applicable.

It was argued by the respondents that by reason of certain other provisions of the Crown Lands Ordinance the charge could not be regarded as existing. Their lordships find it unnecessary to decide this question because their lordships are of opinion that assuming that a charge exists the agreement is nevertheless admissible for reasons which follow.

Dealing with the point the President of the Court of Appeal (who wrote the principal judgment) said of s. 127:

> "what is rejected in Kenya is evidence of specified transactions – of the sale, lease, transfer or charge etc. of registered land. The Agreement in this case was not tendered as evidence of a charge. No charge was sought to be proved, and the existence or otherwise of a charge was irrelevant to any issue in the suit. I am of opinion that the Agreement was not excluded by s. 127 (2) from being received as evidence in this suit."

Their lordships are of the same opinion. The section says "no evidence shall be receivable" "of a charge" unless "the instrument is registered". When the sole object of using the instrument has nothing whatever to do with a charge the court is not receiving evidence of a charge within the meaning of the section. To be "evidence" within that meaning it must be evidence for the purposes of the case.

The learned trial judge in dismissing the action was opinion that the decision of the Board in *Dayal Singh v. Indar Singh* (1) (1926), 53 I.A. 214) "completely governed" the present case. The Court of Appeal held that there were significant differences between the statutory provisions in India referred to in that case and the corresponding statutory provision in Kenya which made the decision inapplicable. Their lordships agree. They will refer to one such difference. In the Indian case, as in the present case, under an agreement for the sale of immovable property the buyer became entitled to a charge under s. 55, sub-s. 6 (*b*), of the Transfer of Property Act, 1882, upon the property in respect of a sum of money that had passed with the result that s. 17 of the Indian Registration Act, 1908, required the document to be registered. It was not registered. The effect of non-registration is stated in s. 49 of the Indian Registration Act thus:

> "49. No document required by s. 17 to be registered shall
>
> (*a*)
>
> (*b*)
>
> (*c*) be received as evidence of any transaction affecting such property. . .unless it has been registered."

The words of the section which have been omitted have no bearing on this appeal.

It will be seen that the Indian Act unlike the Kenya Ordinance makes inadmissible the document itself. The learned President said:

> "Section 49 of the Indian Registration Act makes 'documents' required by s. 17 to be registered not receivable as evidence of any transaction affecting immovable property unless registered. This disqualifies the instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property. On the other hand, s. 127 of the Kenya Crown Lands Ordinance says: 'No evidence shall be receivable in any Civil Court . . . of a sale, lease . . . charges etc.' What is rejected by s. 127 is not the unregistered instrument per se in so far as it is to be received as evidence of any transaction affecting immovable property, but evidence of certain specified transactions, and of those only."

With this view their lordships agree and they are of opinion that the President's view that the agreement for sale was admissible is correct.

It is also contended that the agreement is void by reason of the provisions of s. 88 of the Crown Lands Ordinance which says:

> "88(1) No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate

> in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this sub-section without the written consent of the Governor, . . .
>
> "(3) Any instrument, in so far as it purports to effect any of the transactions referred to in sub-s. (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument."

Sub-section (2) has no bearing on the case.

It is argued the agreement to sell is void by reason of the provisions of sub-s. (3). There was an admission in the course of the proceedings in Kenya that the Governor's consent to the agreement has been obtained subsequent to execution by the parties. It is argued by the appellant that the consent should have been obtained prior to execution and that in any case it should be endorsed on the instrument before it can be regarded as valid.

Sub-section (3) is applicable only to an instrument which "purports to effect any of the transactions referred to in sub-s. (1)" for instance a conveyance which makes a sale effective. Their lordships are of opinion that an agreement to sell does not "effect a transaction" and that therefore sub-s. (3) is not applicable to the agreement in question.

The view that sub-s. (3) is applicable to an agreement to sell necessarily involves the view that an "agreement for any of the transactions referred to in this sub-section", namely sub-s. (1), is also a "transaction" within the meaning of sub-s. (1). Their lordships are unable to take this view and are of opinion that sub-s. (3), applicable to the transactions mentioned in sub-s. (1), is not applicable to agreements for such transactions.

It has been urged that if sub-s. (3) is held to be inapplicable to the provision

> "nor shall any person enter into an agreement for any of the transactions referred to in this sub-section without the written consent of the Governor"

in sub-s. (1) the provision is left without a sanction in express terms such as is to be found in sub-s. (3). There is force in this argument but their lordships are of opinion that what they have said earlier outweighs the considerations that arise from the argument. As sub-s. (3) is inapplicable the consent of the Governor need not be endorsed on the agreement.

Sub-section (1) requires the written consent of the Governor to an "agreement for any of the transactions" set out in the sub-section. They include a transaction of sale. It has been argued that the consent of the Governor must be obtained before the agreement is entered into and that subsequent consent is insufficient. Some form of agreement is inescapably necessary before the Governor is approached for his consent. Otherwise negotiation would be impossible. Successful negotiation ends with an agreement to which the consent of the Governor cannot be obtained before it is reached. Their lordships are of opinion that there was nothing contrary to law in entering into a written agreement before the Governor's consent was obtained. The legal consequence that ensued was that the agreement was inchoate till that consent was obtained. After it was obtained the agreement was complete and completely effective.

It is to be observed that in cl. 4 of the agreement the parties provided that

> "The purchase and sale hereby effected is expressly made subject to the consent thereto of the Land Control

Board and the Governor of the said Colony. In the event of such consents being refused then this agreement

> shall become null and void and any payment made by the purchasers shall thereupon be refunded to them but without interest."

Thus the parties had every regard for the provisions of sub-s. (1) of s. 88 and it would be remarkable if they could not negotiate in the manner in which they did.

An argument was addressed to their lordships based upon s. 129 of the Crown Lands Ordinance which says:

> "129. Nothing in the last two preceding sections shall apply to
>
> (*e*) any document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest to or in land registered under this Part, but merely creating a right to obtain another document, which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest."

The other sub-sections are not relevant.

It was submitted that the agreement to sell came within the class of documents specified in sub-s. (*e*) and that therefore s. 127 was inapplicable. On the view which their lordships have taken of s. 127 it is not necessary for them to consider the submission.

For the reasons which they have given their lordships are of opinion that the agreement to sell was not void and that it was admissible in evidence. They agree with the Court of Appeal that the case should be remitted to the Supreme Court for further hearing. They will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondents the costs of the appeal.

Appeal dismissed.

For the appellant:
Goodman, Derric & Co., London
Ralph Milner (of the English Bar)

For the respondents:
Field, Roscoe & Co., London
S. P. Khambatta, Q.C., H. Lester and G. Chakrawati (all of the English Bar)

Toyi s/o Kalihose v R
[1960] 1 EA 760 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	21 October 1960
Case Number:	161/1960
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Mosdell, J.

[1] Criminal law – Judgment – Misdirection – Retracted confession – Whether corroboration required.

Editor's Summary

The only point considered on this appeal against conviction for murder was the adequacy of the direction to the assessors by the trial judge on the need for corroboration of a retracted confession. In his direction the judge had said that there was no rule of law or practice which required corroboration of a retracted confession but that such was desirable.

Held –

(i) it is dangerous to act upon a retracted confession unless it is corroborated in material particulars or unless the court after full consideration of the circumstances is satisfied of its truth.

(ii) the judge's direction, so far as it fell short of a warning that in the absence of corroboration a retracted confession is to be received with great caution, amounted to a misdirection, but there had been no failure of justice.

Appeal dismissed.

Cases referred to in judgment:

(1) *R. v. Kaperere s/o Mwaya* (1948), 15 E.A.C.A. 56.

(2) *Miligwa s/o Mwinje and Another v. R.* (1953), 20 E.A.C.A. 255.

Judgment

Sir Alastair Forbes VP, read the following judgment of the court: The appellant was convicted of the murder of one Bwehera s/o Muyogo by the High Court of Tanganyika sitting at Kigoma and was sentenced to death. He appealed to this court against conviction and sentence. He was not present or represented at the hearing of the appeal, and after hearing Crown counsel for the respondent we dismissed the appeal, but undertook to give reasons. These we now give.

The only point that arose on the appeal was the adequacy of the direction given by the learned trial judge to the assessors on the question of the need for corroboration of a retracted confession. As to this the learned judge said:

> "In his unsworn statement in this court the accused retracted his extra-judicial statement. There is no rule of law or practice which requires corroboration of a retracted confession, which is what the accused's extra-judicial statement amounts to. It is desirable, however, to have such corroboration, and it is not to be found in the evidence regarding the spear which wounded the deceased and which the assessors may feel satisfied is accused's spear, or the deceased's statements to the prosecution witnesses to which I have referred, and to Mr. Makinda, regarding the incident in his shamba. And even if the assessors are satisfied that the spear which injured Bwehera was accused's spear it may have been wielded by somebody other than the accused. Moreover, the statements made by Bwehera before he died are conflicting and really leave the impression that Bwehera was not sure who speared him. However, even without corroborative

> evidence the assessors may feel the accused's extra-judicial statement to be true. If however the assessors have any doubts on this matter they should give the accused the benefit of any such doubts and acquit him."

We agree that there is no rule of law or practice which requires corroboration of a retracted confession before it can be acted upon. But we think the learned judge was understating the case in merely saying that "it is desirable . . . to have such corroboration". It is a well-established rule of prudence that it is dangerous to act upon a rectracted confession unless it is corroborated in material particulars or unless the court, after a full consideration of the circumstances, is satisfied of its truth – *R. v. Kaperere s/o Mwaya* (1) (1948), 15 E.A.C.A. 56; *Miligwa s/o Mwinje and Another v. R.* (2) (1953), 20 E.A.C.A. 255. With respect, we think that the learned judge's direction, in so far as it fell short of a warning to the assessors that in the absence of corroboration a retracted confession is to be received with great caution and reserve, amounted to a mis-direction. However, we were satisfied that in fact in his judgment the learned judge had accepted the appellant's extra-judicial confession as true only after full consideration of the circumstances, and that there was every justification for such acceptance. We may add that it seemed to us that the learned judge was unduly favourable to the appellant in directing the assessors that the identification of the spear with which the deceased was killed as the appellant's spear was not to be regarded as corroboration, and that this circumstance could properly have been relied upon as some corroboration of the appellant's confession, especially as, in the course of the confession, the appellant actually identified the spear as the one with which he had speared the deceased.

In all the circumstances we were satisfied that the misdirection referred to occasioned no failure of justice, and we accordingly dismissed the appeal.

Appeal dismissed.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

Sharmpal Singh s/o Pritam Singh v R
[1960] 1 EA 762 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	28 November 1960
Case Number:	112/1960
Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Wicks, J.

[1] Criminal law – Evidence – Admissibility – Medical and scientific textbooks – Indian Evidence Act, 1872, *s.* 32, *s.* 45, *s.* 57, *s.* 60 – *Indian Divorce Act,* 1869, *s.* 17.

[2] Criminal law – Murder – Intent – Circumstantial evidence – Whether evidence excludes possible killing without intent necessary for legal malice – Penal Code, s. 198, *s.* 202 (*K.*).

Editor's Summary

The appellant had been convicted on circumstantial evidence of the murder by strangulation of his wife to whom he had apparently been happily married for less than one year. On appeal much of the argument concerned the medical evidence and counsel for the appellant sought to rely on passages from textbooks on medical jurisprudence to the citation of which Crown counsel objected.

Held –

(i) although s. 45, s. 57 and s. 60 of the Indian Evidence Act authorise reference by the court to certain textbooks and treatises, the proper function of such works is to assist the court to a right understanding of and conclusion upon the evidence given; when passages from such works are relied upon, they should be put to the expert witnesses for their opinions.

(ii) in the instant case the circumstantial evidence did not eliminate as a reasonable hypothesis that the appellant killed his wife by an unlawful assault but without the intent necessary to constitute legal malice.

Appeal allowed. Conviction of murder quashed and sentence set aside; conviction of manslaughter substituted. Appellant sentenced to eight years imprisonment.

Case referred to:

(1) *Collier v. Simpson* (1831), 5 C. & P. 73; 172 E.R. 883.

(2) *R. v. Taylor*, 13 Cox C.C. 77.

(3) *Tikam Singh v. Dhan Kunwar* (1902), 24 All. 445.

(4) *Howe v. Howe* (1915), 38 Mad, 466.

(5) *R. v. Dada Ana* (1891), 15 Bom. 452.

(6) *Grande Venkata Ratnam v. Corporation of Calcutta* (1919), A.I.R. Cal. 822.

(7) *Sajid Ali v. Ibad Ali* (1895), 22 I.A. 171.

(8) *R. v. Wallace*, 23 Cr. App. R. 32.

(9) *Mancini v. Director of Public Prosecutions*, [1942] A.C. 1; [1941] 3 All E.R. 272.

Judgment

Gould JA, read the following judgment of the court:

This appeal has been brought from a judgment of the Supreme Court of Kenya at Kisumu dated June 3, 1960, whereby the appellant was convicted of the murder of his wife Ajeet Kaur on or about the night of February 28/29, 1960.

The appellant is a young man and had been married to the deceased for less than one year. The evidence was that the marriage was a happy one and the deceased had been pregnant for a period estimated by one doctor as from sixteen to eighteen weeks, and by another as from twenty-two to twenty-four weeks. The evidence against the appellant was circumstantial and it is right to say at once that the direction by the learned trial judge to the assessors and to himself upon the subject of the nature and effect of circumstantial evidence was impeccable, and has not been criticized in any way.

The following description of the premises in which the couple lived is taken from the judgment under appeal:

> "The evidence is that the accused lived with his wife, Ajeet Kaur, in a room in a flat in Jaipur Street, Kisumu. Upkar Singh Pardesi (P.W. 9), Ajeet's brother, lived with his wife, Inderjeet Kaur (P.W. 10), and their two children in the other room in the same flat. There are several flats opening on to a courtyard and there is a door which leads from the accused's room and down some steps to the outside of the building. There were two beds in the accused's room, one along the wall next to the courtyard on which the accused usually slept and the other, on which Ajeet Kaur usually slept, along a wall in which there is a door leading to a verandah, from which one can reach the courtyard through double doors, the kitchen, the room occupied by Upkar Singh Pardesi, and a shower room."

The undisputed facts are accurately summarised in the judgment:

> "At about 7.30 p.m., on February 28, 1960, some friends having called, Upkar Singh went away with them leaving his wife, their two children, the accused and Ajeet in the flat. Upkar Singh returned alone at about 9.30 p.m., and went up the steps to the outside door to the accused's room. The light in the room was put on and the accused opened the door and let Upkar Singh in. The accused then shut and bolted the door. Upkar Singh saw that Ajeet was in her bed and with her was Amarjeet Singh, a boy aged about seven years, one of Upkar Singh's children. Upkar Singh then went to his room and on the way checked the verandah door and found it was locked and that the key was in its usual place in the lock. The verandah light and the yard light were not on. Upkar Singh shut the door to his room, undressed, read a book for about half an hour and then went to sleep on the floor, it was then before 11.0 p.m. At about 3.45 a.m., the next morning, Upkar Singh woke up, felt thirsty, and went to the kitchen to get a glass of water. On the way he saw that the courtyard light was on, as also was that in the accused's room, the door of which was open. Upkar Singh consumed his glass of water and then went to the accused's room to find out why the light was on, he stood in the doorway and saw that Ajeet's bed was empty, the accused was in his with the boy Amarjeet and they appeared to be asleep. Upkar Singh then went out of the verandah door, which was shut, but not locked, into the yards, saw that the toilet room light was on and the door half closed, then going a little further he saw, by the light that came through his bedroom window, Ajeet's body lying on the murram part of the yard. Ajeet was lying on her back, her left arm was stretched out, her right arm was bent the hand being near her waist and her legs were a little bent, her head was towards the boys' quarters, her legs towards the exit door from the yard to the outside of the building. Upkar Singh saw that Ajeet's clothes were bloodstained, shouted his sister's name and, when she did not reply, he shouted for his wife and she came, followed by the accused. Upkar Singh felt near Ajeet's heart over her clothing for heart-beat and thought her heart was beating. Upkar Singh and his wife then lifted Ajeet from the murram and placed her on the concrete part of the courtyard.

> By this time the houseboys had come out of their quarters and they and the accused carried Ajeet into her room and put her on the floor opposite to her bed. Upkar Singh then went off to fetch Dr. Hasham (P.W. 8). Dr. Hasham was called at about a quarter to four and arrived at the flat in Jaipur Street at about 4 a.m., he went into the accused's room and saw Ajeet lying on the floor covered with blankets or rugs. Dr. Hasham thought that Ajeet was in a state of shock, he did not think she was dead, he felt for her pulse and thought at first that he felt it beat, he was not sure. On an examination for injuries Dr. Hasham found two wounds, one on the right side of the chest at about the bottom of the ribs and the other towards the middle, there was bleeding from the first wound which was a large one, the other was not bleeding at all. Dr. Hasham made arrangements for Ajeet to be taken to the Nyanza General Hospital, Kisumu, and went on ahead and called Mr. Treadway (P.W. 3), the Provincial Surgeon. Soon after Dr. Hasham arrived at the Hospital, Ajeet was brought there by Upkar Singh and his wife. Mr. Treadway examined Ajeet in the operating room of the hospital and, not being sure whether she was dead or alive, he took immediate steps in an attempt to resuciate her. He administered an intracardial injection of Adrenalin, he picked up her left arm to find a vein, but it was cold and no vein showed, he then went to the left leg as the best available place to find a vein and made an incision administering an intravenous injection of Glucose Saline and Nor-Adrenalin. There was no response at all and Mr. Treadway reached the conclusion that Ajeet was dead and had been dead for at least quarter of an hour, possibly an hour and a quarter or longer. Mr. Treadway examined Ajeet at between 4.30 a.m. and 4.45 a.m."

There were two post-mortem examinations made. The details of the first, by Dr. S.N. Ngure, are given in the following passage:

> "Later on the same morning Dr. Ngure (P.W. 7) carried out a post-mortem examination on Ajeet's body. Dr. Ngure found that the stab wound on the right chest measured 2 1/2 inches by 1 1/2 inches, had cut through the cartilages of the 7th and 8th ribs and into the liver to a depth of about an inch. The wound on the left chest was found to be superficial. Dr. Ngure described the term 'lividity' as meaning the discoloration of the skin after death caused by blood flowing to the lowest part of the body and there staining the skin red, and said that he found extensive lividity over the whole of the back and the left side of the face and ear, that this was not unsual in a corpse if not extensive, but in this case it was very gross, that it was cyanosed almost violet in colour indicating lack of oxygen in the blood before death. The mucous membranes of the mouth and conjunctiva showed cyanosis, a symptom of lack of oxygen before death. The mucous membranes of the respiratory system showed a fair amount of cyanosis and the trachea and bronchi were found to be full of frothy mucus which extended right through to the small bronchi, the pleural surfaces of the lungs showed a few pin-point haemorrhages. Dr. Ngure was very doubtful as to the cause of death and formed the opinion that the stab wound of itself would not have been the cause as not enough blood had been lost. Dr. Ngure was of opinion that the wound on the chest was suffered before death though it would have necessitated a microscopic examination to have determined that, and came to the conclusion that death was due to asphyxia mainly and possibly from haemorrhage and shock from the stab wound. Dr. Ngure having completed his post-mortem examination the body was handed over to the relatives at about 1.30 p.m."

The body was, however, recovered by the police about 9.30 p.m. the same night and on the following day the second examination was carried out by

Dr. M.G. Rogoff, the Kenya Government Pathologist. That is described as follows in the judgment:

> "Mr. Treadway (P.W. 3) and Dr. Ngure (P.W. 7) were present and pointed out to Dr. Rogoff what they had done to the body. Dr. Rogoff found small blood spots inside the lining of the eyes also on the face. The eyes, the lips, the membranes of the mouth and nose, and the skin of the face had a purplish cyanotic discoloration. In the region of the neck Dr. Rogoff found extensive haemorrhage into the muscles under the skin and into the thyroid gland, also into the salivary gland under the right jaw and into the right muscle of the lower jaw. There was bruising of the cartilages of the larynx and also bruising over both the left and right carotid arteries, the windpipe showed considerable bruising and the surface of the windpipe showed haemorrhagic blood spots. The region of the chest above the left breast showed an area of haemorrhage into the muscles and a large number of areas of haemorrhages was found under the membranes lining the lungs and under the lining inside the chest cavity. All of these conditions are symptoms of asphyxia. Dr. Rogoff also found a collection of fluid in the lung tissues which he said was a common result of the lowering of the oxygen content of the blood caused by asphyxia, Also areas of haemorrhage were found inside and outside the heart muscles and this condition is one of the phenomena of asphyxia, although it can have other causes. An examination of the brain disclosed haemorrhagic spots in all areas, which is an indication of asphyxia, the brain was waterlogged, a condition not uncommon in the case of death from asphyxia. Apart from some pus and a small amount of urine found in the bladder it was empty and one expects to find a small amount of urine in a dead body, that the bladder is found empty is one of the normal reactions of asphyxia and is found in ninety per cent. of cases of death from this cause.
>
> "Dr. Rogoff described the two wounds to the lower chest, as had Dr. Ngure (P.W. 7), said he took deep sections of them and found that both had been inflicted after death. Dr. Rogoff explained that had the wounds been inflicted up to a quarter of an hour after death there would be reaction and he found none on a microscopical examination of the sections, in the result the conclusion was that the wounds had been inflicted a quarter of an hour or more after death. Dr. Rogoff could not say how long after the expiry of a quarter of an hour after death the wounds were inflicted. Mr. Sood cross-examined Mr. Treadway, Dr. Rogoff, and Dr. Ngure at some length on the wound found on Ajeet's right chest. On the point of the wound gaping, Mr. Treadway explained that it was difficult to relate the degree of gaping which can be affected by reaction as the cut was across the tissue. Mr. Treadway also said that 'this fibrous tissue remains alive long after death has taken place' and, as I have said, Dr. Rogoff's evidence was that this period had passed when the wound was inflicted. Dr. Ngure was insistent that there had not been a sufficient blood loss to have caused death."

The evidence by Dr. Rogoff as to the time when the stab wounds were inflicted with relation to the time of death was of vital importance in the reasoning of the learned judge when he was considering the circumstantial evidence. He said, though he examined various possibilities in detail later in his judgment:

> "If Dr. Rogoff's evidence is accepted the circumstances of an intruder or intruders being responsible can be put very shortly – Ajeet met her death by strangulation, or strangulation plus damage to the left chest by compression, and a quarter of an hour or more after her death the two stab wounds were inflicted to the lower part of the chest, so if an intruder

> or intruders were responsible, one or more of them strangled her and then waited, or came back, a quarter of an hour or more later and stabbed her dead body – a startling sequence of events."

The learned judge did accept Dr. Rogoff's evidence, when he said:

> "Dr. Ngure said that at the time he carried out his post-mortem examination he thought that the wound on the right of the chest had been inflicted before death but to establish this it would be necessary to carry out a microscopic examination. Dr. Rogoff made such an examination with the result that I have set out. I accept this evidence and find as a fact that the stab wounds on the right and left of Ajeet's body were inflicted a quarter of an hour or more after she had met her death from asphyxia."

The finding that the deceased met her death from asphyxia has not been attacked, but one of the main grounds argued on the appeal was that the finding that the stab wounds were inflicted a quarter of an hour or more after death ought not to be supported. It will be convenient at this point, to set out the grounds as embodied in the memorandum of appeal, though they were not argued by counsel in the order indicated:

"1. That the learned judge misdirected himself in law in finding that:

(i) there was a chain of circumstancial evidence pointing to the guilt of the appellant;

(ii) there were no circumstances which weakened or destroyed the inference of guilt;

(iii) the circumstantial evidence was incompatible with the innocence of the appellant and incapable of explanation upon any hypothesis other than that of guilt.

"2. That the findings of the learned judge were based largely upon theory and speculation, and not upon facts proved by, or reasonably to be inferred from, the evidence.

"3. That the finding of the learned judge that the appellant murdered his wife was against the weight of the evidence.

"4. That the learned judge erred in failing to give due weight to the conflict of evidence with regard to the time of the deceased's death, or to attach proper significance thereto when considering whether the stab wounds found on the deceased's body were inflicted before or after death and, if the latter, whether they were inflicted at least a quarter of an hour after death.

"5. That the learned judge erred:

(i) in finding that the stab wounds were inflicted a quarter of an hour or more after the deceased had died from asphyxia;

(ii) in attaching significance to the absence of any outward signs of urine on the murram, especially when no analysis was made of the murram at the place where the deceased's body was found;

(iii) in attaching significance to the presence of urine in the bed in view of the evidence that the same might have been caused by the child Amarjeet;

(iv) in finding that the deceased's headdress was found in the toilet and was bloodstained when found."

Counsel for the appellant commenced his argument by indicating that he would challenge the finding as to the time when the stab wounds were inflicted,

as incorrect, and would comment on the conflicting evidence regarding the estimated time of death. He submitted that, on the evidence, it was quite likely that the wounds were inflicted before death or almost contemporaneously with it. He referred to the medical evidence. Dr. Ngure said that at the time of examination he thought that the wounds were inflicted ante-mortem, but qualified that opinion by saying that to establish that as a fact it would be necessary to make a microscopic examination. On the subject of bleeding Dr. Ngure said (*a*) that the deceased had not lost enough blood for the stab wounds to constitute the sole cause of death (*b*) that the bleeding of which he saw evidence would be more likely to have taken place from a live person than from a dead body and (*c*) (in re-examination) that a dead person may bleed more than a live one.

Dr. Treadway, Provincial Surgeon, Nyanza General Hospital, said that he could not be sure if the deceased was alive or dead when he first saw her, but after his test showed that she was dead he formed the opinion that she had been dead "at least a quarter of an hour, possibly an hour and a quarter or longer", and then he said

> "I am not competent to give an exact estimate – approximately an hour at most".

Dr. Treadway did not say whether or not he conducted any tests to determine the time of death. On the subject of bleeding the witness said that the wounds (by which he no doubt meant the deep wound on the right side) could cause haemorrhage, from the loss of a few cubic centimetres to complete extravasation, but that extensive loss of blood could be caused whether the person were alive or dead. In the cross-examination there is a passage concerning the time of infliction of the wounds which we will set out:

> "Q. One wound appears to be very open, is it open because of reaction to the injury?
>
> "A. I do not understand.
>
> "Q. Inflicted before or after death?
>
> "A. It depends on whether the cut is along the tissue, where there would be little gaping, or across the tissues when, as in this wound, Exhibit E, there would be great gaping.
>
> "Q. Such gaping would be more before death than after?
>
> "A. Yes, but unfortunately this fibrous tissue remains alive long after death has taken place.
>
> "Q. In a person who is alive the results are more pronounced than when dead?
>
> "A. Yes."

In re-examination on this topic he said:

> "Q. Exhibit E, the wound is almost across the lines of tension?
>
> "A. Yes.
>
> "Q. The wound would draw it closed or shut?
>
> "A. Open.
>
> "Q. Elastic tissues in the body take time to die?
>
> "A. Yes, under favourable conditions can be left alive for weeks after death."

Dr. Rogoff's evidence, as has been seen, was that he took deep sections of the stab wounds and a microscopic examination of the tissue showed no reaction to the injury – "if live flesh is cut it reacts, if dead, it does not". The tissue

would have been reactive until a quarter of an hour after death, and therefore the wounds were inflicted not less than a quarter of an hour after death. In cross-examination he said that it was difficult to establish if a wound has been caused "just before or after" death, but if it has been caused a quarter of an hour or more after death there is no difficulty. Dr. Rogoff said that the deep wound gaped because the muscle had been cut – he does not appear to have been questioned upon the comparative degrees of gaping to be expected from ante-and post-mortem wounds, but, as he had just expressed the firm opinion that these wounds were post-mortem, it is a fair assumption that he saw nothing in the degree of gaping which would cause him to qualify his opinion. This witness does not appear to have been questioned on the subject of the bleeding.

As to the degree of the bleeding which had taken place there was evidence from the Government Analyst that the pantaloons and underpants of the deceased were heavily bloodstained. The evidence of Chief Inspector Shaw was that on the murram portion of the courtyard (where other evidence indicates that the deceased was found) there was "a small patch of blood about eight inches in diameter, it was wet". The murram was a stony loose surface type, though it was soft enough to show an impression when the witness dragged his foot in it. There was also a patch of congealed blood about twelve inches in diameter on the concrete part of the courtyard where the deceased had been placed, prior to her removal into the flat. Upkar Singh said that he could not remember seeing any blood at that spot before they placed the deceased there.

Before dealing with counsel's submissions on this evidence we will refer briefly to the evidence, upon which he relied, concerning the time of death. The earliest attempt to ascertain whether the deceased was dead or alive was made by Upkar Singh after he found the body at about 3.45 a.m. He felt for a heartbeat, by placing his hand flat over the region of the heart on top of the clothing; he thought he felt a beat, not very strong. The next attempt was made by Dr. A.I. Hasham who was called by Upkar Singh, according to the doctor, at about 3.45 a.m. and arrived at the flat at 4 a.m. If that is the case Upkar Singh must have found the deceased before 3.45 a.m. though the discrepancy is not necessarily very great. Dr. Hasham did not think that the deceased was dead at the time. He thought she was shocked, and, when he felt her pulse, he thought "at first" that he felt it, but was not sure. The evidence does not disclose where the doctor felt for the pulse. He said that her face was very cold but her abdomen very warm; it does not appear, however, that the doctor was told that other inmates of the flat had applied an electric pad or blanket to the abdomen. Mr Treadway put the time of his examination at between 4.30 a.m. and 4.45 a.m. and, as has been seen, he was not sure until he had made tests whether she was alive or dead. Mr. Treadway was recalled later in the case and said that it is a notorious error, made even by doctors, to mistake the pulse in one's own hand for a pulse in the body of another. Where the person concerned was a woman he doubted whether her pulse could be felt by placing the hand flat over the region of her heart, though it was possible.

It is of course self-evident that if death had not occurred when the deceased was found, the stab wounds could not have been inflicted a quarter of an hour, or more, after death, as Dr. Rogoff says they were. In that case, the hypothesis upon which the learned judge based most of his reasoning would be a false one. It was submitted by counsel for the appellant that the evidence concerning the amount of bleeding was more consistent with ante-mortem infliction of the wounds. He conceded that he could not stress the evidence as to the gaping of the large wound very much in the appellant's favour, though he relied upon Mr. Treadway's statement that it is more pronounced in a person alive than in one who is dead. Counsel submitted further that at least a real doubt as to whether the deceased was dead when found, arose from the evidence of Upkar Singh, Dr. Hasham and Mr. Treadway.

We are not inclined to think that very much is to be drawn from the amount of the bleeding. The general trend of Dr. Ngure's evidence can be taken to be that more bleeding is to be expected from a person who is alive; though that may be accepted generally it is apparently not an inflexible rule, but in any event what is lacking in the present case is any statement of opinion one way or the other, as to whether the quantity of blood actually shed in the present instance, might reasonably have been the result of the particular wounds, if inflicted post-mortem. Some bloodstained clothing and two comparatively small pools do not necessarily denote a great quantity of blood. We think that there was insufficient expert evidence on the subject to render this question anything but indeterminate and that it provides no appreciable support for either side. Very similar considerations apply to the question of the gaping of the big wound. It was a deep stab wound and all that the evidence indicates is that, in the part of the body in which it was inflicted, it might be expected to gape, possibly a little more if inflicted before death, than after it. There was no opinion expressed that (on this account) the particular wound could not have been inflicted after death and Dr. Rogoff obviously held the contrary opinion.

We have not overlooked what was frequently stressed by counsel before this court, that the general onus of proof lies upon the Crown. That does not mean, in our opinion, that every facet of the evidence which does not support the Crown's case, thereby tends to derogate from the strength of the evidence upon which the Crown does rely. The two matters upon which we have so far expressed an opinion are, in our view, entirely neutral.

The third matter is in a different category. It was essential to the case of the Crown (having regard to the reasons given by the learned judge for convicting the appellant) that the stab wounds be proved to have been inflicted an appreciable time after the death of the deceased. The onus of proving this beyond any reasonable doubt was on the Crown, and counsel for the appellant has pointed to the evidence of Upkar Singh and Dr. Hasham as establishing the existence of such a doubt; we do not think that their evidence is supported by that of Mr. Treadway, who rapidly established the fact that the deceased was in fact dead, except to the extent of his very hesitatingly expressed view that death had taken place from a quarter of an hour to an hour and a quarter before his examination. If that had been expressed as a firmly held opinion based on sound premises it would have provided a substantial measure of support for the evidence that a pulse was perceptible when the deceased was found. As has been seen, however, Mr. Treadway said that he was not competent to give an exact estimate.

If the evidence of Upkar Singh, Dr. Hasham and Mr. Treadway as to the probable time of death, stood alone, we would agree, and think that the learned judge would have agreed, that there was doubt on this particular point, and that the Crown had therefore not discharged the onus which rested upon it. There is, however, the evidence of Dr. Rogoff, who has, to the knowledge of this court, frequently given evidence in capital cases in his capacity of Government Pathologist, and whose opinion must carry weight. He, alone, of the medical witnesses made the microscopic examination, which, as Dr. Ngure said, was necessary in order to establish whether the wounds were inflicted ante-mortem or post-mortem. Based upon that examination, Dr. Rogoff's opinion was that the wounds were inflicted not less than a quarter of an hour after death, and he considered the ascertainment of that fact to present no difficulty. If he is right, the deceased was certainly dead when she was found, and the reasoning of the learned judge, so far as this factor is concerned, was firmly based. The learned judge accepted Dr. Rogoff's opinion, and counsel for the appellant, in contesting the validity of that finding, pointed in the first place to the evidence of Upkar Singh, Dr. Hasham and Mr. Treadway, which

we have discussed above, and also sought to rely upon passages from certain medical textbooks. These passages were not quoted in the court below or put to any of the witnesses – in particular, in so far as one or more of the passages was relied upon as tending to throw doubt upon Dr. Rogoff's evidence, generally accepted practice would require that he should have been given an opportunity of commenting upon them in cross-examination.

Objection having been taken by Crown counsel to the passages in question, we permitted them to be quoted de bene esse, reserving our opinion as to whether they constituted material which we might appropriately consider. Under English practice and law of evidence there is no doubt that medical textbooks are not evidence per se, though if passages from them are put to a medical expert he may refresh his memory from them or describe them as representing his own views; *Collier v. Simpson* (1) (1831), 5 C. & P. 73; see Phipson on Evidence (9th Edn.), p. 409. In *R. v. Taylor* (2), 13 Cox C.C. 77 counsel was not permitted to read a case from Taylor's Medical Jurisprudence to the jury. As a court of appeal (unless it admits further evidence) decides a case upon what was before the court below, it follows that counsel on appeal may not refer to passages, which have not been adopted or made the basis of testimony given by medical experts below.

Counsel for the appellant submitted that under the Indian Evidence Act, which is (with certain amendments) in force in Kenya, greater latitude is permitted. Section 57 and s. 60 of the Act were referred to. Section 57 enumerates a number of facts of which courts must take judicial notice and continues:

> "In all these cases and also on matters of public history, literature, science or art, the court may resort for its aid to appropriate books or documents of reference."

We do not think that this section, taken alone, would assist the appellant's argument. As is stated in the commentary upon it in Sarkar on Evidence (9th Edn.), p. 492:

> "But obviously, it cannot be meant that the court is to take judicial notice of all facts mentioned in all books of public history, literature, etc. Only books of accepted or recognised authority may be resorted to and for obtaining information regarding only undisputed and notorious facts."

On page 499 it is said:

> "S. 57 however does not intend to make books or documents of reference themselves evidence. What is obviously meant is that the court may use the books of reference in appraising the evidence given and coming to a right understanding the conclusion upon it. It has been held that the court can dispense with evidence only of what may be regarded as notorious facts of public history."

The section is not intended, in our opinion, to enable or require a court, to solve for itself by reference to textbooks, difficult and perhaps controversial questions in medical or other science.

Section 60 of the Act however goes further and there is unanimity among legal textbook writers on the subject, that it effects a change from the English law. It should be read with s. 45 which is as follows:

> "45. When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity of handwriting (or finger impressions), the opinions upon that point of persons specially skilled in such foreign law, science or art, (or in questions as to identity of handwriting) (or finger impressions) are relevant facts.

> "Such persons are called experts."

Section 60 so far as it is relevant, reads:

> "60 Oral evidence must, in all cases whatever, be direct; that is to say:
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>
> if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:
>
> "Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable."

The proviso last quoted has effected a change from the principles followed under English law. In Woodroffe's Law of Evidence (9th Edn.), p. 516, is the following passage:

> "The first proviso, which makes an exception to the general rule analogous to the exceptions made in s. 32, should be read with s. 45, ante, and is an alteration of the rule of English law, which does not admit this evidence. The treatise in order to be admissible, must be one commonly offered for sale, and the author of it must be not producible within the meaning of the section. Strictly the burden of proving these facts will be upon the person who desires to give such treatise in evidence. Section 45, ante, refers to the evidence of living witnesses given in court. This section makes scientific treatises and the like, commonly offered for sale, evidence, if the author be dead, or under any of the circumstances specified in s. 32, which render his production impossible or impracticable."

There are similar passages in Sarkar on Evidence (9th Edn.), p. 521 and in Monir's Law of Evidence (3rd Edn.), p. 511. There are a number of cases in which the proviso has been acted upon. In *Tikam Singh v. Dhan Kunwar* (3) (1902), 24 All. 445 the Court of Appeal considered a number of treatises and textbooks for the purpose of ascertaining the utmost limit of the period of gestation. Scientific evidence had however been given in the court below and the same books may have been referred to there. The same problem was considered in *Howe v. Howe* (4) (1915), 38 Mad. 466, in which the court was not acting in a purely appellate capacity, but as a court confirming a decree of divorce by a district judge. Such confirmation is rendered necessary by s. 17 of the Indian Divorce Act, 1869, which provides also that the High Court shall have power to direct further inquiry to be made or additional evidence taken and that the additional evidence is to be certified by the district judge. In *Howe v. Howe* (4), there was apparently no expert evidence before the district judge, but the High Court, instead of directing that it be taken, said, at p. 471:

> "With regard to this we are of opinion that, although there was no expert evidence in the court below, we are entitled under s. 60 of the Evidence Act to consider and act upon the opinions of experts contained in the treatises to which we have referred. We are prepared to hold that it has been shown in this case that there was no access by the petitioner at any time during which the child could have been begotten."

The case of *R. v. Dada Ana* (5) (1891), 15 Bom. 452 was a reference to the High Court under s. 307 of Indian Code of Criminal Procedure, in a case in which the prisoner had been acquitted by a majority of the jury, with whom

the trial judge disagreed. Under those circumstances the High Court may exercise any of the powers which it might exercise on appeal. In the judgment of Jardine J. (at p. 457) there is reference to his having consulted Taylor's and Chevers' works on medical jurisprudence, though it is not stated whether he acted under s. 57 or s. 60.

Perhaps the most informative discussions of the section are to be found in the judgments in *Grande Venkata Ratnam v. Corporation of Calcutta* (6) (1919), A.I.R. Cal. 822; this report is not obtainable in Nairobi and we are indebted to counsel in Mombasa for making it available. At p. 864 the judgment of Chitty J. reads:

> "In the appeal however this court can and must go into the questions of facts, and it was strenuously argued that the deductions of the analyst were erroneous. Counsel for the accused attempted to show this by more or less cursory references to the treatises, which the analyst admitted, were leading authorities on the subject of butter analysis.
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>
> The use of such books by the court is regulated by s. 57 and s. 60, Evidence Act. The former section first enumerates thirteen facts of which the court may take judicial notice. The penultimate paragraph of the section says:
>
> > 'In all these cases and also on all matters of public history, literature, science, or art the court may resort for its aid to appropriate books or documents of reference.'
>
> "This section does not justify the court in treating the opinions or deductions of the authors of such books as evidence in the case whether to supplement or rebut that already given. Section 60 however allows the opinion of experts expressed in any treatise commonly offered for sale and the grounds on which such opinions are held, to be proved by the production of such treatises in circumstances which no doubt apply in the present case. The conclusion seems to be that books of reference may be used by the court on matters (inter alia) of science to aid it in coming to a right understanding of and conclusion upon the evidence given, while treatises may be referred to in order to ascertain the opinions of experts who cannot be called, and the grounds on which such opinions are held. In these cases the direct evidence on the record, relating to the quality of the ghee in question consists of the sworn testimony of the analyst, which stands alone and uncontradicted. I think that we should be very careful to avoid introducing into the case extraneous facts culled from textbooks, and also to refrain from basing a decision on opinions, the precise applicability of which to the ghee in question it is impossible to gauge. This is an error which was strongly condemned by the Judicial Committee of the Privy Council in the case of *Sajid Ali v. Ibad Ali*. We may however usefully refer to these books in order to comprehend and appraise correctly the evidence of the expert, who has actually analyzed the ghee in question and gives on oath his opinion as to the result of such analysis. It would, I think, be dangerous to base the decision of the court solely on the evidence of books whether for a conviction or an acquittal."

In the judgment of Woodroffe, J., in the same case, at p. 871, is the following:

> "It seems to me however clear that the use of scientific treatises may lead to error if either those who so use them, are themselves not expert in the matter dealt with or are assisted by experts to whom passages relied upon may be put. At any rate, having no expert knowledge myself I am not prepared to decide this matter on conclusions drawn from the books without the assistance of expert evidence. It is said for the defence

> that the matters on which they rely, were substantially put to the prosecution, but the Advocate General says that in eleven instances this was not done and in part at least this is admitted. Not only should such passages be put to the prosecution expert but he should be given notice by cross-examination of the deductions which the defence seek to draw from them so that he may give an answer if he can."

In the judgment of the Privy Council in *Sajid Ali v. Ibad Ali* (7) (1895), 22 I.A. 171 (referred to by Chitty, J.), is the following, at pp. 181-182:

> "The learned judge, after an examination of the evidence, cites passages from the treatise of Dr. Ross on Diseases of the Nervous System, and Dr. Quain's Dictionary of Medicine, and then proceeds to quote various dicta of English judges in cases of insanity and incapacity, which appear to their lordships to have little or no bearing upon the facts of the present case. Under the influence apparently of these medical and legal authorities, and relying on the fact spoken to by Dr. O'brien, that there had been extravasation of blood in the brain, he held that the deceased must, at the time when he made his third will, have had 'a fresh access of his terrible malady.' That speculative theory, for it is nothing else, illustrates the danger of deriving inferences of fact from medical books and judicial dicta, instead of depending upon the facts established by the evidence in the case."

These passages illustrate the danger of over free use of text books and the like, and point their proper function as assisting the court to a right understanding of and conclusion upon the evidence given. There is also the opinion of Woodroffe, J., that all passages relied upon by the defence should be put to the expert witness for the prosecution for his opinion.

In the present case that was not done and the position is complicated by the fact that the passages relied upon were put forward for the first time on appeal. They may not be evidence in the strict sense, being tendered for the purpose of appraisal and understanding of evidence given below, but they certainly are akin to evidence and we were most reluctant to accede to an application which appears to offend against the usual rules concerning the calling of further evidence on appeal. Nevertheless the courts in India have apparently so construed the sections as to allow of such a practice and, this being a capital case, we felt that it was incumbent upon us to consider the passages to which counsel referred us.

Counsel for the appellant drew attention to passages in Medical Jurisprudence, by Gordon Turner and Price and to Forensic Medicine by Keith Simpson. The former work is not one with which the court is familiar; two of the three authors are shown as being highly qualified in pathology and the third in law. The book is published by E. & S. Livingstone Ltd. and is in its third (1953) edition; the preface indicates a hope that it will be of value to both medical and legal professions and it can reasonably be assumed that it is a book commonly offered for sale within the meaning of s. 60 of the Indian Evidence Act. That section in fact uses the word "treatise" but the meaning ascribed to that term in the Shorter Oxford English Dictionary is wide enough to include a book on a particular subject.

The only passages, among those referred to, which in our opinion, merited consideration, were those which tended to provoke thought on the subject of Dr. Rogoff's inferences as to the time of death, arising from his microscopic examination of the tissue from the two wounds. The more important passage is in Gordon Turner and Price at p. 608:

> "It may be possible on naked-eye examination to state that a wound is ante-mortem in origin if it shows evidence of a marked inflammatory reaction. In cases of doubt an ante-mortem wound must be distinguished

> from a post-mortem wound by a microscopic examination for evidence of tissue reaction. Although margination and a limited emigration of leucocytes may occur in tissues in response to injury after somatic death, marked cellular exudation and reactive changes in the tissue cells are seen in ante-mortem wounds only. The absence of tissue reaction, however, does not necessarily indicate that a wound was post-mortem in origin. There may have been insufficient time before death for the development of tissue reaction, or, in the case of small wounds, the reaction may have terminated in resolution. In small wounds such as small contusions, the degree of cellular injury may have been insufficient to elicit an appreciable leucocytic exudation, while in severe injuries the associated circulatory failure may have interfered with the normal reaction."

Prima facie this indicates that in the opinion of the authors the test of absence of tissue reaction, of which Dr. Rogoff gave evidence, is not necessarily a conclusive one.

In Forensic Medicine by Keith Simpson, there is the following passage in the section relating to injuries to the body after death, at pp. 15-16:

> "All such injuries have one thing in common: they lack a vital reaction. Abrasions to the cutis are sharply defined, becoming brown as the raw grazed skin tissue dries, and hardening like parchment. No local flushing is present, for the vessels being dead are incapable of such vital change.
>
> "Post-mortem blistering can occur from exposure to heat, for dead tissue fluids may be swollen by heat or even boiled raising cuticular weals.
>
> "As regards bruising after death, there can be no doubt that it is possible. Heavy blunt injury can tear dead vessels and open up tissue spaces into which blood may seep passively. Such extravasations of blood will not extend far, and the difficulty of distinguishing them from ante-mortem bruises is seldom great.
>
> "It is fair to add, on the contrary, that when injuries occur closely at or about the time of death it may be impossible to say whether they occurred just before, at, or about the time of death. An opinion that they took place 'at about the time of death' is the most that can safely be offered. The blood remains fluid for some time – indeed may never clot at all, and may percolate into spaces opened up by injury at, or after, death."

Counsel for the appellant relied upon the sentence which commences, "It is fair . . .". The opening sentence of the passage quoted supports Dr. Rogoff's view, except as to the period of fifteen minutes mentioned by him, but the whole passage is in such general terms, that it would be unwise to seek to draw from it anything specifically referable to the present problem.

Having considered these passages, of which only that quoted from Gordon Turner and Price appeared materially to conflict with the evidence of Dr. Rogoff, we thought that though, in all the circumstances, we might justifiably refuse to attach any weight to the new material, our proper course, in a capital case, was to call Dr. Rogoff before this court, under r. 42 of the Eastern African Court of Appeal Rules, 1954, for further cross-examination. We so ordered, (though with reluctance as a departure from normal practice was involved) in order that the omission to put these passages to him as an expert witness in the lower court, might be remedied.

On November 11, 1960, the further evidence of Dr. Rogoff was accordingly taken before this court. Except in a matter which we do not consider material he adhered to what he had said in the Supreme Court. He did not put forward the period of a quarter of an hour after death (as the earliest at which the wounds in question could have been inflicted) as a rigid minimum. It was more of an

elastic period and fifteen minutes was an average; it had never been put to him in the Supreme Court that it might be a little more or less. He was quite sure that the shortest possible period would be ten minutes; in every wound of the kind in question, microscopic examination would reveal a reaction if it had been inflicted within ten minutes after death. He agreed with what was said in Forensic Medicine, by Keith Simpson, that

> "when injuries occur closely at or about the time of death it may be impossible to say whether they occurred just before, at, or about the time of death".

The period of difficulty in the witness's view was between a quarter of an hour before and a quarter of an hour after death. The passage above quoted from Medical Jurisprudence by Gordon Turner and Price was put to him. He did not agree with the statement that the absence of tissue reaction did not necessarily indicate that a wound was post-mortem in origin. This was a proposition which emerged in 1952 and was generally accepted by the profession in South Africa up to about 1956. He did not agree with the statement because it was in conflict with the earlier part of the same passage, by reason of his own experience and by reason of subsequent publications on the subject. The conflict referred to was to be found in the contrast between the statements (*a*) that margination and a limited emigration of leucocytes may occur in tissues in response to injury after somatic death and (*b*) that there may have been insufficient time before death for the development of tissue reaction. We understand the point to be that if tissues can react from an injury after somatic death the fact that an injury was inflicted a very short time before somatic death should not prevent the development of reaction. The witness did not agree either with the statement that in severe injuries, associated circulatory failure may have interfered with the normal reaction. In Dr. Rogoff's opinion the degree of inflammatory changes shown by injured tissues has been proved experimentally to be completely unrelated to the degree of failure of circulation.

Having considered this evidence we do not think that we ought to be influenced against accepting it, or to say that the learned trial judge erred in accepting Dr. Rogoff's evidence in the Supreme Court, by the passage relied upon by counsel for the appellant in the textbook by Gordon Turner and Price. We have, on the one hand, general statements in a textbook published seven years ago; the science of medicine is a living science and we cannot tell whether the authors, at the present time, would or would not adhere to the opinion expressed. On the other hand we have an expert witness of considerable experience, dealing with a particular problem, and basing himself upon experience and recent medical study. Though he conceded a minimum period of ten minutes instead of the fifteen minutes mentioned in the Supreme Court, this is not sufficiently material to affect the reasoning of the learned trial judge.

We now return to counsel's argument that the evidence as a whole should have left the learned judge in doubt as to whether the wounds were inflicted before or after death. The learned judge had before him a certain amount of evidence, to which we have already referred, that a heart-beat in the deceased was discernible at a time subsequent to the infliction of the wounds. Such a state of affairs would be quite incompatible with Dr. Rogoff's evidence. He had also an uncertain estimate by Dr. Treadway as to the time of death. We should mention that the references by Dr. Treadway in his evidence to the possibility of fibrous tissue remaining alive for a long time after death, do not appear to us to conflict with the evidence of Dr. Rogoff; he was dealing with the minimum and not the maximum period of the life of tissue after somatic death. The learned trial judge preferred the opinion of Dr. Rogoff based upon microscopic examination to the other evidence which we have mentioned and we see no reason for saying that he was wrong. We are therefore unable to

accept as a valid ground of appeal the submission of counsel relating to the time of death.

We proceed now to counsel's argument that even upon the basis of the acceptance of Dr. Rogoff's evidence, the conviction ought not to be supported. In this part of our judgment we will have occasion to refer to the period of time which elapsed between the death of the deceased and the stabbing of her body. In so doing we will refer to it as "a quarter of an hour" as being consistent with Dr. Rogoff's evidence generally, though Dr. Rogoff's evidence before this court indicates that it may conceivably have been only ten minutes. We do not consider that the difference is material. Counsel's argument was that the learned judge resorted to a great deal of theory and speculation, and in doing so failed to appreciate that it was insufficient to show that no one else could have committed the crime, but that the evidence must show that the appellant did commit it. He relied on *R. v. Wallace* (8), 23 Cr. App. R. 32 as indicating that a court is not concerned with suspicion, however grave, or theories, however ingenious.

That principle, however, does not detract from the fact that it is the bounden duty of a judge in dealing with circumstantial evidence, to consider every possible set of circumstances, in the process of determining, as he must, whether the evidence is incapable of explanation upon any other reasonable hypothesis than that of the guilt of the prisoner. He must examine every other reasonable possibility and test it against the evidence – only if it is incompatible with the evidence may he discard it.

That is the approach adopted here by the learned trial judge and in a long and careful judgment he set out his reasons for eliminating various possibilities. In addition to accepting Dr. Rogoff's evidence that the stab wounds were inflicted at least a quarter of an hour after death, he made another basic finding of fact. It was that the deceased had urinated in her bed, the mattress of which was stained with what appeared to the Government Analyst to be a complete micturition. He accepted the medical evidence that only a very small quantity of urine was found in the bladder of the deceased, that it is abnormal to find such a small quantity, and that micturition is a normal reaction in about ninety per cent. of deaths by asphyxia. The trousers of the deceased, when she was found, were properly tied, but her trousers and underpants were wet with urine. The learned judge found on this evidence that it would be reasonable to expect to find traces of urine upon the place where the deceased had been asphyxiated. The police saw no stains other than those of blood, in the yard or lavatory. The learned judge said:

> "Had she been attacked when she was in the toilet then one could expect to find traces of urine on the floor, for if the urine went on to her clothing, and her trousers were found to be properly tied, it seems impossible that the remainder could have gone into the closet leaving the floor dry. If the micturition was on the murram where she was found, on the concrete where she was first placed, or on the floor of the room, signs of it should have been found, for Chief Inspector Shaw was there about 2 1/2 hours after Ajeet was found and the blood found on the murram was then found to be still wet. The only reasonable conclusion is that Ajeet urinated whilst in her bed, as Mr. Bradwell (P.W. 2), the Government Analyst, said there appeared to have been a complete micturition passed on the mattress that had been on Ajeet's bed, though of course it is possible that the child Amarjeet also urinated on the mattress during that night."

Counsel for the appellant submitted that the absence of traces of urine in the courtyard and lavatory were inconclusive, particularly in the absence of any scientific tests of the murram where the deceased was found. In our opinion the evidence as a whole amply supports the view of the learned judge.

The evidence against the appellant, was, basically, that he had started the night in the same bedroom as his wife. According to his own unsworn statement he had sexual intercourse with her at about 10.45 or 11 p.m. and the medical evidence showed that she had in fact had sexual intercourse just before death. There were internal bruises to her neck and chest which could have been caused in a number of ways – the simplest way, in Dr. Rogoff's opinion, being pressure from an elbow or a knee on her chest and hands on her throat. There were no bruises on her back, and the presence of bruises could be expected if she had been asphyxiated on a rough or rocky surface; murram, in Dr. Rogoff's opinion, would be expected to cause damage to skin and tissues, and concrete, more generalised bruising. The expectation of back bruising on a hard surface was based on the necessity of there being resistance at the back in order that sufficient pressure be put on the front (chest and neck) to cause asphyxia. The evidence pointing to the deceased having urinated in the bed (already discussed), combined with the absence of back bruising pointed to strangulation in bed. The child in the room can be disregarded as a possible aggressor. The gap of at least a quarter of an hour between the asphyxia and the stabbing is consistent with the body of the deceased having been removed from her bed to the murram courtyard in the meantime. There was no trace of blood in the bed or bedroom. There were no signs of forcible entry into the flat. A partly completed blouse, which the deceased had been sewing, and which was in the bedroom the previous evening, was found a little distance outside the courtyard. Four gold bangles had been removed from the arm of the deceased, but a steel one, having religious significance, had been left, as had two gold ear-rings. Her head-dress and one shoe were found in the toilet and one shoe in the court yard.

The learned judge examined the various possibilities which occurred to him, and we will give a brief analysis of this part of his judgment. First if, in spite of the evidence that the deceased was asphyxiated in her bed, she had put on the light and gone to the courtyard and toilet, and had been attacked after leaving the flat, the learned judge said:

(*a*) One would expect to find some sign of micturition where she was attacked.

(*b*) It is unlikely that the intruder would distinguish between the gold and steel bangles when he removed the bangles, or that he would leave the ear-rings.

(*c*) There could be no reason for an intruder to go into the flat and bedroom and remove a partly completed blouse.

(*d*) There could be no reason for the intruder waiting a quarter of an hour or more before stabbing the deceased.

(*e*) It would be reasonable to expect signs of a struggle if she was strangled on the murram where she was found.

The learned judge also referred to the bloodstained headdress being found in the toilet, and that the stains must have got upon it at least a quarter of an hour after death – it would appear however, that, though there was evidence that the headdress was first seen in the toilet, the witness did not say it was bloodstained. It was produced and was in fact bloodstained, but there was no evidence about the stains. The learned judge, having seen it, may have taken the view that it could not have been stained by accidental contact with some bloodstained object after being found, but the evidence is silent upon the point.

The learned judge then considered the possibility that the deceased was attacked by an intruder or intruder while in bed. If so, she must have been carried out to the murram. He reasoned:

(*a*) Would an intruder take out her shoes, and headdress, which was under her pillow, in the circumstances that the light was on, and the accused and a child in the room.

(*b*) Would the intruder, having asphyxiated the deceased in the bed and carried her outside, stab her a quarter of an hour later, and then put on the light in the toilet and place the headdress and shoe therein and another shoe in the yard, leaving also a light in the bedroom?

(*c*) Would the intruder carry away the partly completed blouse?

The learned judge considered also the possibility of the intruder being an inmate of the flat itself, and was of the opinion that, though the deceased might not be so likely to have raised an alarm if she saw a person known to her, the assailant would have had to encounter all the hazards which would have faced an intruder from outside, in addition to having to unlock and open the verandah door and after having placed the body and various articles in position, including the blouse, would have had to return to the flat.

The learned judge did not consider on the evidence, that either of the two possibilities which we have mentioned, were reasonable possibilities, and rejected them. He also referred to other possibilities, rather more remote, which we do not deem it necessary to deal with here.

Counsel for the appellant called attention to a number of points in favour of the appellant. There was no knife found on the scene and none was missing from the house. There was no blood found on the appellant's clothing. The existence of two wounds – one small and one large – was consistent with an intruder having first threatened the deceased by holding a knife against her and then having stabbed her. It appears to us that there is nothing in the second and third of these points if the wounds were inflicted a quarter of an hour or more after death. As to the first, there was at least time to wash a knife, if not to dispose of it by other means.

Upon the basis of the acceptance of the medical evidence that the wounds were inflicted at least a quarter of an hour after death, and having regard to the strength of the evidence that the deceased was asphyxiated in her bed and later carried out and stabbed in the murram portion of the courtyard, we are of the opinion that the learned judge was justified when he found it proved beyond reasonable doubt that the appellant was the assailant.

At the hearing of the appeal the court raised the query whether, even accepting that the death had been caused by the appellant, the evidence was sufficient to establish beyond reasonable doubt that the appellant intended to cause death or grievous bodily harm or knew that his act would probably cause death or grievous harm, so that his crime would be murder. This was a matter not relied upon by counsel for the appellant in the memorandum of appeal or in his argument before this court. That does not relieve us from the necessity of considering it, particularly having regard to the principle that circumstantial evidence must exclude all reasonable possibilities save that of guilt. The learned judge considered the question and mentioned the medical evidence indicating that the deceased had had sexual intercourse shortly before her death and the appellant's statement that they had had intercourse at about a quarter to eleven or eleven p.m. He quoted the following medical evidence:

> "In cross-examination, Mr. Treadway was asked about four diseases or disabilities which Ajeet may have been suffering from, which I have referred to, and the evidence was then as follows: Q. If such a woman were then to be embraced violently during coitus could it cause compression of the chest that might lead to asphyxia? A. I imagine it would need to be extremely violent. Q. In a person who was suffering from these four things, if she were embraced during a sexual embrace, she would need less force to cause asphyxia? A. Yes. Q. A highly excited sexual embrace could cause this

> compression of the chest? A. Yes, conceivably. Q. And could also cause shock and haemorrhage? A. I find that very hard to believe. Then Dr. Rogoff was asked in cross-examination, 'The compression of the chest could have been caused by a violent sexual embrace?', and Dr. Rogoff replied, 'It is difficult to imagine it in the normal way'."

That, of course, is not the whole of the medical evidence and relates particularly to the chest pressure. Dr. Rogoff also said:

> "As regards the neck and chest, the injuries could have been caused by the hands being on the throat and the knee or elbow on the chest, this would be the simplest way of causing it. The injuries to the neck and chest were, in simple language, internal bruises caused by pressure which could have been applied in all sorts of ways. I just give the simplest way in which they could be caused. Such pressure would be fatal if enough was used over a sufficiently long period of time also to cause the heart to stop beating."

There were no external marks upon the throat of the deceased and, though the medical evidence indicates that marks may or may not be left by a strangler, we think that the absence of marks indicates that there was no violent struggle and is more consistent with a firm pressure. In our opinion, these injuries are quite consistent with the appellant having killed his wife during or just after a sexual embrace, applying pressure in an excess of sadism to frighten or torment her, or to overcome resistance. The learned judge said:

> "The accused made an unsworn statement in which he said that on that night he had intercourse at about a quarter to 11 p.m. or 11 p.m. If the evidence I have referred to related to this intercourse, be it later, and death from asphyxia took place during it, would the accused replace Ajeet's drawers and trousers? Would they then have been dry? It would appear to be unlikely. However, whether it was during intercourse or whilst Ajeet was just lying in her bed, to strangle one's wife is murder, be it to stifle her complaints because she objects to intercourse, or refuses to submit to it, or even, she having consented to intercourse, the accused strangled her to gratify his lust."

We are, with respect, unable to agree with all that is said in that passage. To strangle one's wife is only murder if the act of strangulation is done with the intention of killing or doing grievous harm or with knowledge that the act will probably cause death or grievous harm – s. 202 of the Penal Code. We do not think that the circumstantial evidence eliminates as a reasonable possibility that the appellant did not have such an intention or such knowledge, but caused a great deal more harm than he intended or anticipated. The learned judge considered it unlikely that the appellant would have replaced the trousers of the deceased in such circumstances, or that they would have been wet. Why not? The trousers could have been left in the bed during sexual intercourse and become wet in that way. Before taking the body outside to simulate death by an attack by an intruder the appellant could be expected to replace the trousers and underpants. With respect we are unable to agree with the reasoning of the learned judge on this particular matter. The evidence of the relations between the appellant and the deceased shows that they lived a happy married life. The deceased was pregnant and no motive whatever has been shown for an intentional killing.

In all the circumstances we are of opinion that the evidence did not exclude the reasonable possibility that the appellant killed his wife by an unlawful assault but without the intent necessary to constitute legal malice. The fact that such a case was not relied upon in the Supreme Court or before this court

does not relieve either court from considering it: *Mancini v. Director of Public Prosecutions* (9), [1942] A.C. 1. The learned judge in the Supreme Court did consider it and he rejected it, but, taking the view of the evidence most favourable to the appellant, we have reached a different conclusion.

For these reasons the appeal is allowed, the conviction of murder is quashed and the sentence passed by the learned judge set aside; in lieu thereof the appellant is convicted of manslaughter contrary to s. 198 of the Penal Code and sentenced to imprisonment for eight years.

Appeal allowed. Conviction of murder quashed and sentence set aside. Conviction of manslaughter substituted. Appellant sentenced to eight years imprisonment.

For the appellant:
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Clive Salter, Q.C. and *A.R. Kapila*

For the respondent:
The Attorney-General, Kenya
K. C. Brookes (Crown Counsel, Kenya)

Ilanda s/o Kisongo v R
[1960] 1 EA 780 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	29 October 1960
Case Number:	147/1960
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Mosdell, J.

[1] Criminal law – Judgment – Irregularity – Judgment failing to comply with statutory requirements – Whether sufficient material on record for appellate court to decide appeal on merits – Criminal Procedure Code (*Cap.* 20), *s.* 171 (1) (*T.*).

[2] Criminal law – Judgment – Direction on circumstantial evidence.

[3] Criminal law – Judgment – Direction to assessors on intoxication – Capacity to form specific intent.

Editor's Summary

The appellant had been convicted on circumstantial evidence of the murder of his concubine. The

evidence showed that when last seen with the deceased he was very drunk and that the deceased had been killed by one blow on the chest with a stick. In summing up the case to the assessors the judge referred to the burden of proof and that the evidence was circumstantial but gave no detailed direction that the evidence must exclude any reasonable hypothesis of innocence or that once evidence indicating that the mind of the appellant might have been affected by drink it was for the Crown to prove beyond reasonable doubt that the appellant was still capable of forming the necessary intent. The assessors gave as their opinions that the appellant had murdered the deceased and in his judgment the judge simply recorded his concurrence and the conviction.

Held –

(i) the judgment fell far short of compliance with s. 171 (1) of the Criminal Procedure Code.

(ii) in a case depending on circumstantial evidence the direction must be very careful and the court must find that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other hypothesis than that of guilt.

(iii) the direction given on the question of intent ought to have been coupled with an explicit direction that it was not for the appellant to prove that he was so drunk as to be incapable of forming an intent to kill or inflict grievous bodily harm but that it was for the Crown to prove beyond reasonable doubt that the appellant was not so affected as to disable him from forming the necessary intent.

(iv) the evidence on the record was insufficient to enable the court to find whether, if the judge and the assessors had been directed upon the lines indicated, they would have inevitably convicted the appellant either of murder or manslaughter, or would have acquitted him; accordingly the court could not decide the appeal on its merits.

Appeal allowed. Conviction quashed. Order for a re-trial.

Case referred to:

(1) *Kagoye s/o Bundala v. R.*, [1959] E.A. 900 (C.A.).

(2) *Desiderio Kawunga v. R.* (1953), 20 E.A.C.A. 281.

(3) *Willy John v. R.* (1953), 23 E.A.C.A. 509.

(4) *Teper v. R.*, [1952] A.C. 480; [1952] 2 All E.R. 447.

(5) *Malungu v. R.*, [1959] E.A. 797 (C.A.).

(6) *Yoweri Damulira v. R.* (1956), 23 E.A.C.A. 501.

Judgment

Gould JA, read the following judgment of the court: The appellant was convicted by the High Court of Tanganyika of the murder of Gili d/o Kondei on or about March 27, 1960. He was not present at the hearing of his appeal by this court and was not represented by advocate, but having heard counsel for the Crown, who conceded that he was unable to support the conviction, we allowed the appeal, quashed the conviction and sentence and ordered that the case be remitted to the High Court for re-trial. We allowed the appeal for reasons which we now give, but, in view of the order for a new trial, we will make only passing references to the facts.

The judgment of the learned trial judge was brief, and can be set out in full:

> "Both the assessors have come to the conclusion that accused murdered Gili Kondei. I also consider that the charge of murder has been proved beyond reasonable doubt. I accordingly convict accused of murder of Gili Kondei C.S. 196 P. C. as laid in the information."

It must be pointed out, with respect, that, as a judgment, this falls far short of compliance with the requirements of s. 171 (1) of the Criminal Procedure Code, which, as amended by the Criminal Procedure Code (Amendment) Ordinance, 1950-1953, reads as follows:

> "(1) Every judgment under the provisions of s. 170 shall except as otherwise expressly provided by this Code, be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by such presiding officer as of the date on which it is pronounced in open court."

In the present case the judgment contains no statement of the points for determination (which were not limited to the single issue whether the appellant was guilty of murder or not) no statement of the decision thereon, save on that issue alone, and no statement of the reasons of the learned judge. The summing-up to the assessors contained a detailed discussion of the evidence but, as was

pointed out by this court in *Kagoye s/o Bundala v. R.* (1), [1959] E.A. 900 (C.A.) at 901, this does not cure the defects in the judgment. In that case also, following the decisions in *Desiderio Kawunga v. R.* (2) (1953), 20 E.A.C.A. 281 and *Willy John v. R.* (3) (1953), 23 E.A.C.A. 509, the court held that a defective judgment will not necessarily invalidate a conviction, if there is sufficient material on the record to enable the Appeal Court to consider and determine the appeal on its merits. We had therefore to decide in the present case whether we could adopt this course.

The evidence against the appellant was entirely circumstantial and therefore called for a careful direction by the learned judge to himself and the assessors upon the correct approach to this type of evidence. The following general references to the question of onus were made, at different stages of the summing-up:

> "Now the evidence against accused is purely circumstantial and the assessors will have to reach a conclusion as to whether the Crown has proved its case beyond reasonable doubt."
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> "If however they have a doubt in the matter the benefit of it must be given to accused."
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> "However is not for the accused to prove his innocence but for the Crown to prove his guilt, and if the assessors have any doubt on any matter it must be resolved in accused's favour."

These are very proper directions and in an ordinary case would be adequate, but in a case depending entirely on circumstantial evidence it is necessary for a judge to direct himself and the assessors that before an accused person can be convicted the court must find that the inculpatory facts are inconsistent with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of guilt. It is also advantageous to bear in mind the following passage from the judgment of the Privy Council in *Teper v. R.* (4), [1952] A.C. 480 at 489.

> "It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

Another matter arises from the summing-up. There was ample evidence, that when the appellant was last seen with the deceased, who was his concubine, he was very drunk. The learned judge directed the assessors as follows:

> "Assessors heard how Gili Kondei had been drinking with the others that night. If the assessors reach the conclusion that accused caused deceased's death they must consider whether or not at the time accused knew what he was doing. For if he did not then accused's offence could only be manslaughter. Drunkenness has not been raised as a defence but nevertheless it is a factor which the assessors must consider. There is no issue here I think as to whether accused was insane through drink but if he was so drunk as not to know what he was doing when he struck deceased then he would lack the necessary intent or malice aforethought i.e. the intent to cause the death of or do grievous harm to Gili Kondei when he struck her, or knowledge that his act would probably cause her death or grievous harm and would be not guilty of murder but guilty of manslaughter only. Assessors must consider whether or not the accused through drunkenness lacked malice aforethought in the sense I have expressed it."
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> "Again if the assessors have any reasonable doubt as to whether accused lacked malice aforethought or not when he struck the deceased, always assuming that they have already found that he did strike her, then they must find him not guilty of murder but guilty of manslaughter."

These directions cannot be said to be incorrect in themselves but they ought, in our opinion, to have been coupled with an explicit direction that it was not for the appellant to prove that he was so drunk as to be incapable of forming an intention to kill or do grievous bodily harm; the onus of proving that the appellant had one or other of such intents lay throughout upon the Crown, and once evidence had been given raising the possibility that the mind of the appellant may have been affected by drink, it was for the Crown to prove beyond reasonable doubt, that it was not so affected as to disable him from forming the necessary intent. See the authorities enumerated in *Malungu v. R.* (5), [1959] E.A. 797 (C.A.). Such a direction was particularly important in the present case in which the fatal injury was an unusual one, apparently caused by one blow on the chest from a stick. We have not seen the stick, but where drunkeness is being considered in relation to intent, the distinction made in the case of *Yoweri Damulira v. R.* (6) (1956), 23 E.A.C.A. 501 between the inferences to be drawn from the use of a lethal or of a non-lethal weapon becomes of even greater importance. We think in the circumstances that the assessors should have been directed to the effect that it was for the Crown to prove that the mind of the appellant was not so affected by the drink that he had undoubtedly taken, that he was incapable of knowing that what he was doing was dangerous, viz.: that it was likely to cause serious bodily harm.

In view of the opinions we have expressed on these two aspects of the summing up, and having regard to the evidence given in the case, we were unable to say that if the court and assessors had been directed upon the lines indicated, they would inevitably have convicted the appellant, either of murder or manslaughter or have acquitted him. We were therefore of opinion that it was not a fit case for an appellate court to decide upon the merits and we made the order for a new trial above mentioned.

Appeal allowed. Conviction quashed. Order for a re-trial.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

The Katikiro of Buganda v The Attorney-General
[1960] 1 EA 784 (PC)

Division:	Privy Council
Date of judgment:	24 November 1960
Case Number:	11/1960
Before:	Lord Morton of Henryton, Lord Keith of Avonholm, Lord Denning, Lord Hodson and Mr L M D De Silva
Sourced by:	LawAfrica

Appeal from E.A.C.A. Civil Appeal No. 11 of 1959 on appeal from H.M. High Court of Uganda – Bennett, J

[1] Constitutional law – Protectorate – Interpretation of agreement with Crown – Royal Instructions relative to composition and proceedings of Legislative Council – Additional Royal Instructions – Office of Speaker created – Governor and Speaker not to vote – Whether amendments constitute fundamental or major changes in constitution of Legislative Council – Buganda Agreement, 1955, *Art*. 7 (*U*.) – *Buganda Agreement*, 1955, *Order-in-Council*, 1955, *s*. 2 (1), *s*. 2 (2) (*U*.) – *Buganda Agreement*, 1894 (*U*.) – *Buganda Agreement*, 1900 (*U*.) – *Uganda Order-in-Council*, 1902, *s*. 12, *s*. 15 (*U*.) – *Uganda Order-in-Council*, 1920, *s*. 7, *s*. 8, *s*. 9, *s*. 13 (*U*.) – *Uganda* (*Amendment*) *Order-in-Council*, 1953, *s*. 4, *s*. 5 (*U*.) – *Royal Instructions* 1920-1957.

[2] Constitutional law – Protectorate – Interpretation of agreement with Crown – Whether rules for construction of statutes apply – Buganda Agreement, 1955 (*U*.).

Editor's Summary

The High Court of Uganda dismissed an action by the appellant seeking declarations inter alia that the Legislative Council of the Uganda Protectorate was not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955, and that the appellant was not bound or entitled to take the steps laid down in that Schedule for the election of members representative of Buganda to the Legislative Council. This decision was affirmed by the Court of Appeal, reported [1959] E.A. 382 (C.A.). On further appeal it was submitted for the appellant that since the Buganda Agreement, 1955, fundamental changes had been made in the constitution of the Legislative Council of the Uganda Protectorate and that, in view of the events leading up to the Buganda Agreement, 1955, the Second Schedule must be construed as coming into existence on the basis that there would be no major changes in the constitution of the Council before 1961. The particular changes which were alleged to be "fundamental" or "major" concerned the creation of the office of Speaker to preside in place of the Governor and the loss by the Governor of his original and casting vote in the Council.

Held –

(i) since the powers of the Crown, the Governor and of the Legislative Council remained unchanged the changes could not be considered fundamental in any ordinary sense of the word and still less could the changes amount to the substitution of a new body for the Legislative Council as it existed before the changes came into force.

(ii) it would be a misuse of words to apply the word "major" to changes which so little affected the conduct of business in the Legislative Council.

(iii) the rules applicable to the construction of the Second Schedule to the Buganda Agreement, 1955, are the rules for the construction of statutes.

Appeal dismissed.

Judgment

Lord Morton of Henryton: The appellant is the plaintiff in this suit. He issued his plaint in the High Court of Uganda on June 25, 1958, claiming the following relief:

"(1) A declaration that the Legislative Council of the Uganda Protectorate as at present constituted is not the Legislative Council referred to in the Second Schedule to the Buganda Agreement, 1955.

"(2) A declaration that the Katikiro is not bound or entitled to take the steps laid down in the said Schedule for the purpose of electing representative members to represent Buganda in the Legislative Council of the Uganda Protectorate as at present constituted.

"(3) A declaration that unless and until the Legislative Council of the Uganda Protectorate is reconstituted so as to be the same as the Legislative Council referred to in the Buganda Agreement, 1955, and contemplated at the time thereof there is no procedure for electing representative members thereto.

"(4) Costs.

"(5) Further or other relief."

Bennett, J., dismissed the suit and the Court of Appeal for Eastern Africa affirmed his decree.

The Buganda Agreement, 1955, was made on October 18, 1955, between the Governor of the Uganda Protectorate on behalf of Her Majesty and the Kabaka of Buganda for and on behalf of the Kabaka, Chiefs and People of Buganda. The Agreement contained provisions regulating the election and the recognition of each successive Kabaka and the composition and functions of the Lukiko. It provided that Buganda should be administered in accordance with the constitution set out in the First Schedule to the Agreement.

Article 7 of the Agreement made the following provisions for the representation of Buganda in the Legislative Council of Uganda:

"7.(1) At all times when provision has been made for at least threefifths of all the representative members of the Legislative Council of the Uganda Protectorate to be Africans and for such number of Africans to be appointed as nominated members of the Council as will bring the total number of Africans who are members of the Council up to at least one half of all the members of the Council, excluding the President of the Council, then Buganda shall be represented in the Legislative Council of the Uganda Protectorate, and for that purpose at least one quarter of the representative members of the Council who are Africans shall be persons who represent Buganda.

"(2) The Katikiro shall submit to Her Majesty's Representative, that is to say the Governor, the names of the candidates for appointment as the representative members of the Legislative Council to represent Buganda, that is to say the persons who have been elected for that purpose in accordance with the provisions of the Second Schedule to this Agreement.

"(3) Notwithstanding the provisions of para. (2) of this article a system of direct elections for the representative members of the Legislative Council who represent Buganda shall be introduced in the year 1961 if such system has not been introduced earlier.

"(4) Her Majesty's Government shall during the year 1957 arrange for a review by representatives of the Protectorate Government and of the Kabaka's Government of the system of election of representative members of the Legislative Council who represent Buganda. In such review consideration will be given to any scheme submitted by the Kabaka's

> Government for the election of such representative members based upon the recommendation contained in the Sixth Schedule to this Agreement. Every effort will be made to give effect to the recommendations resulting from such review in time for the election of the representative members of the Legislative Council who represent Buganda when the Legislative Council is generally reconstituted after the general vacation of seats in the Council next following the coming into force of this Agreement."

Regulation 5 of the Buganda (Legislative Council Candidates) Regulations contained in the Second Schedule to the Agreement was in these terms:

> "5. Whenever there is occasion to appoint a representative member or members to represent Buganda in the Legislative Council of the Protectorate the Governor shall by notice in writing request the Katikiro to submit names to him for that purpose and the Katikiro shall submit to him the names of persons who have been elected in that behalf by the electoral college in accordance with these regulations."

The Buganda Agreement, 1955, Order-in-Council, 1955, made on July 29, 1955, to come into operation on a day to be appointed by the Governor of the Uganda Protectorate, provided that the Governor might declare by Proclamation that any part of the Uganda Agreement, 1955, should have the force of law. The Governor appointed October 18, 1955, as the date when this Order-in-Council should come into operation, and upon the same day declared by Proclamation that the First and Second Schedules of the Buganda Agreement, 1955, should have the force of law.

It is common ground between the parties that the two conditions laid down in art. 7 (1) of the Agreement of 1955 have at all times been fulfilled. Therefore, in the absence of valid reasons to the contrary, the Katikiro would be bound to carry out the provisions of para. 7 (2) of that Agreement and of reg. 5 in the Second Schedule thereto. Mr. Quass on behalf of the appellant based the appellant's claim to the three declarations set out in his plaint upon the following contentions:

> (1) Between October 18, 1955 (the date of the Buganda Agreement) and June 25, 1958, when the plaint was issued, certain changes were made in the constitution of the Legislative Council of the Uganda Protectorate. These changes were so fundamental that the Council bearing that name on June 25, 1958, ought to be regarded as a different body from the Council bearing that name on October 18, 1955. Therefore the appellant was not bound to take any of the steps laid down in the Second Schedule to the Buganda Agreement for the purpose of electing representative members to represent Buganda in the former body. Alternatively,
>
> (2) Having regard to the events leading up to the Buganda Agreement of 1955, and in particular to the matters set out in a White Paper (Cmd. 9320) presented by the Secretary of State for the Colonies to Parliament by command of Her Majesty in November, 1954, the Second Schedule to the Buganda Agreement should be construed as coming into existence on the basis that there would be no major changes in the constitution of the Council prior to the year 1961. The changes already mentioned were major changes. Accordingly the basis for the Second Schedule is gone, and the appellant is no longer bound by it.

Before examining these contentions it is desirable to refer to certain stages in the constitutional history of Uganda. In June, 1894 (following an agreement made in 1893) Uganda was placed "under the Protectorate of H.M. Queen Victoria" and, by the Buganda Agreement, 1894, made on behalf of Her

Majesty and then Kabaka, the Kabaka pledged himself to certain conditions.

By the Buganda Agreement, 1900 (Laws Vol. VI p. 12) made on behalf of Her Majesty and on behalf of the Kabaka, the relationship between Her Majesty's Government and the Kabaka, chiefs and people of Buganda was further defined. This Agreement was extended by various supplementary agreements.

By the Uganda Order-in-Council, 1902, s. 12, the Governor was made the Legislative authority for the Uganda Protectorate. By s. 15 the High Court of the Uganda Protectorate was constituted.

By s. 7 of the Uganda Order-in-Council, 1920 (Laws Vol. VI p. 99) a Legislative Council was constituted for the Protectorate, consisting of the Governor and such persons as His Majesty might direct by any Instructions under His Sign Manual and Signet. Legislative powers (subject to veto by the Governor and assent by the Governor on behalf of His Majesty to Bills) were given to the Legislative Council (s. 8), without prejudice to the power of the Crown to disallow Ordinances and to legislate by Order-in-Council (s. 9). By s. 13, the Legislative Council was bound to observe Royal Instructions.

Royal Instructions were issued in 1920 (Laws Vol. VI p. 104). Under cl. XV, the Legislative Council was to consist of the Governor, certain ex officio members, and such official and unofficial members as the Governor might from time to time appoint pursuant to Royal Instructions. By cl. XXV the Governor was required to attend and preside at all meetings unless prevented by illness or other grave cause. By cl. XXVI, all questions were to be decided by majority vote, and the Governor or member presiding was given an original vote and a casting vote if upon any question the votes should be equal.

Thus the position was that from 1902 to 1920 the Governor was the legislative authority for the Protectorate. In 1920 a Legislative Council was constituted, presided over by the Governor in which he was given an original and a casting vote.

In December, 1953 (Legal Notice 314 of 1953) the Royal Instructions of 1920 were amended. A new clause was substituted for cl. XV, providing that the Legislative Council of the Protectorate should consist of (i) the Governor; (ii) ex officio members; (iii) nominated members; and (iv) representative members. A new cl. XVA set out who the ex officio members were to be. By a new cl. XVB the nominated members were to be (*a*) such persons holding office in the public service and (*b*) such persons not holding such office

> "who the Governor is satisfied will support Government policy in the Legislative Council when requested by him so to do";

as the Governor in pursuance of Royal Instructions might appoint. The representative members were to be such persons (not official members and not nominated members) as the Governor might in pursuance of Royal Instructions from time to time appoint.

In December, 1953, by s. 4 of the Uganda (Amendment) Order-in-Council, 1953 (Legal Notice 317 of 1953), s. 8 of the Uganda Order-in-Council, 1920, was replaced, the Legislative Authority now being made "the Governor with the advice and consent of the said Legislative Council".

Their lordships were informed from the bar that the representative members were not appointed to represent geographical constituencies but were appointed on a racial or community basis, as follows: fourteen Africans, six Europeans and eight Asians, a total of twenty-eight representative members – the Africans being balanced by the Europeans and Asians. There were in addition eight ex officio members and twenty nominated members.

The Uganda (Amendment) Order-in-Council, 1953, s. 5, introduced a new s. VIIIA in the Uganda Order-in-Council, 1920, giving the Governor reserved

powers to legislate in the interests of public order, public faith or good Government, notwithstanding failure by the Legislative Council to pass the relevant Bill or motion, subject to report to, and revocation by, the Secretary of State.

Before November, 1954 (the date of the White Paper already mentioned), Her Majesty's Government had withdrawn recognition from H.H. the Kabaka, and he had left Uganda. A suit had been filed against the Government, judgment had been given and an appeal was pending. A conference presided over by a constitutional expert from England had deliberated at Namirembe near Kampala and had made constitutional proposals relating inter alia to the continued participation of Buganda in the Protectorate, a constitution for Buganda and the representation of Buganda in the Legislative Council of the Protectorate.

It is common ground that these events were matters of notoriety in Uganda and most of them are set out in the White Paper. The White Paper also contained "Agreed Recommendations of the Namirembe Conference" (Appendix A), "Statement by the Governor" (Appendix B) and "Explanatory Memorandum issued by the Namirembe Conference" (Appendix C). The White Paper was included in the Record and its contents were strongly relied on by Mr. Quass in support of his second contention already stated. Mr. MacKenna for the respondent did not object to its being read de bene esse but he contended that it was not admissible in evidence.

Their lordships will return to this subject later and will now pass on to the subsequent events.

On May 19, 1955 (Legal Notice 122 of 1955) the Royal Instructions of 1920 (as amended in 1953) were again amended. A new clause was substituted for cl. XV under which the members of the Legislative Council were to be (*a*) the Governor; (*b*) three ex officio members; (*c*) the nominated members; and (*d*) the representative members. A new clause was substituted for cl. XXV which provided inter alia:

> "The Governor shall, so far as is practicable, preside at meetings of the Legislative Council."

The next event was the signing of the Buganda Agreement of 1955, and the declaration by the Governor (already mentioned) that the First and Second Schedules of the 1955 Agreement should have the force of law.

A further amendment to the Royal Instructions was made on April 13, 1956 (Legal Notice 88 of 1956). Clause XXV was again replaced and it was provided that the Governor should preside at the sittings of the Legislative Council and, in his absence, "such member of the Council as the Governor may appoint" and in the absence of the Governor and of any member so appointed, the senior ex officio member present.

Their lordships now come to the changes which Mr. Quass describes as "fundamental" or, if not fundamental, "major" changes. On December 17, 1957, additional Royal Instructions were issued (Legal Notice 272 of 1957). These came into operation on January 1, 1958 (Legal Notice 271 of 1957). By these, cl. XV of the Royal Instructions was amended by providing that the Legislative Council should consist of a Speaker, as well as the Governor and the ex officio, nominated and representative members. A new cl. XVA was inserted reading as follows:

> "*The Speaker*. – XVA (1) The Speaker shall be a person who is not an ex officio, nominated or representative member of the Legislative Council and shall be appointed by the Governor by Instrument under the Public Seal.

(2) The Speaker shall hold office during Her Majesty's pleasure, and, subject thereto, for such period as may be specified in the Instrument by

> which he is appointed, and shall not vacate his office by reason of a dissolution of the Legislative Council."

There follow provisos enabling the Speaker to resign his office and giving the Governor power to revoke any appointment of a Speaker.

Clause XXV and cl. XXVI of the Royal Instructions were revoked and new clause substituted which, so far as material, read:

> "*Presiding in the Legislative Council*. – XXV (1) The Speaker shall preside at the sittings of the Legislative Council, and in the absence of the Speaker such member of the Council as the Governor may appoint, or if there is no member so appointed, or the Member so appointed is absent, the senior ex officio member present shall preside:
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> "Provided that if the Governor shall have occasion to be present at any sitting he shall preside at such sitting.
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> "*Voting*.-XXVI (1) All questions proposed for decision in the Legislative Council shall be determined by a majority of the votes of the members present and voting, and if upon any question before the Legislative Council, the votes of the members are equally divided, the motion shall be lost.
>
> "(2) (*a*) Neither the Governor nor the Speaker shall have an original or casting vote;
>
> "(*b*) any other person shall, when presiding in the Legislative Council, have an original vote but no casting vote."

Their lordships have thought it right to state these events in some detail, and in substantially the same form as they were stated by the learned President of the Court of Appeal for Eastern Africa, because they have some bearing on the question whether the changes made by the Royal Instructions of December, 1957, were either "fundamental" or "major".

Mr. Quass' first contention, already stated, can succeed only if these changes were so fundamental that the Council bearing the name of "the Legislative Council of the Uganda Protectorate" on June 25, 1958, ought to be regarded as a different body from the Council bearing that name on October 18, 1955. In counsel's second contention there are three steps, (i) the White Paper of November, 1954, is admissible in evidence for the purpose of construing the Buganda Agreement of 1955; (ii) the contents of the White Paper show that the Second Schedule to the Buganda Agreement came into existence on the basis that there would be no major changes in the constitution of the Council prior to the year 1961; (iii) the changes made by the Royal Instructions of December, 1957, were "major" changes.

The changes which Mr. Quass invites their lordships to regard as being either "fundamental" or "major" changes are first, that the Speaker would normally preside at the sittings of the Legislative Council instead of the Governor, and secondly that the Governor loses his original and casting vote.

It is to be observed that the powers of the Crown and the Governor respectively as regards legislation are left entirely unchanged. So too are the powers of the Council. As regard the conduct of business in the Council, the Governor will still preside when he has "occasion to be present" at any sitting, and the Speaker who will preside in his absence is to be appointed by the Governor and can be removed from his post by the Governor. In these circumstances there seems to be every reason to suppose that the business of the Council will be conducted on the same lines whether the Governor or the Speaker presides.

The loss of the Governor's two votes was counterbalanced by the appointment

of two additional "nominated" members, and it will be remembered that nominated members are defined as being persons

> "who the Governor is satisfied will support Government policy in the Legislative Council when called upon to do so."

See cl. XV (*b*) of the Royal Instructions of 1920, inserted in December, 1953, by Legal Notice No. 314 of 1953 already mentioned. Thus, from a practical point of view, the balance of voting power in the Council was preserved.

Their lordships find it quite impossible to regard these changes as being "fundamental" in any ordinary sense of the word. Still less can they regard the changes as amounting to the substitution of a new body for the Legislative Council as it existed before the changes came into force. Mr. Quass' first contention fails.

Turning to counsel's second contention, it is to be observed that if the changes in question cannot properly be described as "major" changes in the constitution of the Council this contention also must fail. Viewing these changes in the light of the constitutional history of Uganda, as already briefly set out, and contrasting them with the important changes made from time to time, between 1920 and 1957, in the constitution of the Council, their lordships think it would be a misuse of words to apply to the word "major" to changes which have so little effect on the conduct of affairs in the Council and on the voting, and no effect at all on the legislative powers of the Crown, the Governor and the Council.

The result is that it becomes unnecessary to consider the first two steps in Mr. Quass' second contention; but as these matters were fully considered in the courts in Africa, and were fully argued on this appeal, their lordships will state their views briefly upon each point.

The members of the Court of Appeal for Eastern Africa were unanimous in holding, first, that the rules to be applied in construing the Second Schedule to the Agreement of 1955 were the rules applicable to the construction of statutes, since that Schedule had been given the force of law, and secondly that the contents of the White Paper were not admissible in evidence for the purpose of construing the Schedule. Their lordships agree with the decision of the Court of Appeal on each of these points. They find no ambiguity in the Second Schedule which would justify the admission of extraneous evidence. They think it right to add that even if the contents of the White Paper were given full consideration they would fall far short of establishing the second step in Mr. Quass' second contention. Their lordships refrain from discussing this matter at length since they have already held that the changes made in December, 1957, were not major changes in the constitution of the Legislative Council. They desire, however, to call attention to two paragraphs in the Agreement of 1955 which indicate that the obligations of the appellant under the Second Schedule were not conditional upon there being no major changes made in that constitution prior to the year 1961. First, in art. 7 (1) of the Agreement, already quoted, representation of Buganda in the Legislative Council is made subject to two express conditions. Their lordships cannot doubt that the conditions for which the appellant contends would also have been inserted in the Agreement if the parties had intended to impose it. Secondly, para. 11 of the Agreement is as follows:

> "11. No major changes shall be made to the Constitution set out in the First Schedule to this Agreement for a period of six years after the coming into force of this Agreement, but at the end of that period the provisions of the said Constitution shall be reviewed."

This paragraph refers to the constitution of Buganda and not to the constitution of the Legislative Council of the Uganda Protectorate; but if the parties had intended a similar prohibition to apply to the

Legislative Council

they would surely have expressed it in the Agreement, since the subject of major changes during the period in question was so fully in their minds.

Their lorships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the respondent, with one exception. On June 29, 1960, the respondent made an application for the appeal to be set down and heard forthwith. That application was refused by the board, and the costs thereof were reserved. In their lordships' opinion the appellant's costs of that application should be paid by the respondent. They will be set off against the general costs payable by the appellant to the respondent.

Appeal dismissed.

For the appellant:
T.L. Wilson & Co., London
Phineas Quass, Q.C., and *M. P. Solomon* (both of the English Bar)

For the respondent:
Charles Russell & Co., London
B. MacKenna, Q.C., and *D.A. Grant* (both of the English Bar)

Societa Per IL Commercio E IL Traffico Maritimo Con L' Africa v P G Yagnik and Another

[1960] 1 EA 791 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	24 October 1960
Case Number:	47/1960
Before:	Gould JA, Crawshaw JA and Connell J
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Aden – Campbell, C.J

[1] Landlord and tenant – Notice to quit – Monthly tenancy – Notice to quit not shown to expire with the end of a month of the tenancy – Whether valid notice given – Rent Restriction Ordinace (*Cap.* 136), *s.* 11 (2) (*f*) (*A.*) – *Transfer of Property Ordinance* (*Cap.* 154), *s.* 103 (1) (*A.*).

Editor's Summary

The appellants had applied for an order for possession of certain premises, of which the respondents were monthly tenants, under s. 11 (2) (*f*) of the Rent Restriction Ordinance on the ground that the appellants

required the premises for demolition. The Supreme Court of Aden refused to make the order for possession. The appellants had given to the respondents notice to quit on May 15, 1959, calling upon the respondents to vacate the premises on August 31, 1959, but no evidence was adduced to show that the notice to quit was a notice which expired with the end of a month of the tenancy. On appeal.

Held – by s. 103 (i) of the Transfer of Property Ordinance a monthly tenancy, in the absence of a contract to the contrary, is terminable by fifteen days' notice expiring with the end of a month of the tenancy; since there was no evidence as to the day of the month upon which the tenancy began, there was no evidence that the notice to quit of May 15, 1959, was a notice which expired with the end of a month of the tenancy.

Appeal dismissed.

Cases referred to in judgment:

(1) *Aboobaker Noor Mohamed Bokhairia v. Hajee Yacoob Hajee Ismail*, E.A.C.A. Civil Appeal No. 48 of 1950 (unreported).

(2) *Lemon v. Lardeur*, [1946] 2 All E.R. 329.

(3) *Aboobaker Noor Mohamed Bokheriawala v. Haji Yacoob Haji Ismail* (1952), 19 E.A.C.A. 108.

The following judgments were read by direction of the court:

Judgment

Gould JA: This is an appeal from a judgment of the Supreme Court of Aden in Civil Suits 825 and 826 (Consolidated) in which the learned Chief Justice dismissed with costs a claim by the appellants for possession of certain premises, of which the respondents were respectively tenants. The claim was brought under s. 11 (2) (*f*) of the Rent Restrictions Ordinance (Cap. 136) on the ground that the appellants required the premises for the demolition thereof. The relevant provisions of the Ordinance are as follows:

> "11(1) No order or judgment for the recovery of possession of any premises to which this Ordinance applies or for the ejectment of any tenant therefrom shall be made or given unless the court considers it reasonable to make such order or give such judgment, and either –
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> (*a*) the court has power so to do under the provisions of sub-s. (2) of this sections;
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>
>
> "(2) The court shall for the purposes of sub-s. (1) of this section have power to make or given an order or judgment for the recovery of possession of any premises to which this Ordinance applies or for the ejectment of a tenant therefrom without proof of suitable alternative accommodation (where the court considers it reasonable so to do) if –
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>
>
> (*f*) the premises are required by the landlord for the substantial alteration or reconstruction thereof or for the demolition thereof, and the landlord has obtained for such alteration, reconstruction or demolition the necessary permit: Provided that an order or judgment shall not be made or given on the ground specified in this paragraph unless the landlord has given to the tenant not less than three months' notice to vacate the premises; . . ."

There is one matter which is fatal to the appellants' case. The only notice given by the appellants to the respondents was one (in identical terms in each case) to each respondent dated May 15, 1959, calling upon the respondents to vacate their premises on August 31, 1959. This is more than the three months' notice required by s. 11 (2) (*f*) of the Ordinance; it is established on the pleadings, however, that the respondents are monthly tenants and by s. 103 (1) of the Transfer of Property Ordinance (Cap. 154) a monthly tenancy, in the absence of a contract to the contrary, is terminable by fifteen days' notice expiring with the end of a month of the tenancy. There was no evidence in the present case as to the day of the month upon which the tenancy began. There is no evidence therefore that the notice of May 15, 1959, requiring the premises to be vacated on August 31, 1959, was a notice which expired with the end of a month of the tenancy.

In the case of *Aboobaker Noor Mohamed Bokhairia v. Hajee Yacoob Hajee Ismail* (1), E.A.C.A. Civil Appeal No. 48 of 1950 – (unreported) this court held, in exactly similar circumstances, that such a notice cannot constitute a good notice to quit. The court relied upon the wording of s. 103 (1) of the Transfer of Property Ordinance and upon *Lemon v. Lardeur* (2), [1946] 2 All E.R. 329 in support of its decision that the notice to quit must expire with a month of the tenancy. The last-mentioned case also lays it down that it is upon

the landlord to prove that he has given a good notice and therefore he has to prove the day of the month upon which the monthly tenancy ends.

In another appeal to this court between the same parties (sub. nom. *Abubaker Noor Mohamed Bokheriawala v. Haji Yacoob Haji Ismail*) (3) (1952), 19 E.A.C.A. 108, it was held that it was not necessary to serve two separate notice (a fifteen day notice to quit in addition to a three months' notice under (now) s. 11 (2) (*f*)) but that both objectives could be attained by one document. In his judgment in that appeal the Vice-President, Sir Newnham Worley (with whom Sir Hector Hearne, C.J., Kenya agreed) expressed the view that were it not for the authority of the judgment in Civil Appeal 48/1950 he would have been disposed to hold that

> "where the Aden Rent Restriction Ordinance prescribes a statutory period of notice to vacate, as in s. 10 (2) (*f*) (now 11 (2) (*f*)) evidence that such notice was given is sufficient to give the court jurisdiction to make an order."

However that may be, the matter is not res integra but has been settled by the authority of the judgment in Civil Appeal 48/1950 – counsel for the appellants conceded that he could not distinguish that case from the present and that this appeal could not therefore succeed.

He requested the court, however, to express its view upon the other points argued on the appeal, which, he said, were relevant in other pending cases. I do not think it would be either useful or desirable that I should express an opinion on whether, but for the point regarding notice, the appeal would have succeeded. Other cases must be decided upon their own evidence and even if there are further proceedings between the parties in the present case, the evidence may well be different.

It may be justifiable, however, to say a few words, obviously obiter upon the construction of s. 11 (2) (*f*). In his judgment the learned Chief Justice said:

> "The phrase 'reasonably required' (I do not think it makes any difference that the word 'reasonable' is omitted in the sub-section with which we are concerned in this case since over-all reasonableness has to be found) have been held to connote 'something more than desire although at the same time something less than absolute necessity will do'. (*Aitken v. Shaw* (1933) *S.L.T. Sheriff Court*, 21). In my view the plaintiffs here are unable to show more than a desire."

Counsel for the appellants submitted that this was a wrong approach; the word "reasonably" does not appear before "required" in s. 11 (2) (*f*) though, by contrast, the phrase "reasonably required" is used in two other paragraphs of sub-s. 2. He submitted that all that had to be shown (apart from questions of permit and notice) was that the premises were required, reasonably or otherwise, for demolition purposes. This is, in my opinion, a good argument but only up to a certain point. I think that what the landlord has to show is that he requires the premises for demolition purposes in the sense that he has a genuine intention to demolish when he obtains possession of the premises. The overall requirement of s. 11, however, is that a court shall only make the order if it considers it reasonable to do so, and in order to decide that question a court must take into consideration, among other things, the motive or reasons of the landlord for his decision to demolish the buildings. It is unlikely that there would be many sets of circumstances in which there would be any substantial difference between that approach and the one adopted by the learned Chief Justice, but I think the fact that a landlord may be, in the words of the learned Chief Justice "unable to show more than a desire" for the possession of the premises, would not debar a court from finding that it is reasonable to make the order. It depends upon the other circumstances.

Counsel for the appellant also made a submission that a doctrine had grown up in Aden under which no order would be made under para. (*f*) unless the premises were in such a bad state that they ought to be pulled down. He submitted that this was a legal error. There is of course no such requirement in the section, but, if there is such a practice it seems most probable that it has arisen from the consideration by the courts of the problem of whether it is reasonable to make orders, in the light of the housing problems of Aden. It is obviously right to consider, but as only one of the factors touching reasonableness, the extent and nature of the residential accommodation afforded by the premises, and the number of years it could be expected to continue. All such matters are for the discretion of the court to be exercised in the light of the particular facts.

I do not think that it is desirable that I should add anything to what I have said on this subject, but would call attention to the following passage in the judgment of the learned president of this court in *Abubaker Noor Mohamed Bokheriawala v. Haji Yacoob Haji Ismail* (3), at p. 109:

> "It is interesting to note that if the respondent had not obtained a permit to reconstruct but had brought his application under s. 10 (2) (*d*), that is to say that the whole of the premises were required for the occupation of himself and his family, the court before granting a possession order would have had not only to consider reasonability but also the balance of hardship and the question whether other accommodation was available for either the landlord or the tenant. As it is the court was not concerned with proof of alternative accommodation and had to consider only whether it was reasonable to make an order. From the judgment I find it impossible to say that the learned judge did not address his mind adequately to the problem or that he was wrong in concluding that in the case of a reconstruction that no obligation lay on him to ensure that no one suffered any hardship. That being so we cannot interfere and say that he has exercised his discretion unjudicially."

I would comment on that passage that I do not think that the learned president intended to say that the factors of alternative accommodation and hardship were not to be taken into account when a court is considering the question of reasonableness, but that they were not of themselves necessarily determining factors.

I would dismiss the appeal with costs.

Crawshaw JA: I agree and would dismiss the appeal with costs.

Connell J: I also agree.

Appeal dismissed.

For the appellant:
Westby Nunn & Kazi, Aden
E. Westby Nunn

For the first respondent:
M.H. Mansoor, Aden
K.A. Gandhi

For the second respondent:
A. Rahman, Aden
Chanan Singh

Gurdial Singh Dhillon v Sham Kaur and Others
[1960] 1 EA 795 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	7 December 1960
Case Number:	100/1959
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Miles, J

[1] Practice – Appeal – Originating summons – Order made on preliminary issue – Leave to appeal against order refused by Supreme Court – Appeal lodged without leave of appellante court – Whether appeal lies without leave – Meaning of "an order made upon the hearing of an originating summons" in O. XLII of the Civil Procedure (*Revised*) *Rules* 1948 *– Civil Procedure* (*Revised*) *Rules*, 1948, *O. XXXVI, O. XLII r.* 1 (1) *and* (2) (*K.*) *– Civil Procedure Ordinance* (*Cap.* 5), *s.* 75 (1), *s.* 76 (1), *s.* 79 *and s.* 81 (*K.*) *– Eastern African Court of Appeal Rules*, 1954, *r.* 54 (6).

Editor's Summary

When an originating summons taken out by the appellant under O. XXXVI seeking determination of the rights and interests of the respondents and the appellant in the estate of the appellant's father, came before a judge in chambers, the judge after argument directed that one issue, namely, whether the appellant and the second, third and fourth respondents were a Hindu joint family, should be tried first. The issue was tried by another judge who delivered a "judgment" thereon which was later embodied in a formal order. The appellant gave notice of appeal and applied for leave to appeal which the Supreme Court refused. No application was made to the appellate court under r. 54 (6) of the Eastern Africa Court of Appeal Rules, 1954, for leave to appeal but a memorandum of appeal was duly filed on the basis that an appeal lay as of right. At the hearing of the appeal a preliminary objection was taken by the respondents that no appeal against the order of the Supreme Court lay as of right, and that in the absence of leave the appeal was incompetent.

Held –

(i) the words "an order made upon the hearing of an originating summons" must in the context of O.XLII of the Civil Procedure (Revised) Rules, 1948, mean the order which is the adjudication upon the originating summons, that is, the "final" order which disposes finally of the rights of the parties.

(ii) an appeal against the order of the Supreme Court did not lie as of right and accordingly in the absence of leave to appeal the appeal was incompetent.

Preliminary objection upheld.

Cases referred to in judgment:

(1) *Violet O' Dell v. A.W. Thompson and Others* (1955), 22 E.A.C.A. 177.

(2) *Bhagat Singh v. Ramanlal P. Chauhan and Others* (1956), 23 E.A.C.A. 178.

(3) *R. v. Arkwright* (1848), 12 Q.B. 960; 116 E.R. 1130.

(4) *Smith Agard and Patel v. J.G. Seth* (1952), 19 E.A.C.A. 34.

(5) *Rene Dol v. Official Receiver of Uganda* (1954), 21 E.A.C.A. 116.

The following judgment were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a "judgment" and order of the Supreme Court of Kenya dated August 25, 1959, made in relation to a preliminary issue which, in pursuance of directions given by the court, was

tried first in the course of the hearing of an originating summons taken out under O. XXXVI of the Civil Procedure (Revised) Rules, 1948 (hereinafter referred to as the Civil Procedure Rules). It may be noted that the description of the grounds for the learned judge's decision as a "judgment" is incorrect. It is common ground that the formal adjudication upon an originating summons under O. XXXVI of the Civil Procedure Rules is an "order" and not a "decree" (*Violet O'Dell v. A.W. Thompson and Others* (1) (1955), 22 E.A.C.A. 177 at p. 179). Owing to the structure of the legislation in Kenya relating to appeals on civil matters a judgment can only be delivered if it will result in a decree. The grounds for making an order cannot be treated as a judgment and are normally referred to as a ruling (*Bhagat Singh v. Ramanlal P. Chauhan and Others* (2) (1956), 23 E.A.C.A. 178 at p. 185).

The originating summons was taken out by the appellant, who is the eldest son of one Harbans Singh Dhillon, deceased (hereinafter referred to as "the deceased") by the latter's first marriage. The first respondent was the second wife of the deceased. The second, third and fourth respondents are the sons of the deceased by the first respondent. The deceased died in 1952 and the first respondent was appointed administratrix of his estate on June 7, 1954. The originating summons taken out by the appellant sought for determination of the rights and interests of the parties in the estate of the deceased, and asked for orders that the first respondent furnish accounts of the estate and that the respondents make retribution to the estate in respect of funds or other benefits received by them from the estate.

The originating summons came before MacDuff, J., in Chambers who, after hearing argument, directed

> "that the one issue of whether or not the applicant and his three stepbrothers are a Hindu joint family should be tried first",

and he gave leave to the parties to call viva voce evidence and to present their arguments in law on such first issue; and for that purpose moved the summons into court.

In pursuance of the directions given by MacDuff, J., the matter came before Miles, J., for trial of the issue as to whether the applicant and his three stepbrothers were a Hindu joint family or not, and Miles, J., delivered his "judgment" on this issue on August 25, 1959. His decision was embodied in a formal order of the court of the same date. The appeal is against this "judgment" and order.

Notice of appeal was duly given on September 5, 1959, and application was made by the appellant to the Supreme Court for leave to appeal to this court. Such leave was refused. No application under r. 54 (6) of the Eastern African Court of Appeal Rules, 1954 was made to this court for leave to appeal, but the appellant filed a memorandum of appeal apparently on the basis that an appeal against the "judgment" and order of the Supreme Court lay as of right.

In this connection it may be noted that the appellant's advocates did not comply with the requirements of Practice Note No. 4 of 1955 (22 E.A.C.A. 542) which requires that if an appeal is from an order the memorandum should state whether the appeal is brought as of right or with leave. I would stress that it is the duty of advocates to see that the requirements of practice notes are complied with. Failure to do so may result in additional costs which would have to be borne either by the party in default or his advocates. However, in the instant case failure to comply with the practice note does not appear to have led to any misunderstanding.

The respondents have taken the preliminary objection that appeal against the order of the Supreme Court does not lie as of right, and that in the absence of leave the appeal is incompetent. After hearing argument we reserved our

decision on the preliminary point and stood the appeal over pending that decision. I now deal with this preliminary objection.

The relevant provisions of the Civil Procedure Ordinance (Cap. 5) for the purposes of this appeal are as follows:

> "75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:
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> (*h*) Any order made under rules from which an appeal is expressly allowed by rules.
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> "76(1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal."
>
> "79. The provisions of this Part relating to appeals from original decrees shall, as far as may be, apply to appeals:
>
> (*a*) from appellate decrees, and
>
> (*b*) from orders made under this Ordinance or under any special or local law in which a different procedure is not provided."

The Civil Procedure Rules, which are made under s. 81 of the Civil Procedure Ordinance, provide for appeals from orders in O. XLII, the relevant provisions of which are:

> "(1) An appeal shall lie as of right from the following orders under the provisions of s. 75 of the Ordinance, namely:
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>
>
> (*o*) An order made upon the hearing of an originating summons under O. XXXVI . . .
>
> "(2) An appeal shall lie with the leave of the court from any other order made under these Rules."

The question at issue is whether the order made on the trial of the preliminary issue in pursuance of the directions given by MacDuff, J., is "an order made upon the hearing" of an originating summons. Mr. Mitra and Mr. Mandla, for the respondents, contend that the word "upon" should be construed as "after" and that the right of appeal conferred by O. XLII, r. 1 (1) (*o*) is confined to the final order upon an originating summons and does not include an order in the nature of an interlocutory order. Mr. Khanna, for the appellant, contends that there is no distinction drawn by the relevant Kenya legislation between final and interlocutory orders and that any order made in the course of the hearing of an originating summons is an order "made upon the hearing" of such summons.

In the course of argument we were referred to a number of English and Indian authorities as to what constitutes a "final" order. I do not think these authorities are of much assistance in the instant case, since they turn on the specific provisions of the relevant English and Indian legislation which draws a distinction, for purposes of appeal, between final and interlocutory orders. The order under consideration is clearly not a final order, in that it does not finally dispose of the rights of the parties under the originating summons. As Mr. Khanna contended, however, the Civil Procedure Ordinance and Rules do not make any express distinction between final and interlocutory orders for

purposes of appeal and the English and Indian authorities are therefore of little assistance. The decision must depend on the construction to be placed on the specific wording of r. 1 (1) (*o*) of O. XLII.

It was common ground that on the authorities the word "upon"

> "may either mean 'before' the act done to which it relates, or 'simultaneously with' the act done, or 'after' the act done, according as reason and good sense require, with reference to the context and the subject matter of the enactment".

(Stroud's Judicial Dictionary, (3rd Edn.) Vol. 4, p. 3165; *R. v. Arkwright* (3) (1848), 12 Q.B. 960 and other cases cited under the definition of "upon" in Stroud). Mr. Khanna argued that before the word "upon" should be given a restricted meaning there must be something in the legislation or in the context impelling the court to give the word such a restricted meaning; that otherwise a liberal construction must be adopted; and that there is nothing in O. XLII to cut down the plain meaning of the word "order" as used in r. 1 (1) (*o*). In my view, however, this argument seeks to put the matter on too restricted a basis. The words to be construed are "an order made upon the hearing of an originating summons", and in order that the word "upon" in that phrase may be construed

> "according as reason and good sense require, with reference to the context and subject matter of the enactment",

it is, I think, relevant to consider the apparent purpose of the provisions of the enactment, that is to say, O. XLII, r. 1 (1) of the Civil Procedure Rules. The court has already had occasion to consider O. XLII, r. 1 (1) with a view to determining its general purpose. In *Smith Agard and Patel v. J.G. Seth* (4) (1952), 19 E.A.C.A. 34, the then learned Vice-President said, at p. 37 of the report:

> "The general principle which emerges from a study of O. 42, r. 1 (1), appears to be that an appeal will lie as of right when the decision, whether it be to grant or to refuse the relief asked for, is in the nature of a final decision; as, for instance, if it puts an end to the proceedings or will irrevocably alter the positions of the parties or their property."

Later a similar view was expressed by the same learned judge in relation to the corresponding order of the Uganda Civil Procedure Rules in *Rene Dol v. Official Receiver of Uganda* (5) (1954), 21 E.A.C.A. 116 at p. 119. I would respectfully agree with the view expressed by the then learned Vice-President. It is in the context of this general principle that r. 1 (1) (*o*) must be considered, and it appears to me to be in accordance with "reason and good sense" to place a construction on the rule which accords with the general purpose of the order as a whole. This inevitably leads to the conclusion that the words "an order made upon the hearing of the orginating summons" must, in the context of O. XLII, mean the order which is the adjudication upon the originating summons, that is, the "final" order which disposes finally of the rights of the parties. To hold otherwise mught lead to a multiplicity of appeals upon incidental orders made in the course of the hearing, when such matters can more conveniently be considered in an appeal from the final decision. No harship results from this interpretation since, under s. 76 of the Civil Procedure Ordinance read with s. 79 of that Ordinance, it is open to an appellant to challenge the correctness of such an incidental order made in the course of the hearing of an originating summons upon appeal against the final order; and in a proper case it is open to the Supreme Court or this court to give leave to appeal against the incidental order.

For the reasons I have given I think the preliminary objection must succeed and that without leave the appeal is incompetent and should be dismissed with costs. The appellant, of course, is not precluded from challenging the decision appealed from if he sees fit to appeal against the final decision on the originating summons.

Sir Kenneth O'connor P: I agree. The appeal is dismissed with costs.

Crawshaw JA: I also agree.

Preliminary objection upheld.

For the appellant:
Sirley & Kean, Nairobi
D.N. Khanna and *M. Kean*

For the first, second and third respondents:
Nahar Singh Mandla & Co., Nairobi

For the fourth respondent:
Bhailal Pate, Nariobi
R.K. Mitra and *S.S. Mandla*

Buganda Timber Co Ltd v Mulji Kanji Mehta
[1960] 1 EA 799 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	2 December 1960
Case Number:	36/1959
Before:	Lewis J
Sourced by:	LawAfrica

[1] Money – lender – Evidence – Admissibility – Evidence of other loans – Admissibility to prove lender a money – lender-Moneys' Ordinance, 1951, *s.* 2 (*U.*).

[2] Money – Lender – Loan to limited company – Debenture charging freehold and leasehold property – Whether loan secured by debenture within Money – Lenders' Ordinance, 1951, *s.* 22 (1) (*U.*).

Editor's Summary

The plaintiff company sought a declaration that a debenture charging inter alia the compnay's real and leasehold properties to secure a loan of Shs. 20,000/- was void as the defendant was a money-lender and

had failed to comply with the provisions of the Money-lenders' Ordinace, 1951. At the hearing it was submitted for the defendant that the evidence of previous loans made by the defendant was not admissible as one could be a money-lender one year and not another year, that the defendant was not a money-lender, and that in any event the transaction was within s. 22 (1) (*c*) of the Ordinance.

Held –

(i) evidence of the previous loans was admissible and on this evidence the defendant was a money-lender within the Money-lenders' Ordinance, 1951.

(ii) although the security for the loan was a debenture and not a legal or equitable mortgage it came with in the saving provisions of s. 22 (1) of the Money-Lenders' Ordinace

Declaration refused.

Cases referred to in judgment:

(1) *Mulji Jetha Ltd. v. Chanan Shah* (1949), 23 K.L.R. (Pt. 2) 46.

(2) *Nash v. Layton*, [1911] 2 Ch. 71.

Judgment

Lewis J: In this case the plaintiff seeks a delaration that the debenture granted to the defandant to secure a loan of Shs. 20,000/- is void. the plaintiff says that the defendant is a money-lender and has failed to comply with the provision of the Money-lenders' Ordinance, 1951. the following issues were agreed:

1. On September 30, 1957, being the date of the debenture (a copy whereof annexed to the plaint and marked "A") was the defendant a money-lender within the definition of that word under s. 2 of the Money-lenders' Ordinance, 1951 (No. 31 of 1951)?
2. If the defendant was a money-lender within the definition of that word, was he deemed not to be a money-lender by virtue of s. 22 (3) of the said Ordinance?
3. If the defendant was a money-lender within the definition of that word, and further was not entitled to the saving provision in s. 22 (3) of the said Ordinance, was the transaction inquestion, namely the dsaid debenture, a transaction within the provisions of s. 22 (1) of the said Ordinance?
4. If the transaction in question, namely the said debenture, a transaction within the provisions of s. 22 (1) of the said Ordinance, was the defendant exempted from the provisions of the said Ordinance by virtue of s. 22 (2) of the said Ordinance?
5. Was the defendant under obligation to comply with –
 (*a*) Section 3 of the said Ordinance, and
 (*b*) Section 7 of the said Ordinance,

 in respect of the transaction in question, namely the said debenture?
6. Is the said debenture unenforeable against the plaintiff?

As to the first issue: There is uncontradicted evidence that between 1949 and 1957 the defendant lent to eighteen persons sums amounting to roughly Shs. 157, 000/-. Mr. Phadke, for the defendnat, argued that evidence as to loans before or after 1957 was inadmissible as one could be a money-lender one year and not another year. There is a weight of authority against this argument. The Kenya case of *Mulji Jetha Ltd. v. Chanan Shah* (1) (1949), 23 K.L.R. (Pt. 2) 46 decided in 1948 reviewed most of the authorities to date on what was carrying on the business of a money-lender, and decided that the word "business" imported the notion of system, repetition and continuity, and that evidence of the number of money-lending transactions was relevant and admissible. It was held in *Nash v. Layton* (2), [1911] 2 Ch. 71, that to establish whether the plaintiff was a money-lender interrogatories could be adminstered as to what, (if any) other loans he had transacted during a reasonable period before the loan in question on the action. I accordingly hold that the evidence of the eighteen loans was admissible. The defendant, during the period of the loans, lived and ran a shop at Zirobwe. This is a small cotton trading centre some 45 miles from Kampala. I find it impossible to believe that the defendant acquired Shs. 157,000/- from his shop in such a place. I accordingly find that on September 30, 1957, the defendant was a money-lender within the Ordinance.

As to the second issue: The security for the repayment of the loan was a debenture charging all the plaintiff company's property and assets with the repayment thereof. The debenture also specifically charged the plaintiff's real and leasehold properties.

It is clear that the provisions of the money-lenders' Ordinance do not apply where the security for repayment is effected by execution of a legal or equitable

mortgage or charge upon immovable property. It was argued that this debenture was a charge upon immovable property within s. 22 (1) (*c*). It is not disputed that if this security was given by a non-corporate body it would have had to be effected by a legal or equitable mortgage or charge. The giving of a debenture is, inter alia, one of the ways a company gives security when borrowing money. I can see no reason, as at present advised, why companies should be regarded differently from individuals for the purpose of the saving provisions of the Ordinance. The result is that the second issue is answered in favour of the defendant. The other issues need not, therefore, be decided. The declaration and injunction asked for is therefore refused with costs.

Declaration refused.

For the plaintiff:
Manubhai Patel & Son, Kampala
M.L. Patel

For the defendant:
Parekhji & Co., Kampala
Y.V. Phadke

Abdul Rehman Bazmi v Sughra Sultana

[1960] 1 EA 801 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	29 November 1960
Case Number:	60/1960
Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Templeton, J.

[1] Mohamedan law – Parent and child – Custody – Parents of Hanafi sect – Whether Hanafi law determines right to custody of child – Guardianship of Infants Ordinance, 1959, *s.* 7, *s.* 17 (*K.*) – *Custody of Children Ordinance*, 1926, (*K.*) – *Mohamedan Divorce and Succession Ordinance* (*Cap.* 148), *s.* 2, *s.* 3, (*K.*) – *Matrimonial Causes Act*, 1950, *s.* 26 – *Supreme Court of Judicature* (*Consolidation*) *Act*, 1925, *s.* 193, *s.* 225.

[2] Infant – Custody – Mohamedan infant – Welfare of infant – Whether all infants are within Guardianship of Infants Ordinance, 1959, *s.* 17 (*K.*).

Editor's Summary

The appellant and respondent were married in December, 1955. The respondent had a child in September, 1956, and returned to her parents' home in December, 1956, leaving the child with the appellant. In 1958 the respondent petitioned for maintenance and the custody of the child, alleging that the appellant to whom she had not returned since 1956 had been persistently cruel to her. The trial judge held that the appellant's treatment constituted a valid reason for the respondent leaving her husband and awarded her maintenance. He also found that under Hanafi law to which the spouses both belonged the respondent was entitled to the custody of the child till seven years of age and so ordered. On appeal it was submitted for the appellant that both before and under the Guardianship of Infants Ordinance, 1959, the welfare of the child was and is the paramount consideration.

Held –

(i) by s. 17 of the Guardianship of Infants Ordinance, 1959, the welfare of the child is the paramount consideration for the court.

(ii) the judge had considered the welfare of the child as well as the application of the religious law and the court would not interfere with his decision that the

respondent should have custody of the child except to delete from the decree the words "until he attains the age of seven years"; there would be liberty to either party to apply.

Per Sir Kenneth O'Connor P: "The (Guardianship of Infants) Ordinance applies with full force to Mohamedan, not less than to other, infants and under s. 17 the welfare of the child and not the right under Mohamedan law of either parent is a paramount consideration in deciding questions of custody".

Appeal dismissed.

Cases referred to in judgment:

(1) *Nana binti Mzee v. Mohamed Hassan* (1942), 20 K.L.R. 3.

(2) *Fazalan Bibi v. Tehran Bibi* (1921), 8 E.A.L.R. 200.

(3) *Fazalan Bibi v. Tehran Bibi*, E.A.C.A. Civil Appeal No. 13 of 1941 (unreported).

(4) *Imambandi v. Mutsaddi* (1918), 45 I.A. 73.

(5) *Mbaruk bin Diwansap v. Hamsini bin Jumbe Kimemeta* (1927), 11 K.L.R. 56.

(6) *Hamisi bin Ali v. Mariamu binti Ali* (1929), 12 K.L.R. 51.

(7) *Shariff Abdullah v. Zwena binti Abedi*, Kenya Supreme Court Civil Appeal No. 20 of 1923 (unreported).

The following judgments were read:

Judgment

Crawshaw JA: This is an appeal against an order of the Supreme Court awarding to the respondent the custody of the sole child of the respondent and the appellant. The parties were married in December, 1955, and the child was born the following September. In December, 1956, the respondent returned to her parents' home, the child remaining in the custody of his father, the appellant.

In October, 1958, the respondent, who had not in the meanwhile returned to the appellant, filed a petition against him alleging persistent cruelty following their marriage, culminating in his turning her out of his house in December, 1956, and asking that she be granted custody of the child and maintenance. The appellant denied these allegations and alleged that the respondent deserted him against his instructions, leaving the child behind.

The learned judge held that the respondent did not desert the appellant and child without cause, and that the appellant's treatment of her constituted a valid and lawful reason for her leaving his house, and for these reasons he awarded her maintenance. He also found that under Mohamedan law as practised by the Hanafi sect (and it is not in dispute that both parties belong to this sect) the respondent, as mother of the child, was entitled to the custody of the child until he attained seven years of age, and ordered accordingly. The decree embodying these orders is dated May 27, 1960.

The appellant has limited his appeal to the question of custody alone. In ground 1 of his memorandum he objects in law to that part of the judgment which reads:

> ". . . it appears to be well settled in the law which applies to the parties that the mother is entitled to the custody of the male child until the completion of his seventh year and it seems that nothing can take this right

away from her except her own misconduct."

In ground 2 he objects to the learned judge failing to hold that two changes

of custody, now and at the age of seven, would be against the interest of the child. The third and fourth grounds read:

> "3. The learned trial judge erred in law in failing to hold that the appellant alone was, and is, the legal guardian of the said child and entitled to the supervision of his custody by virtue of his guradianship, whether or not such custody belonged to the respondent.
>
> "4. The learned trial judge erred in failing to give effect to the legal rights of the appellant as such legal guardian and in failing to provide for proper access to the said child to be given to the appellant."

As to ground 1 of the appeal, Mr. O'Donovan who appeared for the appellant, conceded that the learned judge correctly stated the Hanafi law, but argued that he should in the circumstances pertaining in Kenya have taken as the paramount consideration the best interests of the child. The appellant in his written statement said, "it is the Hanafi sect of Mohamedan law that is applicable to the parties", but Mr. O'Donovan submits that this does not bind the court. He referred to the Custody of Children Ordinance, 1926, which was in force at the time the trial started, but the provisions of which would not appear to have applied to the circumstances of this case in any event. That Ordinance, however, was repealed by the Guardianship of Infants Ordinance, 1959 (Ordinance No. 7 of 1959), which I will hereafter refer to as the 1959 Ordinance. It came into operation on May 5, 1959, before the trial, which appears to have suffered many delays, was concluded. Section 7 of the 1959 Ordinance empowers the court on application by either party to make:

> "such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge such order on the application of either parent . . . "

Section 17 reads as follows:

> "Where in any proceeding before any court the custody or upbringing of an infant, or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, is in question, the court, in deciding that question, shall regard the welfare of the infant as the first and paramount consideration, and shall not take into consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father, in respect of such custody, up-bringing, administration or application is superior to that of the mother, or the claim of the mother is superior to that of the father."

This Ordinance was not referred to by the learned judge or by counsel for either party in the trial court. (Counsel for the appellant was not then Mr. O'Donovan.) The case was argued on Mohamedan law, although the welfare of the child was made an issue in the written statement of defence and argued also.

Mr. O'Donovan has submitted that even before the introduction of the 1959 Ordinance the courts were not bound to follow Mohamedan law in the matter of custody, and that the welfare of the child was the primary consideration. Mr. Akram, who appeared for the respondent here and in the court below, has given no reason why the 1959 Ordinance should not apply to Mohamedans, but for all that still submits that Mohamedan law applies; whether in law or merely because the parties agreed that it did, is not clear.

Mr. O'Donovan has referred to the Mohamedan Divorce and Succession Ordinace (Cap. 148), which was enacted in 1920. Section 3 (1) provides that parties to a Mohamedan marriage,

> "shall subject to the provisions of this Ordinance, be entitled to any relief by way of divorce or otherwise which can be had, granted, or obtained according to Mohamedan law and such law can apply accordingly".

Section 3 (2) gives jurisdiction to the Supreme Court

> "to hear and detemine all matrimonial causes and suits arising out of Mohamedan marriages, wherever contracted, at the suit of either party to such marriages . . ."

Section 2 says that the expression "matrimonial cause or suit" shall mean:

> "all causes or suits relative to the validity of a marriage according to Mohamedan law and all causes and suits relative to or claiming any species of relief, whether by way of divorce or otherwise, in respect of Mohamedan marriages, recognized or given by Mohamedan law".

The question is whether a suit relating to the custody of a child can be said to be

> "relative to or claiming any species of relief . . . in respect of Mohamedan marriages",

and if so, whether the provisions of the Mohamedan Divorce and Succession Ordinance would prevail over the specific provisions of the 1959 Ordinance. The words in the definition are certainly in very wide terms. No case however has been cited to us in which the Mohamedan Divorce and Succession Ordinance has been considered in connection with custody.

We have been referred by Mr. O'Donovan to the case of *Nana binti Mzee v. Mohamed Hassan* (1) (1942), 20 K.L.R. 3, in which the Supreme Court held that English law and not Mohamedan applied to "guardianship", by which from the context was meant also "custody". In so holding the learned judge, Lucie-Smith, J., as he then was, professed to be following earlier decisions, amongst which he cited *Fazalan Bibi v. Tehran Bibi* (2) (1921), 8 E.A.L.R. 200, a 1921 case, of which he said,

> "the Court of Appeal upheld the decision of Guthrie Smith, J., that he had jurisdiction to make orders for the custody of children and their property but that the jurisdiction is exercisable according to English and not Mohamedan law".

With respect, I do not think it can be definitely said that the Court of Appeal considered the law applicable to the custody of children. The petitioner was held to have no locus standi, and it may be that in dismissing the appeal as to custody, the learned judges had this only in mind, as Sheridan, J., as he then was, made it clear he did. In the case which Lucie-Smith, J., was hearing, an earlier decision relating to the same parties was mentioned as having been taken to the Court of Appeal (*Fazalan Bibi v. Tehran Bibi* (3), E.A.C.A. Civil Appeal No. 13 of 1941 (unreported)). In it the learned President had stated,

> "The Supreme Court originally made an order giving the custody of the child to the child's grandmother. This order was proper and in accordance with Mohamedan law".

Lucie-Smith, J., however, regarded this as obiter, as no question had been raised in the appeal as to what law was applicable. No reference was made to the Mohamedan Divorce and Succession Ordinance, and I certainly would not say that the learned President's remark had, in the circumstances, any binding effect on this court.

The English Matrimonial Causes Act, 1950, is described, as,

> "An Act to consolidate certain enactments relating to Matrimonial Causes . . ."

and s. 26 enables provision to be made by the court for the custody of children,

> "in any proceedings for divorce or nullity of marriage or judicial separation".

In the Supreme Court of Judicature (Consolidation) Act, 1925, Part VIII is headed "Matrimonial Causes and Matters", and "Matrimonial Causes" is defined in s. 225 as meaning

> "any action for divorce, nullity, judicial separation, jactitation of marriage or restitution of conjugal rights".

Section 193 also enables provision to be made for the custody of a child in "any proceedings for divorce or nullity of marriage or judicial separation". An application to the court relating to custody alone would not, as I see it, be a "matrimonial cause" in itself but a "matter" arising out of a matrimonial cause. This may be a fine distinction, but it is perhaps arguable whether in somewhat the same way the words

> "relative to or claiming any species of relief whether by divorce or otherwise in respect of Mohamedan marriages",

in s. 2 of the Mohamedan Divorce and Succession Ordinance, could not be held to include relief as to custody. On the other hand it might be said that the words "or otherwise" must be read as ejusdem generis as relief affecting only the status of the husband and wife, such as divorce, nullity or separation, and that in the absence of such specific enabling powers regarding custody as appear in the English Acts of 1925 and 1950, one has to look elsewhere for jurisdiction. Section 3 (2) of the Mohamedan Divorce and Succession Ordinance gives jurisdiction to the court

> "to hear and determine all matrimonial causes and suits arising out of Mohamedan marriages".

This I think tends to broaden the meaning of the words "or otherwise", but although a suit relating to the custody of a child might be described as one arising out of a marriage, I am doubtful whether it could be properly called a "matrimonial suit"; the Shorter Oxford English Dictionary gives the meaning of "matrimonial" as "pertaining to marriage".

On the whole I am inclined to the view that the Mohamedan Divorce and Succession Ordinance would not apply to the present case, irrespective of the enactment of the 1959 Ordinance. But anyway it seems to me that s. 17 of the 1959 Ordinance is intended to make the welfare of the child the paramount consideration in all circumstances and even though the parties may be Mohamedans, for it says that the court

> "shall not take into consideration whether from any other point of view the claim of the father . . . is superior to that of the mother, or the claim of the mother is superior to that of the father".

This being so, the 1959 Ordinance in my opinion applied, and the court was required in terms of s. 17 thereof to give paramount consideration to the welfare of the child.

Apart from finding that under Hanafi law the respondent was entitled to the custody of the child, the learned judge gave consideration also to the welfare of the child. He said:

> "It was submitted that in the present case it would not be in the interests

> of the child to disturb the custody of the father which has been uninterrupted for 3 1/2 years and Dr. Foley and Mrs. Lemon were called as witnesses in support of this submission. Both these witnesses said the child appears to be very happy in his present surroundings and that it would take some time for him to adjust himself to a change of custody. However, both agreed that in most circumstances the mother is the proper person to bring up a child.
>
> "There is no evidence which would justify me in holding that the petitioner is not in every way a fit and proper person to have the custody of her child, and after carefully considering the evidence of Dr. Foley and all the other evidence in the case I am satisfied that it would not be in the interests of the child to deprive him of the love and care of his mother until he attains the age of seven years when, under Hanafi law, the custody of a male child reverts to the father."

Counsel for both parties have asked that if it is held that the interests of the child are paramount, then this court should decide the question of custody on the evidence which was produced before the learned trial judge. Dr. Foley, who gave evidence for the appellant at the trial, after mentioning the possible deleterious effect on the child's mind and personality should he be transferred to the custody of another person, said,

> "the upset due to change has to be balanced against the undoubted beneficial effect of a child by return to his own mother. The advantages and disadvantages would be about equal. That is a general rule".

Another witness called by the appellant, Mrs. Lemon, Child Care Officer of the Nairobi Branch of the Child Welfare Society, said,

> "If the mother is affectionate it would not take very long for the child to adapt itself".

I do not think that on the evidence as a whole it can be said that the learned judge was wrong in holding that it would be in the interests of the child that he should have the benefit of the love and care of his mother. If the advantages and disadvantages of change of custody are about equal, it would be proper for the religious law of the parties to be a deciding factor and Mr. O'Donovan agreed that this was an element which could properly be considered. The child is now over one year older than when the evidence was given and it is nearly half a year since the learned judge gave his judgment, but I do not think that this advance in the child's age is sufficient to alter the position.

I have not dealt with grounds 3 and 4 of the memorandum for the question of guardianship was not in issue or argued as distinct from custody. The 1959 Ordinance contains provisions relating to guardianship as distinct from custody, and Mohamedan law also recognises guardianship as distinct from custody, and Mohamedan law also recognises guardianship of a child's estate as distinct from custody (*Imambandi v. Mutsaddi* (4) (1918), 45 I.A. 73).

If the welfare of the child is the paramount consideration, it will no doubt be a matter for an application to the court should either party at some future time wish to resume or retain, as the case may be, the custody of the child against the wishes of the other party. In the circumstances the qualified period, until the child attained seven years of age, was inappropriate, and I would vary the relevant part of the decree dated July 22, 1960, by deleting the words "until he attains the age of seven years". Mr. O'Donovan has submitted that the judgment cannot be altered unfavourably to the appellant in the absence of any cross-appeal, but it seems to me that the removal of the limiting period is a natural corollary to the principles of law which he has asked this court to apply. That part of the judgment of the learned judge which limits the period is based on Hanafi law alone and there is nothing to suggest that it would be

in the interests of the child to return to his father when seven years of age, nor do I think that the best interests of the child could be assessed so long ahead; in the three years or a little less which intervenes, many new factors may arise and the circumstances of the parties change.

The learned judge did not consider the question of the right of access to the child, a matter for which he might make provision under s. 7 of the 1959 Ordinance. It is a matter on which liberty to apply to the Supreme Court should I think be reserved.

I would award the costs of the appeal to the respondent.

Sir Kenneth O'connor P: I have had the advantage of reading the judgment of Crawshaw, J.A., and I agree with his conclusions.

The Kenya cases prior to 1932 were not consistent on the problem whether Mohamedan law or English law applied to questions of the custody of Mohamedan children (see, on the one hand, *Mbaruk bin Diwansap v. Hamsini bin Jumbe Kimemeta* (5) (1927), 11 K.L.R. 56; and, on the other, *Hamisi bin Ali v. Mariamu binti Ali* (6) (1929), 12 K.L.R. 51, following *Shariff Abdullah v. Zwena binti Abedi* (7), Kenya Supreme Court Civil Appeal No. 20 of 1923 (unreported)). I think that the law in Kenya must be taken to have been settled by *Nana binti Mzee v. Mohamed Hassan* (1), in favour of the application of the English law. That case was decided in 1932. It is certainly not contrary to the Uganda case decided by Guthrie Smith, J., in 1921 and upheld by this court in *Fazalan Bibi v. Tehran Bibi* (2). *Whether Hamisi's* (6), *Shariff Abdullah's* (7) and *Nana's* (1) cases were correctly decided or not, they have stood for many years and important rights have been regulated by them. It would be too late to question them now except by legislation. In my opinion, the Legislature of Kenya, in enacting the Guardianship of Infants Ordinance, 1959, must be taken to have known the then state of the law. It did not see fit to make any exception from the provisions of that Ordinance regarding the custody of Mohamedan infants. In my view, that Ordinance applies with full force to Mohamedan, not less than to other, infants, and, under s. 17, the welfare of the infant and not the right under Mohamedan law of either parent is a paramount consideration in deciding questions of custody.

For these reasons and for the reasons given by the learned Justice of Appeal, the decree dated July 22, 1960, will be varied by:

(i) deleting from paragraph (*a*) the words "until he attains the age of seven years"

(ii) deleting paragraphs (*d*) and (*e*) and substituting therefor the words: "Liberty to Apply".

The respondent should have the costs of this appeal.

Gould JA: I have had the advantage of reading the judgments of the learned President and the learned Justice of Appeal; I agree with both and do not wish to add anything to what they have said.

Appeal dismissed.

For the appellant:
B. O'Donovan, Q.C., and *A. Rauf*, Nairobi

For the respondent:
S. M. Akram, Nairobi

I A K Sikabuza v The Director o Land and Surveys
[1960] 1 EA 808 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment	12 October 1960
Case Number:	8/1960
Before:	Sheridan, J
Sourced by:	LawAfrica

[1] Statutory tribunal – Natural justice – Professional body – Composition of tribunal – Surveyor – Inquiry by tribunal including rivals of surveyor – Whether composition of tribunal contrary to natural justice – Survey Ordinance, s. 4, *s.* 12 (2) *and* (6) (*U.*).

Editor's Summary

Under s. 12 (6) of the Survey Ordinance the Surveyors Licencing Board cancelled the appellant's licence to practise as a surveyor on the ground that a survey plan prepared by the appellant bore no resemblance to an actual plan done by a later Government survey. The grounds of appeal filed by the appellant in the High Court were that the composition of the board was contrary to the rules of natural justice since two of its members were rival surveyors and accordingly were interested parties who did not disclose their interest at the hearing of the inquiry.

Held – the appellant had not objected to the composition of the board at the inquiry and in a case such as this there must be some element of conflicting interest but the mere fact that interested parties sit on a disciplinary body does not necessarily conflict with the maxim "no man shall be a judge in his own cause"; accordingly the composition of the board was not contrary to the rules of natural justice.

Appeal dismissed.

Cases referred to in judgment:

(1) *Leeson v. The General Council of Medical Education and Registration* (1890), 43 Ch. D. 366.

(2) *Cooper v. Wilson*, [1937] 2 K.B. 309; [1937] 2 All E.R. 726.

(3) *C. I. C. Kiwanuka Mabira v. Surveyors Licencing Board*, Uganda High Court Miscellaneous Cause No. 64 of 1958 (unreported).

Judgment

Sheridan J: This is an appeal under s. 16 of the Survey Ordinance from an order of the Surveyors Licencing Board made under s. 12 (6) of the Ordinance whereby the appellant's licence was cancelled.

The grounds of appeal are:

(1) that the board's composition was contrary to the rules of natural justice since two of its members were surveyors and rivals of the appellant in the same area of Masaka and accordingly were interested parties in the cancellation of the appellant's licence to practise as a surveyor and did not disclose their interest to the board at the hearing of the inquiry.

(2) on the facts there was no justification for cancelling the appellant's licence;

(3) in any event the order of cancellation was unduly harsh.

In support of the first ground Mr. Kazzora, for the appellant, cited the well-known cases to the effect that no man shall be a judge in his own cause.

In accordance with s. 12 (2) of the Ordinance the board was composed of a magistrate of the first class, the Director of Surveys and two other members of the board elected by the board for the purpose of holding this inquiry. It is to these two members that objection is taken. Section 4 of the Ordinance provides that the board shall consist of the Director of Surveys and not less than three other members to be appointed by the Governor-in-Council, two of whom shall be licenced surveyors. Their tenure of office is three years. I was informed from the bar that the two members objected to were the only two members of the board at the relevant date. This difficulty could have been overcome by gazetting further members but this would not have helped the appellant because, as I have been again informed, there are about twenty licensed surveyors practising in Uganda and while most of them live in Kampala, they are licensed to practise anywhere within the Protectorate. It follows that the same objection could have been taken to any other member of the board. In a case such as this there must be some element of conflicting interests but the mere fact that interested parties sit on a disciplinary body does not necessarily conflict with the maxim: “No man shall be a judge in his own cause”.

In *Leeson v. The General Council of Medical Education and Registration* (1) (1890), 43 Ch. D. 366 the General Council acting under the powers of the Medical Act, 1858, held an inquiry in which they adjudged a medical practitioner to be guilty of professional misconduct and removed his name from the register. Two of the twenty-nine persons of the board of inquiry were members of the body which was responsible for instituting the proceedings. It was held that the two members had not such an interest in the matter in question as to disqualify them from taking part in the inquiry and the court refused to interfere with the decision of the council. That case is stronger than the instant case where the two members had nothing to do with the laying of the charge. A case on the other side of the line is *Cooper v. Wilson* (2), [1937] 2 K.B. 309 where a chief constable sat at a meeting of a watch committee during the hearing of an appeal by a police sergeant against his dismissal by the chief constable. It was there held that his presence rendered the proceedings contrary to natural justice. Although the appellant was not legally represented at the inquiry, he is an experienced surveyor of some twenty-one years’ standing and he took no objection at the time to the personnel of the board. There is nothing in the first ground of appeal.

With regard to the other grounds of appeal the effect of the order of cancellation is very serious and might be thought to be unduly harsh. The charge related to an incorrect survey of five acres. The appellant did not dispute that it was wildly incorrect. On the evidence the error was in delineation and not in acreage and it was such that there was no resemblance between the plan which he submitted showing the outlines and the actual outline shown by a later Government survey which he does not challenge. Mr. Bindon’s opinion was that the work could only have been done in an office and not on the ground. The appellant was unable to give any reasonable explanation for this gross error. The professional activities of surveyors can have wide repercussions. Not only does the buyer of the land stand to lose but there have been cases recently where as a result of wrong surveys the Registrar of Titles has been held liable for negligence thereby involving Government in payments of large sums of money. Under s. 12 (1) (*a*) of the Ordinance, the board may inquire into any case in which it is alleged that a licensed surveyor intentionally or through negligence, carelessness or incompetence makes an incorrect survey – here the appellant’s mistake transcended mere incompetence and approximated to professional misconduct.

Finally as I remarked in *C. I. C. Kiwanuka Mabira v. Surveyors Licencing Board* (3) Uganda High Court Miscellaneous Cause No. 64 of 1958 (unreported):

> "There were professional surveyors on the board of inquiry. Once the board had found that the appellant was guilty of such improper conduct as to render him unfit to practise as a surveyor it had no option but to cancel his licence. Under s. 17 of the Ordinance the board has power to restore a licence which has been cancelled. If the appellant were to make an application to the board I am sure that it would be considered on its merits and would not be dismissed out of hand because of the order of cancellation. Although this is the first case of its kind and the appellant is a first offender, who may have lost his sole means of livelihood, I do not consider that I should substitute my discretion for that of a board which was better qualified than I am to gauge the seriousness of the allegations and the appropriate punishment."

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

For the appellant:
Binaisa & Kazzora, Kampala
John W. R. Kazzora

For the respondent:
The Attorney-General, Uganda
A. McMullin (Senior Crown Counsel, Uganda)

Twentsche Overseas Trading Co Ltd v Jamal Kanji
[1960] 1 EA 810 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	15 December 1960
Case Number:	79/1960
Before:	Sir Alastair Forbes VP, Crawshaw JA and Law J
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Murphy, J.

[1] Evidence – Admissibility – Receipt for deposit in hire purchase agreement – Whether oral evidence admissible to explain written receipt – Indian Evidence Act, 1872, *s.* 92.

Editor's Summary

The respondent entered into a hire purchase agreement for the purchase of an Austin van from the appellants and subsequently sued in the district court for an order to the appellants to transfer the van into his sole name. It was alleged by the respondent that he had paid the instalments in full, and that having exercised his option to purchase, under the terms of the agreement the van had become his property. The

appellant alleged that the full amount due under the agreement had not been paid and counterclaimed Shs. 2,800/-. Under the agreement the appellants had acknowledged receipt of a deposit of Shs. 4,400/- but the magistrate admitted extrinsic evidence under proviso (1) to s. 92 of the Indian Evidence Act that only Shs. 1,600/- was paid in cash and the balance of Shs. 2,800/- was represented by the value of a second-hand car which the respondent had left in part exchange; that the appellants had only given temporary credit for the second-hand car and that the responsibility for selling the second-hand car remained with the respondent. The magistrate dismissed the respondent's claim and allowed the counterclaim. The respondent's appeal to the High Court was allowed on the ground inter alia that oral evidence was not admissible to contradict the written agreement and receipt contained therein. This second appeal was confined to the appellant's counterclaim and the finding of the High Court that oral evidence was not admissible to contradict the receipt in the agreement.

Held –

(i) it was open to the appellants to show what the true consideration was and whether there had been a failure of consideration.

(ii) the evidence adduced by the appellants was in fact an explanation of the conditional nature of the receipt and was admissible.

Appeal allowed. Decree of the High Court relating to the counterclaim set aside. Order of the district court on the counterclaim restored.

Cases referred to in judgment:

(1) *Indarjit v. Lalchand* (1895), 18 All. 168; (1900), 22 All. 370.

(2) *Pandurang v. Vishwanath* (1939), A.I.R. Nag. 20.

(3) *Chunni Bibi v. Basanti Bibi* (1914), 36 All. 537.

The following judgments were read by direction of the court:

Judgment

Crawshaw JA: The respondent (whom hereafter I shall for convenience refer to as "the hirer") sued the appellant company (which I shall hereafter refer to as "the owners") in the district court at Moshi in connection with a hire purchase agreement dated August 25, 1957, relating to an Austin van (which I shall hereafter refer to as "the Austin"). The hirer alleged that he had paid the instalments in full and that having exercised his option to purchase the Austin it had, under the terms of the agreement, become his property, and he asked for an order that the owners transfer it into his sole name, it previously having been in the joint names of himself and the owners, In the alternative he claimed Shs. 9,000/- damages for breach of contract, but this claim was not pursued. The owners maintained that the terms of the agreement had not been fully complied with and that the property in the vehicle had not passed to the appellant, and also counterclaimed in a sum of Shs. 2,800/-.

The owners were successful in the district court, the magistrate dismissing the hirer's claim and allowing the counterclaim. The hirer successfully appealed to the High Court, it being that ordered that his claim for "specific performance" be allowed and the owners' counterclaim be dismissed. Against this judgment the owners now appeal. The appeal is only against that part of the decision of the High Court which held that the appellant was not entitled to judgment on the counterclaim. The owners now concede, as Mr. Thornton who appeared for them stated, that in view of cl. 11 of the agreement the hirer was entitled to the Austin. The learned judge's finding on that issue therefore remains undisturbed.

As regards the counterclaim, the learned judge set out the facts as follows:

> "Under cl. 2 of the agreement the appellant was to pay a deposit of Shs. 4,400/- and instalments amounting in all to Shs. 9,744/-. Clause 11 provided that upon payment in full of Shs. 9,744/- the vehicle should become the appellant's sole property at his option. The appellant exercised this option on February 19, 1959, and it was not disputed that by that date the full amount of the instalments had been paid. What was in dispute between the parties concerned the payment of the deposit. When the hire purchase agreement was made the appellant did not in fact pay the full deposit of Shs. 4,400/- but paid Shs. 1,600/- and delivered to the respondents a second-hand car No. MG. 557 for which he was credited with the balance of the deposit, that is

to say Shs. 2,800/-. It was the appellant's case that this was a 'trade-in' and that the respondents agreed to accept this car in lieu of payment of Shs. 2,800/- in cash. The respondents on the other hand maintained that they had given only

> temporary credit for the car and that the responsibility for selling it rested with the appellant."

As the learned judge said,

> "If therefore the hire purchase agreement had been the only evidence in the case, the appellant would have been bound to succeed."

The learned magistrate, however, admitted extrinsic evidence and on the facts thereof, as he believed them, found that the owners had established their case. That was that the owners had given only temporary credit for the second-hand car (hereinafter referred to as "the Vanguard") and that as it had not been sold, the hirer still owed to the owners Shs. 2,800/- balance of deposit.

Referring to the ground of appeal that extrinsic evidence had wrongly been admitted to vary the terms of the written agreement, the learned judge said:

> "It was the appellant's case that he had paid the full consideration. He was entitled, if necessary, to show by reference to an oral agreement that this had been paid partly in cash and partly by delivery of the car, MG. 557, to the respondents. But what was the case for the respondents? Not that they had received no consideration, since they admitted having received both the Shs. 1,600/- and the car. Their case was that they received the car on the understanding that the appellant would find a buyer for it. They were thus seeking, by reference to an oral agreement, to add an entirely new term to the written contract. Section 92 debarred them from doing this."

The reference was to s. 92 of the Indian Evidence Act which, excluding the provisos, reads as follows:

> "When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from, its terms."

Clause 2 (*a*) of the agreement contains provision for the payment of deposit, it being stated that the hirer agreed to pay

> "A sum of Shs. 4,400/- on or before the date of signing this agreement (the receipt whereof the owners hereby acknowledge)."

Counsel for the hirer submitted to the magistrate that this was a clear admission and that evidence could not be led to deny or qualify it. The learned magistrate however said,

> "I do not agree, . . . for a receipt is an admission only and may be contradicted by extrinsic evidence."

In support he called in aid proviso (1) to s. 92, which reads:

> "Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law."

The learned magistrate observed there is

> "a weight of authority in English law that such extrinsic evidence is admissible to show that although a receipt has been given yet the money

has not been paid. I think that such evidence must in equity be admissible under the Indian Evidence Act."

I would add that there is also a weight of authority in Indian law to that effect.

The learned judge in referring to proviso (1) said:

"The subject would seem to be one on which, by reference to the authorities, argument and counter-argument could be continued indefinitely and one is therefore driven back to the words of the section itself. The difficulty in which the resident magistrate (quite excusably) found himself was in deciding which of the provisos to the section was applicable. Assuming (and I am not prepared to dissent from the resident magistrate's decision in this respect) that extrinsic evidence is admissible to contradict a written receipt, I think that it can only come under the heading of want or failure of consideration which is referred to in proviso 1. In Woodroffe's commentary on this proviso one finds the following (op. cit. at p. 660):

> "So also this section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from claiming that there was no consideration, or that consideration was different from that described in the contract.'

"Thus in *Pandurang v. Vishwanath*, A.I.R. 1939 Nagpur 20, it was held that where one party to a sale deed showed that he did not receive consideration, the other party could show that consideration was paid in full, not in cash but in kind by proving contemporaneous oral agreement to that effect."

As has earlier been said, the learned judge then went on to point out that the instant case was not one in which it was alleged that there had been no consideration by way of deposit (for Shs. 1,600/- had been paid in cash); what the owners sought to do, he said, was to add an entirely new term relating to that part of the consideration which was alleged to be represented by the Vanguard. He said,

"None of the provisos was applicable and there is no authority of which I am aware on which they could rely."

The question is, was the oral evidence admissible, and, if so, was the ora agreement that the property in the Vanguard was to pass to the owners, and the hirer be credited with Shs. 2,800/- against the deposit, or was it merely handed to the owners for sale on the hirer's behalf, the proceeds to be credited to the balance of the deposit due?

No objection seems to have been taken to the admissibility of the evidence at the time it was given; it was first taken on the final address by counsel. Mr. Reid for the hirer (neither he nor Mr. Thornton were engaged at the trial) has conceded that it was open to the parties to prove what was the true consideration, but not to prove a collateral agreement relating to the Vanguard, for that would be varying the express provisions of the written agreement. It seems to me however that only by hearing evidence of the nature of the transaction relating to the Vanguard could the court have come to a decision as to what the true consideration was. The hirer himself raised the matter in para. 4 of his plaint in this way:

"4. On execution of the above contract the vehicle No. 5012 was registered in the joint name of the plaintiff and the defendant and as first payment according the agreement the plaintiff delivered to the defendant

> plaintiff's vehicle No. MG. 557" (the Vanguard) "valued by both parties at Shs. 2,800/- and signed appropriate forms for the transfer of the said vehicle No. MG. 557 and delivered the signed forms to the defendant and further made a payment of Shs. 1,600/-."

The transaction is not very clearly pleaded, but presumably it is intended to mean that the Vanguard was traded-in against a credit of Shs. 2,800/-. It was not perhaps necessary for the hirer to mention at all in his pleadings how the credit arose, in view of the acknowledgment in the Hire Purchase Agreement of the receipt of the full Shs. 4,400/- deposit. In any event it was in my opinion open to the owners to show what the true consideration was, and whether there had been a failure of consideration; and with the greatest respect to the learned judge I would say that what he describes as a "new term to the written contract" was in fact an explanation of the conditional nature of the receipt – what the owners described as "temporary credit" pending the sale of the car.

It is not a case of varying the amount of the consideration, which would of course be varying a term of the contract, but rather of contradicting the fact, apparent on the face of the agreement, that the deposit had been received in full. In Woodroffe's Law of Evidence (9th Edn.) at p. 661 it is said in reference to the case of *Indarjit v. Lalchand* (1) (1895), 18 All. 168, affirmed on appeal in (1900), 22 All. 370,

> "Section 92 will not debar a party to a contract in writing from showing notwithstanding the recitals in the deed, that the consideration specified in the deed was not in fact paid as therein recited, but was agreed to be paid in a different manner."

In the case of *Pandurang v. Vishwanath* (2) (1939), A.I.R. Nag. 20 to which the learned judge referred, it was said by the court:

> "If then one party to a document can show that he did not receive the consideration specified though the document recites that he did, I can see no reason why the other party should not be allowed to show that the consideration was paid in full, not in cash but in kind. The two are ejusdem generis. That fact would, in the language of the proviso, 'entitle him to a decree or order'."

In the instant case this is virtually what happened. The owners proved that they did not receive the full cash deposit as specified in the document, though receipt was acknowledged therein, and the hirer sought to prove that the consideration was partly in kind. In an earlier case, *Chunni Bibi v. Basanti Bibi* (3) (1914), 36 All. 537 (referred to by Woodroffe with apparent approval) the plaintiffs had sold property to the defendant, the consideration in the sale deed being shown as Rs. 40,000. There was a recital in the deed that this sum had been received in full, but the plaintiffs alleged in their plaint that in fact only Rs. 21,726 had been received and that the balance was due. This surely is precisely what in effect the owners have pleaded in the instant case. In the *Chunni Bibi* case (3), the appeal court reviewed many earlier cases and held that in rebuttal of the plaintiff's claim, the defendant was entitled to produce oral evidence in support of her contention that the amount of the consideration specified in the sale deed was fictitious. The headnote reads:

> "If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to s. 92 of the Indian Evidence Act, 1872, and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real nature of the transaction."

In the instant case the hirer produced evidence in rebuttal to show that although only Shs. 1,600/- had been paid in cash, the balance of the consideration was the acceptance by the owners of the Vanguard, for which credit for Shs. 2,800/- was given.

I think perhaps some difficulty may have arisen in viewing the matter in the right light because of the manner of the pleadings. It was, strangely, the hirer who first pleaded in his plaint the nature of the transaction relating to the Vanguard, although it was not really then a part of his case; his claim relied on and was decided by the learned judge on the absolute provisions of cl. 11 of the agreement, irrespective of payment of the deposit. Had he not pleaded the transaction relating to the Vanguard the owners would not have had to plead it either, for their counterclaim rested on the basis that all the deposit which they had received was Shs. 1,600/. It would then have been for the hirer in his defence to the counterclaim to plead the transfer of the Vanguard as part consideration and for the owners in reply to have denied it. The matter was further complicated by the hirer and his witnesses first being called on to give evidence, not only of the hirer's claim but in denial of the counterclaim.

As to the evidence itself, the hirer said that in so far as he himself had dealt with the transaction he had done so with one, Sadrudin, who described himself as a broker employed by the owners, who told him that the owners would purchase the Vanguard for Shs. 2,800/-, as a result of which the Vanguard was delivered to them with a cheque for the balance of Shs. 1,600/-. He produced a statement of account from the owners dated December 31, 1957, which showed instalments paid and included an item "By C/N – G.S. 105 – Shs. 2,800/-". He admitted having seen a credit note but not one containing any condition that he was to find a buyer. On December 31, 1958, a statement of account was sent to him by the owners in which the credit for Shs. 2,800/- had been reversed, the sum being placed on the debit side, about which the hirer's son, Noordin, went and complained to the owners' manager, Mr. Vermeer.

Noordin had most to do with the transaction, although he says he asked Santock Singh, who apparently owned a garage, to negotiate with the owners on his behalf; Santock Singh said he received commission on business he introduced to the owners. Noordin says that eventually he and Santock Singh saw Vermeer who agreed to buy the Vanguard for Shs. 2,800/- and asked for a cheque for the balance of Shs. 1,600/-. A blank transfer form in respect of the Vanguard and the registration card were handed to Sadrudin on the owners' behalf. The transfer form, he says, was in blank for handing to such person as might buy the Vanguard, presumably he means in order to save a double transfer. He denies receiving the credit note exhibit "D" reading,

> "Agreed exchange allowance of your second-hand Vanguard van Reg. No. MG. 557. Sale of vehicle guaranteed by you – Shs. 2,800/-."

He says that the Vanguard was eventually returned to him on or about February 19, 1959, without notice, and the Austin was seized about the same time but later returned.

Santock Singh averred that Vermeer agreed to buy the Vanguard outright for Shs. 2,800/- and that he, Santock, said he would find a buyer for it, for which he would get commission. He says it was not part of the agreement that Noordin should find a buyer. He himself failed to provide one.

Vermeer said in evidence in relation to his negotiations with Santock Singh:

> "We eventually agreed upon a price of Shs. 2,800/- for MG. 557, which as I explained to Mr. Singh and P.W. 2 was not excessive – but I made it clear I could only allow temporary credit on the vehicle to make up for

> the full deposit. But that Shs. 2,800/- would have to be guaranteed by Messrs. Kanji.
>
> "Mr. Santock Singh offered to guarantee the sale of the vehicle which was very definitely not accepted and we gave a credit note with the remarks 'Sale of vehicle guaranteed by you'."

This credit note was said to be the original of exhibit "D". In cross-examination, Vermeer said:

> "The credit note original – I presume it was forwarded with the invoice and posted with it. We have not been able to find out exactly when it was forwarded. It is difficult after so long . . .
>
> "I can only presume that the credit note was forwarded, but as the invoice reached him I presume the credit note did."

As to this the learned magistrate said:

> "about the copy of credit note, Mr. Vermeer has been unable to prove that it was received by the plaintiffs but he said that in 999 cases out of 1,000 it is sent out with the invoice regarding the new vehicle and it is reasonable to assume that this is what happened in this case since the invoice did reach the plaintiff but moreover the credit note is clearly referred to in the first statement of account (exhibit B)."

Mr. Reid objected that this was not sufficient proof of the despatch of the credit note, but for reasons which I shall shortly give, I do not think it is necessary to decide this. Vermeer said in cross-examination:

> "It was definitely not agreed we would buy the second-hand vehicle for Shs. 2,800/-. It was part exchange but only on the basis I have explained.
>
> "I made it clear that the Shs. 2,800/- would have to be produced by someone . . .
>
> "We might have taken the vehicle outright if the price had been right but we knew we could make nowhere near Shs. 2,800/-. We would have offered no more than Shs. 1,500/- . . .
>
> "We would have allowed about Shs. 1,500/- but no figure was mentioned.
>
> "Shs. 2,800/- was demanded because we were not interested in taking the vehicle at our own risk."

Sadrudin says that before the deal was closed Noordin said to him he had a purchaser for Shs. 2,800/- for the Vanguard and that he, Sadrudin, then took him to Vermeer. He says Vermeer told Noordin that he was not prepared to take the Vanguard in exchange, but that if he could find a purchaser he would credit him with Shs. 2,800/-. He produced exhibit "K" which was a list of second-hand cars in possession of the owners, and which alongside the Vanguard in question had the words "guaranteed by client". Mr. Reid objected to the admissibility of this list and I think he is right. Sadrudin said:

> "I produce a list of second-hand vehicles which we had in our possession dated September, 1957."

He said a list was prepared every month. There is no evidence however where the information for compiling the list was obtained, or by whom, and I think it cannot be regarded as evidence of what it contains. He says they would not have accepted Santock Singh's guarantee as he was already indebted to the owners in a large sum. He explained that the Vanguard was left with the owners for sale as they could have arranged hire purchase terms if a purchaser should require them.

The learned magistrate reviewed the evidence in detail and came to the conclusion that Santock Singh was "trying to run with the hare and hunt with the hounds", and that he had probably to some extent misled Noordin; it is clear that he did not regard Santock Singh as a reliable witness. On the other hand he accepted the evidence of the defence witnesses. In doing so he may wrongly have admitted the credit note exhibit "D" and the list of second-hand cars exhibit "K", but it was not on these that he relied, for he said

> "I accept Mr. Vermeer's evidence of the arrangements made concerning this old second-hand vehicle."

Vermeer's evidence as to this did not depend on the credit note or list of second-hand cars, but on the verbal agreement which he says he himself entered into. An appeal court will not lightly interfere with findings of fact by the trial court, especially where the credibility of witnesses is concerned. The trial court has the recognised advantages of hearing and seeing the witnesses give their testimony, and there was positive and direct evidence on which the learned magistrate could come to the conclusions he did on the counterclaim, and I would not disturb them. The learned judge did not find it necessary to consider the finding of fact, for he held that in law the evidence was inadmissible. It would not however be any advantage merely to reverse his decision as to the admission of the extrinsic evidence and to remit the case to him for a decision on the facts as found by the learned magistrate, for this court is in as good a position as he would be in that connection.

For the reasons given I would allow the appeal with costs. I would set aside that part of the decree of the High Court which relates to the counterclaim and would restore the order of the magistrate's court thereon. I would also set aside that part of the High Court decree which relates to costs and would substitute an order that in the court of first instance the owners pay the costs of the hirer's claim, and the hirer pays the costs of the owners' counterclaim; and that in the High Court each party pay its own costs.

Sir Alastair Forbes VP: I agree. There will be an order in the terms proposed by the learned justice of appeal.

Law J: I also agree.

Appeal allowed. Decree of the High Court relating to the counterclaim set aside. Order of the district court on the counterclaim restored.

For the appellant:
Fraser Murray, Thornton & Co., Dar-es-Salaam
R. S. Thornton

For the respondent:
Reid & Edmonds, Moshi
A. Reid

The Commissioner of Lands v Sheikh Mohamed Bashir
[1960] 1 EA 818 (CAN)

Division: Court of Appeal at Nairobi

Date of ruling:	4 October 1960
Case Number:	76/1957
Before:	Sir Kenneth O'Connor P, Gould Ag VP and Crawshaw JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Rudd, J.

[1] Landlord and tenant – Crown lease with covenant that building should be erected by specified time – Relief against forfeiture granted – Appeal – Change in financial position of covenantor pending appeal – Whether appellate court entitled to hear evidence relative to such change – Crown Lands Ordinance (*Cap.* 155), *s.* 83 (*K.*) – *Conveyancing Act*, 1881, *s.* 4 *and s.* 14 – *Indian Evidence, Act* 1872, *s.* 35 – *Rules of the Supreme Court* (*Appeals*), 1955, *O. LVIII*, *r.* 4, *r.* 9 – *Eastern Africa Court of Appeal Rules*, 1954, *r.* 74.

Editor's Summary

The respondent, a lessee from the Crown of lands granted to him subject to a covenant requiring him to erect certain buildings thereon within a specified time, defaulted in the performance of the covenant as a result of which the Crown brought proceedings in the Supreme Court for forfeiture and other relief. That court found that the lessee had in fact defaulted in the performance of his covenant but granted him relief against forfeiture upon terms affording him a further opportunity to comply with the covenant. Upon appeal against the grant of such relief based on alleged want of jurisdiction and other grounds, the Court of Appeal, without determining the remaining questions comprised in the appeal, held that in the circumstances of the case the Supreme Court had no jurisdiction to relieve against forfeiture. This decision was reversed by the Privy Council which held that the Supreme Court had full jurisdiction to relieve against forfeiture and remitted the matter to the Court of Appeal to determine the remaining questions raised by the appeal. Upon the action coming again before the Court of Appeal for disposal of such remaining questions the respondent sought to adduce by affidavit evidence of his ability to comply with the building covenant, including evidence of matters which had occurred since the hearing in the Supreme Court.

Held –

(i) although the position of the respondent was such that it would be unfair to the appellant that relief should be granted to the former except upon terms designed to ensure that the respondent's financial ability to comply with the building covenant should be demonstrated at the earliest possible moment, nevertheless the respondent should not be deprived of the opportunity originally afforded to him by the Supreme Court order of demonstrating that ability;

(ii) the respondent was entitled, with a view to such demonstration, to adduce evidence of matters occurring since the hearing in the Supreme Court;

(iii) the appeal should be allowed to the extent only that the terms under which the relief against forfeiture would be granted should be made more strict in favour of the appellant.

Appeal allowed only by variation of the terms of the Supreme Court order.

[**Editorial Note:** The decisions of the Court of Appeal and Privy Council referred to above are reported in [1958] E.A. 45 (C.A.) and [1959] E.A. 1018 (P.C.) respectively.]

Cases referred to in judgment:

(1) *The Commissioner of Lands v. Sheikh Mohamed Bashir*, [1958] E.A. 45 (C.A.).

(2) *Sheikh Mohamed Bashir v. The Commissioner of Lands*, [1960] 1 All E.R. 117; [1959] E.A. 1018 (P.C.).

(3) *Mohindra v. Mohindra* (1955), 22 E.A.C.A. 214.

(4) *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board*, [1912] A.C. 788.

(5) *Krakauer v. Katz*, [1954] 1 All E.R. 244.

(6) *Quilter v. Mapleson* (1882), 9 Q.B.D. 672.

(7) *Hyman v. Rose*, [1912] A.C. 623.

(8) *Dedhar v. Commissioner of Lands*, [1957] E.A. 104 (C.A.).

(9) *Barrow v. Isaacs & Son*, [1891] 1 Q.B. 417.

The following judgments were read:

Judgment

Gould Ag VP: By a grant dated January 8, 1953, His Excellency the Governor granted to the respondent a town plot in Nairobi, to hold for the term of ninety-nine years from September 1, 1952, subject to payment of rent and also subject to certain "special conditions" of which the following is the first:

> "1. The grantee shall erect complete for occupation within thirty-six months of the commencement of the term an hotel building of approved design on proper foundations constructed of stone burnt-brick or concrete with roofing of tiles or other permanent materials approved by the Commissioner of Lands and shall maintain the same (including the external paintwork) in good and substantial tenantable repair and condition. The building shall be of at least six storeys and the cost of construction shall be at least shillings seven million."

On November 16, 1955, the appellant filed a plaint in the Supreme Court of Kenya alleging non-compliance with special condition No. 1, and claiming possession by reason of breach thereof, or alternatively, if the special condition should be held to be a covenant and not a condition, a declaration that the lease should be forfeited. The respondent, by his defence, contended (inter alia) that the special conditions were, and were to be construed as, covenants, admitted that he had erected no buildings on the land by September 1, 1955, and prayed that he might be relieved against forfeiture under s. 83 of the Crown Lands Ordinance (Cap. 155) upon such terms as might appear just.

Judgment in the action was given on March 4, 1957, and the learned trial judge held that the special conditions in the lease were covenants within the meaning of s. 83 of the Crown Lands Ordinance, and that, pursuant to that section he had power to relieve against forfeiture, being guided by the principles of English law as set out in s. 4 of the Conveyancing Act, 1881, and the doctrines of equity. He proceeded to grant relief upon conditions which he settled after hearing argument thereon.

The appellant appealed to this court and it will be convenient to set out the grounds of appeal as set out in the memorandum, with the exception of grounds Nos. 5, 6 and 7, which were not pursued:

"1. That the learned judge had no jurisdiction to make the order the subject of this appeal.

> "2. That on the facts proved or admitted at the trial the learned judge was wrong in holding that this was a case in which relief should be granted from forfeiture.
>
> "3. That the learned judge erred in granting relief on terms which were unjust to the plaintiff.
>
> "4. That the terms on which relief has been granted cannot be complied with".
>
> "8. That the learned judge was wrong in law in refusing to admit as evidence the estate duty affidavit of the estate of Sheikh Fazal Ilahi, deceased."

On that appeal it was held by this court (as reported in [1958] E.A. 45 (C.A.)) that the grant in question was a lease, but that special condition No. 1 was not a covenant, and that consequently the decree purporting to grant relief against forfeiture was made without jurisdiction; orders were made in favour of the appellant for possession and mesne profits. In the circumstances this court did not find it necessary to consider grounds 2,3,4 or 8 of the memorandum of appeal. The respondent then appealed to the Privy Council, and their lordships, allowing the appeal ([1959] E.A. 1018 (P.C.) and [1960] 1 All E.R. 117) held that special condition No. 1 was a covenant and that the learned judge in the Supreme Court, did have jurisdiction to grant relief. Their lordships then referred to the questions still outstanding and, after discussing the law applicable to question of granting relief against forfeiture, remitted those questions to this court for hearing and determination. The following passages from their lordships' judgment, at p. 127 and p. 128 are relevant:

> "There remains the question whether, given the jurisdiction to grant relief, the learned judge was right in holding that this was a case in which relief from forfeiture should be granted and, if so, whether the terms on which he granted relief were terms on which he could properly grant it in the exercise of his discretion. This aspect of the case was included in grounds 2, 3 and 4 of the Commissioner's memorandum of appeal to the Court of Appeal for Eastern Africa, but, as that court decided in his favour on ground 1 (want of jurisdiction), it was unnecessary for it to consider grounds 2, 3 and 4, and it refrained from doing so. In connexion with these grounds, the Commissioner applied to the Court of Appeal to adduce further evidence bearing on the question whether or not it would be just to grant relief, and tending to show that the present appellant was no longer financially able to build a hotel."
>
>
>
> "This means, in effect, that the court is to be guided (which does not mean necessarily bound) by the principles laid down by s. 14 (2) of the Conveyancing Act, 1881, and the decisions of the English courts under that section, so far as applicable to a case under s. 83, which (apart from requiring a bare notice of the breach) does not include the preliminary steps prescribed by s. 14 (1) as necessary in order to make the forfeiture enforceable; and that the court should also have regard to the doctrines of equity."
>
>
>
> "For the reasons above stated, their lordships are of opinion that this appeal should be allowed, and the order of the Court of Appeal for Eastern Africa dated March 24, 1958, should be discharged, and that the case should be remitted to the Court of Appeal for Eastern Africa to hear and determine the grounds of appeal contained in 2, 3 and 4 of the Commissioner's memorandum

> of appeal to that court, and also the Commissioner's application to adduce fresh evidence bearing on these grounds."

Upon the questions so remitted argument has now been heard. It is to be observed that, in terms, their lordships' order related only to grounds 2, 3 and 4 in the memorandum of appeal, but in argument, counsel for the appellant has sought to rely upon ground 8 also. Counsel for the respondent contended (inter alia) that this court was precluded from considering that ground by the terms of the order of their lordships. In order to dispose of it I will deal with this matter now. I should not have thought that it was their lordships' intention to eliminate ground 8 from the matters to be considered by this court as it is ancillary to ground 2; a decision of ground 8 in manner favourable to the appellant would add in some small measure to the evidence which is relevant to the consideration of ground 2. I do not need to express a concluded opinion upon the question whether it is open to this court, in view of the terms of their lordships' order, to consider ground 8 as I am of opinion that it is a ground which lacks substance and therefore must be resolved against the appellant. What happened in the court below was this. During the cross-examination of the respondent reference was made to the will of his late father Sheikh Fazal Ilahi. The respondent claimed to be entitled to a portion of the estate (whether under the will or as an heir under Mohamedan law is not material to the present question) and is recorded in the learned judge's notes as having given the following answers to counsel:

> "Sheikh Abdul Ghafur tried to get letter of administration, I entered caveat to the application. I do not know that he swore an affidavit for estate duty."

The record then continues:

> "Solicitor: Wanted to ask witness if the affidavit was true?
>
> "Court: I will not allow the affidavit to be proved in this way. I will allow facts apart from affidavit to be put to the witness, but fact that they are on this affidavit are irrelevant."

As I read that passage the learned judge was not ruling upon the admissibility of the affidavit as such, but was saying that it could not be proved by asking the witness if the contents were ture. Counsel for the appellant relied in this court upon s. 35 of the Indian Evidence Act, which reads:

> "An entry in any record, official book or register kept in any State or at sea, or in any foreign country, stating for the purpose of being referred to by the public, a fact in issue or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which record, book or register is kept, is itself deemed to be a relevant fact."

If counsel for the appellant at the trial wished to tender the affidavit in evidence as falling within this section it was for him to call evidence showing that it comprised

> "an entry in a public or other official book, register or record . . . made by . . . any other person in performance of a duty specially enjoined by the law . . . "

If it did so (and I express no opinion on that question) that fact had to be proved before the document could be admitted – it did not prove itself. Nor could it be proved as a relevant fact under s. 35 by cross-examining the respondent as to the truth of its contents. The learned judge made no ruling that the affidavit would not be received if properly proved and the appellant did

not seek to lead any other evidence to prove it. In my opinion, therefore, in the circumstances of the case, the learned judge did not make any incorrect ruling in law.

Among the matters remitted to this court by their lordships was an application by the appellant to adduce further evidence bearing on the grounds of appeal which were remitted. Notice of intention to make that application was given on behalf of the appellant to the registrar of this court and to the respondent by letter dated January 24, 1958. It was an application to prove by affidavit certain matters alleged to have occurred subsequently to the hearing of the case in the Supreme Court, and relating to the financial position of the respondent. Copies of the proposed affidavits were forwarded with the letter of January 24, 1958, but prior to the present hearing before this court, counsel for the appellant gave notice that, owing to the length of time which had elapsed, it had been found necessary to prepare fresh affidavits "to cover matters which have taken place since,". Whether this was intended to be a new application or an amendment of the original one is rather obscure, but in any event, when leave was sought to adduce the evidence before this court, counsel for the respondent objected upon two grounds, with which I will now deal.

In the first place it was argued (as it was in the case of ground 8 of the memorandum of appeal) that this court was limited to what had been specifically remitted to it by their lordships of the Privy Council, and could therefore hear only the original application. I would not so interpret their lordships' order. This court was required to "hear and determine" the grounds of appeal numbered 2, 3 and 4, in the memorandum, and the result was that these grounds were to be argued and considered on appeal for the first time. That could only mean in my opinion, that this court could entertain any application relative to the proper and effective consideration and disposal of those grounds of appeal. The application to adduce fresh evidence was remitted because it related to those grounds and was undisposed of – that does not limit the power of this court to deal with the application in any way which it has power to deal with any application incidental to an appeal – to permit it to be amended if necessary – or to accept a new application. The essence of the matter is that the order of their lordships was not creative of jurisdiction in this court, but was an intimation from a superior court that it was now, in view of the decision of that court, necessary for this court to hear and determine those portions of the original appeal which had not yet been disposed of. If it is right at all for this court to consider evidence of events subsequent to the trial in the Supreme Court, I would not ascribe to their lordships an intention to limit that consideration to those events which occurred prior to January, 1958, when the original application was made, and to exclude consideration of events which may have occurred in the supervening two and a half years.

The next objection by counsel for the respondent rested upon the argument that evidence of matters arising subsequent to the trial was rarely admitted, and must be such as would have a determining, or at least an important, influence on the result of the case. Counsel for the appellant, on the other hand, argued that as regards occurrences after the date of the trial, it was sufficient to show that the proposed evidence was relevant. If it was not, of course, it would be inadmissible in any event. It would appear that the rule of this court relative to the admission of new evidence follows closely the wording of the English rule as it stood prior to the making of the Rules of the Supreme Court (Appeals), 1955. The present rule in England is O. 58, r. 9 (2) which reads:

> "(2) The Court of Appeal shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner:

> "Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds."

A fair contruction of that rule would be that, although the requirement of "special grounds" does not apply where the evidence sought to be adduced relates to matters occurring after the trial, nevertheless the result of the first part of the rule is that the whole power to receive further evidence is discretionary; the discretion relates to matters both prior and subsequent to trial. The rule in its original form appeared as O. 58, r. 4, of which the following is the relevant portion (1956 Annual Practice):

> "4. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without special leave of the court."

Rule 74 (1) to (3) of the Eastern Africa Court of Appeal Rules, 1954, is as follows:

> "74(1) Appeals to the court shall be by way of rehearing, and the court shall have all the powers and duties, as to amendment or otherwise, of the superior court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.
>
> "(2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> "(3) Upon appeals from a judgment, decree or order, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the court."

With the rule in this form, there seems less justification for saying that the provision as to discretion is an overriding one, which extends to interlocutory applications and matters which have occurred since the date of the decision under appeal. If evidence in those two cases may be given without leave it is difficult to see how the discretion could be exercised. That position was accepted by this court in *Mohindra v. Mohindra* (3) (1955), 22 E.A.C.A. 214, of which it will be sufficient to set out a portion of the headnote:

> "The evidence sought to be adduced related to something that had occurred after the date of the decision from which the appeal was brought, and, as such, might be given in evidence without leave under r. 74 (2) aforesaid, it being something which had only come to the appellant/applicant's knowledge since the trial as he could not, until then, know what note the trial judge was making of what occurred thereat. It is nevertheless a sound practice that a party proposing to adduce evidence on a point such as in the instant case should give notice to the opposite party of his intention so to do."

Counsel for the appellant called attention to a passage from the speech of Lord Robson in *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* (4), [1912] A.C. 788, at pp. 807-8, where he said:

> "Under O. LVIII, r. 1 and r. 4, an appeal to the Court of Appeal is by way of rehearing, and, in dealing with questions before it, the court has full discretionary powers to receive further evidence even as to matters which have occurred after the decision appealed from, if, upon special grounds, it thinks such evidence material to be considered."

At that time the English rule was in the terms I have quoted above from the 1956 Annual Practice. I do not consider, however, that this passage should be treated as authoritative on the question before this court, both because it is doubtful whether his lordship intended his reference to special grounds to apply to matters occurring after the trial, and because the admissibility of the affidavits then in question does not appear to have been contested in the argument. There is, however, a decision of the Court of Appeal in England, given by Denning, L.J., for the court, in *Krakauer v. Katz* (5), [1954] 1 All E.R. 244, which was not referred to by counsel before this court. It has reference to O. 58, r. 4, in its earlier form, and reads, at p. 245:

> "A preliminary point has arisen whether in an interlocutory matter this court can or should admit further affidavits on behalf of the defendant. It was suggested that an appellant on an interlocutory matter has a right in this court to adduce further evidence by affidavit. I am clearly of opinion that he has no such right. It is a matter of discretion in this court whether or not further evidence by affidavit should be admitted.
>
> "In exercising our discretion in this case, there is an overwhelming obstacle in the way of the defendant. At the hearing below the judge in chambers asked his counsel whether he wanted to answer the affidavit of the plaintiff and whether he wanted an adjournment so to do, and his counsel said that he did not. Counsel thus took his stand on the evidence as it then stood before the judge; and it would be contrary to the right exercise of our descretion if we were to allow counsel for the defendant to go back on that position and to introduce further evidence in this court.
>
> "We must, therefore, proceed with the case on the evidence as it stood before the learned judge."

Although there is no indication in that ruling of the way in which the court approached the question of construction before it, it is a ruling by high authority, and is apparently in conflict with the view taken by this court in *Mohindra v. Mohindra* (3), though in that case the specific point in question was not argued. I do not think that it is necessary in this case to come to a final conclusion as to this apparent conflict, as, if there is an overriding discretion, I am satisfied that its use is not limited, when facts occurring subsequently to the decision under appeal are being considered, to the same extent as it is when the evidence tendered is of matters precedent to that time. The rule that the new evidence could not have been discovered by reasonable diligence at the time of the trial, is of course inapplicable when the facts have occurred subsequently. That fact, together with the negation in r. 74 (1) to (3) of the necessity for special grounds in such cases, imports in my view, a discretion to be exercised only in accordance with the ordinary principles upon which a judicial discretion is exercisable; it does not appear at the moment to be limited specifically by authority. I do not think that it is a necessary requirement that the evidence should be evidence which would be probably decisive of the case, though, if the discretion is to have any value, it would be futile to admit evidence of little or no weight.

The evidence sought to be adduced in the present case related to the financial position of the appellant, and it was necessary to decide, quite apart from any question of weight or cogency, whether it was relevant to the questions which this court had before it. Put in another way, the question was whether this court was bound to decide the appeal upon the state of facts as presented to the learned trial judge, or whether subsequent events could be permitted to influence the result. The case of *Quilter v. Mapleson* (6) (1882), 9 Q.B.D. 672, is a leading authority for the proposition that a change in the law between hearing in the court of first instance and appeal will be given effect to on appeal, where (as is the present case) the appeal is by way of rehearing. In *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* (4), the House of Lords extended the principle by applying it to a change in the state of facts occurring between first hearing and appeal. That was a case in which an injunction had been granted by the court of first instance, and, was discharged by the Court of Appeal upon proof of changed facts. The House of Lords, though it varied the order of the Court of Appeal, held that it had jurisdiction to discharge the injunction. Lord Gorell said at pp. 801-2 of the report:

> "Under the Judicature Acts and Rules the hearing of an appeal from the judgment of a judge is by way of rehearing, and the court has power to give any judgment and to make any order which ought to have been made, and to make such further or other order as the court may think fit (see O. LVIII, r. 1 and r. 4).
>
> "The court also has power to take evidence of matters which have occurred after the date of the decision from which the appeal is brought (see O. LVIII, r. 4).
>
> "It seems clear, therefore, that the Court of Appeal is entitled and ought to rehear the case as at the time of rehearing, and if any authority were required for this proposition it is to be found in the case of *Quilter v. Mapleson*."
>
>
>
> "In my opinion the Court of Appeal was entitled to make such order as the judge could have made if the case had been heard by him at the date on which the appeal was heard."

That case appears to be decisive of the point now under consideration, particularly when it is considered that the present case, like *Attorney-General v. Birmingham, Tame, and Rea District Drainage Board* (4), involves the grant or withholding of an equitable remedy. The ability of the respondent to remedy his failure to carry out the requirements of special condition No. 1 was a matter which the learned trial judge had to consider in deciding whether to grant relief; his ability to do so still remains a question and it would be futile now to uphold or renew the relief granted over three years ago, if it is presently clearly shown that the respondent is financially unable to comply with the conditions imposed and to discharge the entailed obligations.

For the reasons I have given the court considered that the evidence tendered was relevant, and, though it was not of opinion that it was necessarily a determining factor, it considered that it was of weight sufficient to entitle it to consideration, and ought to be admitted as a matter of discretion. It so ordered. I will deal later with the content of the additional evidence.

There was no material difference between the views of counsel for the respective parties as to the law to be applied by this court. As was laid down in the passage of the judgment of the Privy Council above quoted it is to be guided, though not bound, by s. 14 (2) of the Conveyancing Act, 1881, and the doctrines of equity. Section 14 (2) reads:

> "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit."

In discussing this section Earl Loreburn, L.C., said in *Hyman v. Rose* (7), [1912] A.C. 623 at p. 631:

> "I desire in the first instance to point out that the discretion given by the section is very wide. The court is to consider all the circumstances and the conduct of the parties. Now it seems to me that when the Act is so express to provide a wide discretion, meaning, no doubt, to prevent one man from forfeiting what in fair dealing belongs to some one else, by taking advantage of a breach from which he is not commensurately and irreparably damaged, it is not advisable to lay down any rigid rules for guiding that discretion."

This passage was relied upon by this court in *Dedhar v. Commissioner of Lands* (8), [1957] E.A. 104 (C.A.), which was referred to by their lordships in the Privy Council in the present case. Mr. Dingle Foot, for the respondent in the present case, laid emphasis on the fact that the discretion given by the section is a very wide one and is to be exercised, in the first place at any rate, by the trial judge. It was common ground between counsel that the effect of the authorities as to the approach of an Appeal Court to an appeal from an order made in the exercise of a judicial discretion is correctly expressed in the 1960 Annual Practice, p. 1653, as follows:

> "There are many authorities for the proposition that an appeal will not be entertained from an order which it was within the discretion of the judge to make, unless it be shown that he exercised his discretion under a mistake of law, or in disregard of principle, or under a misapprehension as to the facts; or that he took into account irrelevant matters or failed to exercise his discretion, or that his order would result in injustice: and the court will assume that the judge properly exercised his discretion unless the contrary is shown."

It was not the submission of counsel for the appellant in the present case that the learned trial judge had acted upon any wrong principle, but that he had failed to appreciate certain facts, had considered irrelevant matters, had made one error of law and that injustice would result from the order made. Counsel submitted also that the principles expressed in the passage from the Annual Practice quoted above, were applicable to ground 2 of the memorandum of appeal, but that in so far as the evidence before the trial court had been supplemented by other evidence before this court, it was necessary for this court, in considering ground 4 to assess for itself the position as it stands today. I think that this approach is in accordance with the decision in *Attorney-General v. Birmingham, Tame and Rea District Drainage Board* (4), as applied to the circumstances of this case; it would be to make a distinction without a difference to say that this court should endeavour to assess the effect that the additional evidence might have had upon the mind of the learned trial judge, had it been before him, and should make the order which it considers he would then have made.

I come now to ground 2 of the memorandum of appeal which embodies a submission that the learned trial judge was wrong in holding, upon the evidence before him, that the case was one in which relief should be granted. Mr. Slade, in opening his argument for the appellant on this ground, placed stress upon the nature of the covenant with which the respondent had failed to comply. A building covenant, he submitted, was unlike an ordinary covenant which ran throughout a lease for the protection of the lessor – it was more in the nature of a condition precedent. Counsel referred to evidence which had been given, which showed that the grant had been made at a very low stand premium and at a nominal rental for a considerable period, because the Government considered that the provision of a first-class hotel in the area a matter of urgency. Counsel for the respondent contended that the policy of the Government was hardly a matter for either court, and that as the parties had contracted, their intention and the terms of their relationship must be gathered from the terms of the grant. I am not inclined to agree that, in a matter of equitable relief, as distinct from the interpretation of a contract as such, a court is so limited, but the question is immaterial, for it is obvious from the premium and rent charged for a valuable site in the centre of Nairobi that great importance must inevitably have been attached to the building covenant. It is also quite apparent that the nature of the covenant broken is one of the factors to be taken into account when the question of relief is under consideration, but I see no reason to believe that the learned trial judge failed to appreciate or give due weight to the importance or the basic nature of the building covenant in the present case. A covenant to build an hotel worth at least £350,000 is a matter the importance of which speaks for itself and can hardly be overlooked.

Before coming to the real issue upon which the learned trial judge based his decision to grant relief (i.e. questions arising out of the delay in the preparation, presentation and approval of plans) counsel dealt with two subsidiary matters. The first arose out of a plea by the respondent in this defence that the appellant had failed to give him vacant possession of the plot until July 24, 1954, or alternatively until October 28, 1955. The finding of the learned trial judge on this matter is expressed in the following passage from his judgment:

> "As far as the present plot is concerned, the emergency had an effect, in so far as certain temporary buildings on the plot were used by the Crown with the defendant's consent up to June 1953, and they were later requisitioned from October 1953 and not returned to the defendant until the end of May 1954 at the earliest. The defendant cannot claim any relief on the ground of the occupation by the Crown with his consent up to June 1953, because it is clear from the correspondence that he gave his consent to that occupation on the basis that it did not interfere with his building plans. As regards the period during which premises on the plot were requisitioned, the defendant had not got his plans approved and passed and so was not in a position to start building before the premises were handed back to him but there would not have been time for him to have completed his building in time in accordance with the special condition even if he had been in a position to start building on June 1, 1954. the delay in getting the building plans passed was due to changes of plan on the part of the defendant and to his failure to get approval of designs and plans which he submitted at various times."

It is quite clear from this passage that the learned trial judge was not influenced, as against the appellant's case, by anything arising out of this question of possession. There is therefore nothing in it which can assist the appellant in his appeal. Counsel for the respondent was able to point to passages in the correspondence in which the respondent had inquired when the temporary buildings would be vacated and finally agreed to buy them subject to their

being vacated – he related this to the question of the conduct of the parties. To my mind the learned judge was quite right in treating the matter as a completely neutral element, as it has never been suggested that the preparation of the plans was delayed thereby, and the plans were never approved within the time allowed.

The second subsidiary matter related to an encroachment over the plot in question by the eaves of a building on adjoining land belonging to the appellant, to the extent of some six inches or a little more. The building was demolished when attention was called to the matter and it is quite clear that the respondent was never impeded by this factor from completing his plans or in any building operations. The learned judge did not refer to the question in his judgment and it is not now material.

Counsel for the appellant then proceeded to his main argument touching the conduct of the parties and all other surrounding circumstances. There is no dispute that the real task before the learned trial judge was the examination of the causes of the delay in complying with special condition No. 1 and that the examination centred in the main around the question of preparation and approval of building plans. I will endeavour, as briefly as possible to race the history of the matter from the correspondence augmented by some references to evidence given viva voce at the trial.

The grant, as has been seen, was dated January 8, 1953, but the term ran from September 1, 1952, for ninety-nine years. The thirty-six month period stipulated for in special condition No. 1 also ran from September 1, 1952. The invitation for tenders for the plot was published on April 8, 1952, and called (inter alia) for a statement indicating the amount of capital available for immediate development purposes with the banker's letter in support. The respondent tendered on July 7, 1952, forwarding plans prepared by architects. This tender was accepted on August 14, subject to certain amendments to the sketch plans. The respondent acknowledged the acceptance on August 15, and on September 18, the appellant made a formal offer of a grant which the respondent accepted on October 8. As from October 8, 1952, therefore the respondent was in a position to proceed with his plans.

The next reference to the plans in the correspondence is contained in the respondent's letter of April 30, 1953, in which he said:

> "The plans of the buildings are just ready for the final touch-up, and as soon as they are completed, they will be sent to the Municipality. Once the plans are approved, I have to start the building immediately, as the site is for a luxury hotel, and facilities for which Nairobi does not possess at present. I would therefore suggest that arrangements could be made for these premises to be vacated at the beginning of June."

There followed correspondence concerning the temporary buildings and on August 11, 1953, the appellant wrote saying that no building plans had been received by him or the City Council, and asking for information as to progress. A reminder was sent to the respondent on November 10, 1953, and on December 24, 1953, a reply was sent, the text of which I will set out in full:

> "I thank you for your letter dated November 10, Ref. 42492/11/70.
>
> "I thought it was sufficient for me to send a copy of the notice served on me by the officer-in-charge, Extra Provincial District, but from the face of this correspondence, I now gather that you are inquiring about the plans.
>
> "The plans of the new hotel site were more or less complete and ready for submission to Council, which were, in fact, prepared with the advice of the Council.

> "It was only last month when we realised that the Council had stopped Lugard Avenue going further than the hotel site, though orginally, this avenue ran further, towards the law courts.
>
> "In the circumstances, I have given instructions to my architect, Mr. Hill, to prepare a new entrance for the hotel, from Government Raod, instead of from Lugard Avenue.
>
> "It is regretted that Mr. Hill could not complete his plan before December 18, but he will now complete on his return from South Africa, during the middle of January, and as soon as he completes it, we will submit our final drawing to the Council."

There is general agreement that the change of intention indicated in this letter was the root cause of much of the delay. It is to be observed, however, that when the letter was written some fifteen months had already elapsed since the respondent became entitled to proceed, and no plans of any kind had been submitted. I will refer later to the question of Lugard Avenue.

Some time between December, 1953, and April 12, 1954, the architects submitted revised plans. The evidence of Mr. S.C. Lock, City Planning Officer, was to the effect that these plans contained less detail than the "tender" plans (i.e. they were still in the category of sketch plans) and that they contained many basic departures from the tender plans. The major changes were the omission of basement car parking, the introduction of fifty small shops approached from arcades instead of twenty-three shops on the ground floor only and a change of entrance from Lugard Avenue to Government Road. Mr. Lock, in a letter dated April 12, 1954, commented adversely on these features and a number of other details and added the following postscript to his letter:

> "In view of the fact that the design is a major departure from the tender design, I feel that it would be advisable for you to obtain the approval of the Department of Lands in writing to the principle of their acceptance of amendments before the City Council is asked for further comment."

In a letter dated April 24, 1954, and also in subsequent correspondence the appellant indicated that any modifications of the tender plans agreed upon between the Nairobi City Council and the respondent would be acceptable to the appellant.

These plans were returned to the repondent for reconsideration. They were revised and re-submitted in June, 1954 and, according to the evidence of Mr. Lock, they were then generally accepted in principle, and in July, 1954, were approved by the Town Planning Committee subject to approval by the Department of Lands and to a condition that the building be put up as a whole, without a long wait between the erection of the shops and the completion of the hotel.

The next relevant letter is one from the appellant to the respondent, dated July 23, 1954. In it, after complaining of a newspaper report quoting a statement by the respondent that he still had not received possession of the plot from the Crown, the appellant continued:

> "As you are aware, you were granted this site on extremely advantageous terms and great importance is attached by the Government to the development of this plot in connection with the development of the whole of the City Square area.
>
> "You are also aware that the time for compliance with the building covenant expires on August 31, 1955, and unless the Government changes its policy there will be no extention of the period allowed for building.
>
> "I am informed that your building plans have only recently been submitted and have not yet been approved by the Nairobi City Council

> so that it would appear to be a physical impossibility now to comply with the building covenant. Accordingly, I suggest that while the City Council is considering the plans, you should submit to me for onward transmission to the Government, a full statement of your position and proposals in respect of the development of this site so that the Government can take a decision now as to whether or not it is prepared to grant an extension to the building covenant, and upon what terms, before you incur any expense in constructing foundations or any other work on the site."

Mr. Lock said in evidence that the reference to the recent receipt of the plans was an error, but there can be no doubt of the correctness of the opinion that compliance with the building covenant was already a physical impossibility. The matter was still only at the sketch plan stage and working drawings had still to be submitted and approved before building could commence. A reminder of the request for a full statement of the respondent's position and proposals was sent to him on August 18, 1954, and again in a letter of September 3, 1954, which concluded with the paragraph:

> "If I do not receive an early reply to this letter containing a full explanation for the delay in development, together with reasonable proposals for its speedy development, you will appreciate that I shall be unable to recommend that any extension should be granted in respect of the building period."

On September 11, 1954, the respondent sent a reply in which he dealt at length with the dispute over the question of vacant possession (a subject which I have discussed earlier in this judgment) and which contains the following passage concerning plans:

> "Although the possession of the plot was really obtained by me on July 1, 1954, I have not been sitting idle in the meantime. On June 18, 1954, I received a letter from Messrs. Jackson and Hill, my architects, informing me that my plans had been provisionally approved by the heads of the various municipal departments, and that final confirmation of these plans was awaited from the Town Planning Committee. I appointed Messrs. Peter Amcott & Partners, structural engineers, to act for me in collaboration with Messrs. Jackson and Hill, to prepare final plans and drawings required by the Municipality, and which are expected to be completed by the end of this year."

The evidence of Mr. Lock is that the plans were again received from the architects on April 12, 1955, were returned to them with comments on May 26, 1955, were re-deposited about the end of August, 1955, approved by the Town Planning Committee in September, 1955, were sent to the Lands Department on September 15, 1955, and returned on November 3, 1955. Formal approval was given in December. As is indicated in a letter from the appellant to the Town Clerk, Nairobi City Council, dated November 7, 1955, his approval was given without prejudice to the right of forfeiture which had arisen.

Meanwhile there had been further correspondence between the parties which is relevant to their conduct. Paragraph 3 and para. 4 of a letter from the appellant to the respondent dated September 20, 1954, are as follows:

> "3. I understand that the building plans have not been approved by the City Council and in any case have yet to be submitted to me for my approval and conseqently as I have previously stated, it would appear to be a physical impossibility now to comply with the building covenant. It would appear, therefore, that the following two questions have now to be decided:
>
> (*a*) whether your statement regarding the date upon which occupation

of the site was given to you has been made with a view to contending that you are legally entitled to claim that the building covenant does not expire on August 31, 1955; and I should like to know now, before taking this matter any further whether this is your contention or not;

(*b*) whether you are in a position to build the hotel within a reasonable period if the Government was prepared to grant a limited extension of the building period.

"4. If you agree with me that the building covenant expires on August 31, 1955, and are prepared to submit your proposals for the phased development of the plot within a reasonable time and also submit to me, in confidence, full particulars showing your financial ability to carry out this development. I will submit the matter to the Government for a decision as to whether or not it is prepared to grant a limited extension to the building covenant and upon what terms before you incur any expense in constructing foundations or other work on the site."

On October 7, 1954, the architects wrote at the respondent's request and estimated that the drawings would be completed and submitted for approval by the end of December, 1954. As has been seen, this programme was not fulfilled. The architects said also that they estimated the time for completion of the building as not less than two and a half years from tender. On October 26, 1954, the appellant again asked the respondent for a reply to the questions raised in para 3 (*a*) and para. 3 (*b*) of his letter of September 20. A further request was sent on November 11, 1954, which elicited a long reply dated December 7, 1954, of which it is sufficient to quote the following:

"My architects, Messrs. Jackson and Hill have estimated that a building of this nature will take at least two and a half year from March, 1955, which means I need a further extension of twenty-one months from September, 1955, to June, 1957.

"I do not consider that there will be any same man who will spend £90,000 on a project of this nature if he was not in position to complete the whole programme and as I have spent approximately £90,000 against this project and I am now ready to commence the erection of the building as soon as the plans are approved; the finance does not enter into the question as I have all the capital that is required to erect this hotel to the entire satisfaction of the Crown."

Counsel for the appellant described the reference to finance not entering into the question in the ultimate portion of this passage, as a refusal to take the appellant seriously.

The appellant continued to press the respondent on this matter and finally a meeting was held between a representative of the appellant, the respondent and the respondent's attorney. It was arranged that the appellant would ask the City Council to expedite consideration of the plans, and that there would be a further meeting in three months' time when the respondent would be in a position to satisfy the Government of his intention and financial ability to develop the plot. Despite the best efforts of the appellant he was unable to secure the presence of the respondent (who meanwhile changed his advocate) at a subsequent meeting. In the course of correspondence designed to secure this second meeting the appellant wrote a letter dated August 15, 1955, containing the following suggestion, which did not find favour with the learned trial judge:

"4. With regard to the question of finance, I think the most satisfactory

> method of dealing with this would be for you to produce a guarantee signed by your bankers rather than expression of opinion given by them."

On September 29, 1955, notice of intention to commence an action was given by the appellant under s. 83 of the Crown Lands Ordinance (Cap. 155) and this elicited from the advocates for the respondent an application for an extension of time on terms; letters from members of the respondent's family were tendered as to finance but were not regarded as satisfactory financial assurance. Finally, in a letter from senior Crown counsel to the respondent's advocates dated November 2, 1955, there is this passage:

> "7. It is, I think, in the interests of your client as well as those of the Government that the plaint should be filed as soon as possible. The civil work of the Supreme Court is greatly in arrears and it is unlikely, even if the plaint is filed now, that the case will be heard this year. If therefore your client can satisfy the Commissioner of Lands by the beginning of December on the following points:
>
> (1) that he has or is about to enter into a contract with a reputable firm to build an hotel;
>
> (2) that he has at his own disposal half the amount of money due under the contract;
>
> (3) that he undertakes not to let the shops until the hotel is completed;
>
> (4) that he enters into a contract with the Commissioner in which he will contract to do stated portions of the work by stated times –
>
> the Commissioner will consider giving the necessary extension to allow the arrangements made to be carried out."

Upon this history I find nothing in the conduct of the appellant which is open to criticism. I have not set out correspondence relating to the occupation of the temporary buildings on the plot as I have already expressed my view that this factor was not conducive to the default of the respondent. The occupation was at first with the consent of the respondent and if there was any delay by the appellant in the later stages, there was never any real urgency in such requests as were made by the respondent for possession. There are, however, passages in the judgment of the learned trial judge which imply that he was at some stage inclined to be critical of the appellant's attitude. He said:

> "There are two possible explanations as to why the plaintiff's attitude hardened in July, 1954. One is that the Government may have decided to build a luxury hotel itself in conjunction with the colonial welfare fund but this had not been proved as a fact. The other reason is that the defendant's financial repute had worsened. I think that the second reason is probably the reason."

Later he said:

"I am left with a suspicion that in spite of professions of readiness to consider an extension of time or terms there may well have been adopted a policy of trying to squeeze out the defendant and of making the erection of the building by him impossible. I am not however prepared to find that as a fact in view of the fact that there appears to have been at least some reasonable grounds for believing that the defendant's financial resources were not adequate. Furthermore the plaintiff's advisers were entitled to endeavour to get the best terms for their point of view that could be."

Concerning the first of these passages I would observe that, at a stage when almost two of the stipulated three years had elapsed and the respondent's preparations had not gone beyond the sketch plan stage, when it was quite

apparent that there was no possibility of the building's being completed within the stipulated time, the appellant was not only within his right in adopting a firmer attitude but could be expected to do so, pursuant to his duty to the Government and the public – quite apart from any question of the possibility of the financial resources of the respondent having deteriorated. He was inevitably to be faced with a decision whether to agree to an extension of the stipulated period for completion of the building and was entitled to expect all information and assistance from the respondent.

As to the expression in the second of the two passages above quoted of a suspicion that a policy of squeezing out the respondent may have been adopted, counsel for the appellant contended that there was no justification in the evidence for this innuendo and that it coloured the whole of the learned judge's decision. Counsel for the respondent suggested that support might be found for it in passages in the evidence of Mr. F.E. Firminger, the land officer responsible for the alienation of the plot, where he said that the Government had lost faith in the respondent as from May 9, 1955, and that it was intended if the site was recovered to offer it again as a hotel site. I do not find that this evidence supports what has been called "the innuendo", particularly having regard to the correspondence subsequent to May, 1955, culminating in the offer in the letter from senior Crown counsel of November 2, 1955. I do, however, agree with the main submission of counsel for the respondent on this point, that there was nothing to show that the judgment of the learned judge was affected by his suspicion, which he refused to translate into a finding of fact. To my mind the basic view of the learned judge was indicated by his reference in the last part of each of the passages, to the financial resources of the respondent. He himself took that aspect of the matter into consideration and it cannot be said that he held it against the appellant that he had done so also. In my view the learned judge based his decision upon consideration touching the conduct and financial position of the respondent, and was not adversely affected towards the appellant's case by the matter under discussion.

There is, however, another aspect of the appellant's conduct, concerning which it can be gathered that the learned judge's view was adverse to the appellant: his view is to be gathered from the following passage of the judgment:

> "In these circumstances the doubts which were entertained by the plaintiff as to the defendant's financial ability to carry through the project were not without substantial reason but the course adopted was not one which was likely to be helpful. The plaintiff demanded a time schedule for the building in stages to be submitted by the defendant which is very reasonable but the plaintiff demanded in addition what was virtually a bank guarantee that the defendant had the necessary funds available before an extension of the time for completion would be authorised. This would involve the freezing of very substantial sums of money for a considerable time before it would be needed in the building. The plaintiff further demanded to know the steps which would actually be taken by the defendant to raise the money that would be required. This the defendant in my opinion was entitled to refuse to disclose. Leakage of his plans might be fatal to the execution of them and further there is no reason why he should not change his plans provided he is able to finance the building."

I am, with great respect, unable to agree that when it became obvious that special condition No. 1 could not be complied with in time, the appellant, knowing that there was no prospect of building even beginning in the immediate future, and finding it necessary to decide whether an extension of time should be granted, was not entitled to ask and receive full disclosure of the financial plans for the erection of the building or adequate security that it would be erected. The respondent would be within his legal rights in refusing to comply

with the request, as, in effect, he did, but in my view, that counts against the respondent and not the appellant when the matter of comparative conduct is being considered. The learned judge considered that "what was virtually a bank guarantee" was demanded, the reference being no doubt to para. 4 of the appellant's letter of August 15, 1955. I see in this no more than a suggestion, which did not necessarily imply a guarantee to cover the total cash cost of the building, and which was susceptible to counter offer; I do not consider that freezing of substantial funds would necessarily have been involved. I think, with respect, that the learned judge to some extent misdirected himself on this matter.

I turn now to the conduct of the respondent. There can I think be no doubt that he was guilty of delay in the first portion of the three year period. After reminders concerning the plans, he wrote on December 24, 1953, indicating that changes in plans had been necessitated by the discovery, only the month before, that Lugard Avenue was not to be a through road. When the plans were finally forthcoming they embodied not only a change of entrance, but other major changes. Whatever the reason for the changes, the decision to make them embodied a departure (not an essential one) from the tender plans and the respondent must have known, not only of the delay involved in actually preparing the new plans, but also that the changes might involve further delay if the City Council or the appellant objected to the major alterations. The learned trial judge fully appreciated this position, and described the decision as a dangerous one. Yet it does not follow that because (for financial advantage, which appears to have been the basic reason) the respondent took a decision involving delay, he thereby barred himself from relief in equity unless his conduct was entirely unreasonable. The appellant, though a little later, indicated that he did not require strict adherence to the original plans provided the requirements of the City Council were met. The learned judge in my opinion accurately summed up the position which then arose in the following passage of his judgment:

> "On the other hand when the defendant got the letter of April 24, 1954, he might in my opinion fairly assume that he would not be bound to a modification of the original sketch plan so as to provide merely reception on the ground floor and a bathroom for every bedroom but that he could introduce any modification which was acceptable to the City Council. And I think that he could further assume that he would not be held strictly to the time for completion that was stipulated in the condition, but he was not entitled to assume that unnecessary delay on his part would be tolerated. Indeed the correspondence shows that fairly steady pressure was being put on him to get his plans approved so as to enable completion to be effected as soon as possible.
>
> "It is evidence that the defendant's advisers were working 'flat out' on the plans from August 1954 into 1955 when delays did occur early in 1955 but by that time the plaintiff had started to threaten that an extension of time for completion might not be granted."

A good deal of time was spent by counsel upon a question arising from the following passage of the judgment:

> "I accept it as true that the defendant was under the impression that Lugard Avenue was, and would continue to be, a through road, and I think that that impression was reasonable. But it turns out that under the Town Planning Scheme, part of Lugard Avenue is to become part of a pleasure garden and the remaining part is to be merely a cul-de-sac off Government Road, leading to no other thoroughfare. When the defendant discovered this, he decided to change his plan, and in my opinion he was entitled

> to do so. This would cause delay. I do not consider that the fact that the defendant's architect knew that Lugard Avenue was to become a cul-de-sac affects the matter. I have no reason to believe that the defendant knew of it until 1954. It occasioned some delay altering plans, but was not the sole cause of delay."

The date given in this passage, 1954, appears to be a slip, as the respondent stated in his letter of December 24, 1953, and also in his evidence, that he knew of it a month earlier. That is hardly material, and the submission of counsel for the appellant was that the learned judge had misdirected himself in law in his statement that the knowledge of the architect did not affect the matter. Counsel relied upon the principle that the knowledge of an agent is that of the principle, and upon the authority of *Barrow v. Isaacs & Son* (9), [1891] 1 Q.B. 417 (a case of the negligence of a solicitor) as establishing that the principle applied where equitable relief was sought. Apparently the finding that the architect knew that Lugard Avenue was to become a cul-de-sac was made upon only one passage in the evidence, when Mr. Firminger said in re-examination:

> "Mr. Hill was a member of Town Planning Advisory Panel and would have been well aware of the intention regarding Lugard Avenue."

The respondent said that he first discovered that Lugard Avenue was to be closed in November, 1953, when he went to the City Council, and while waiting there, saw a model of City Square; he immediately gave instructions to his architects to change the entrance to Government Road. The architect, Mr. Hill, did not give evidence. I agree with counsel for the respondent that the evidence is insufficient to found an argument that the learned judge erred in law, or, if there was error, that it was material. There is no evidence of the extent of Mr. Hill's knowledge as a member of the Town Planning Advisory Panel – whether it extended to every detail; nor was there evidence of when the decision to close Lugard Avenue was taken, or, what is more important, when and in what capacity Mr. Hill acquired his knowledge, if in fact he did know. There is too little here to justify a finding that the learned judge made a material error in law. I would in fact find it easier to accept that the conduct of the respondent, as the prospective builder of an expensive hotel, in failing to inform himself fully from the outset, through his legal advisers or otherwise, of all relevant town planning proposals, was open to very serious criticism. I do not find anything in the knowledge of the architect which ought to weigh against the case of the respondent. In *Barrow v. Isaacs & Son* (9), the negligence of the solicitors went to the root of the matter; in the present case there is no sufficient evidence that the architects were negligent or, if they were, of the extent and effect of their negligence.

I have already considered the conduct of the appellant and found it not open to criticism in any material matter. The conduct of the respondent, on the other hand, cannot be regarded as praiseworthy. He was guilty of some initial delay, not all of which can be attributed to the discovery that Lugard Avenue was to be closed. His decision to alter his plans on that ground and others, without prior consultation with the appellant on the question of the delay involved, was open to criticism. These matters were, however, fully considered by the learned trial judge, who found also that the respondent genuinely intended to put up the building required by special condition No. 1. Indeed his plans showed that he aspired to an even bigger and more costly building. My third criticism of the respondent's conduct would be that, at a stage when it was clear that the special condition could not be complied with, the respondent was completely unco-operative in his attitude towards the repeated requests of the appellant for information as to the respondent's plans

and assurance of his ability to carry them out. I think that the learned judge might have been more critical of the conduct of the respondent in this respect, had he not, as I think, misdirected himself to some extent as to the actions of the Crown, a subject which I have already discussed. On this question of the conduct of the parties, however, I do not find that the misdirection referred to is of such materiality as to induce me to say that the learned judge exercised his discretion wrongly. The discretion was his and he undoubtedly exercised it, and in doing so no doubt had in mind (as did this court in *Dedhar v. Commissioner of Lands* (8)), the principle that equity leans against forfeiture. Only if the learned judge were shown to be clearly wrong by reason of mistake of law or fact or disregard of principle would it be right for this court to reverse his decision to grant relief and, in my view, such error as there may have been was not of sufficient materiality to justify that course.

I have not dealt so far with the question of the respondent's financial ability to complete the building, except incidentally by reference to his failure to disclose his financial plans. Financial ability, in a case of this sort, is a circumstance which must be considered, in arriving at a decision whether relief against forfeiture should be granted or withheld. If a lessee is clearly unable to comply with a building covenant for financial reasons it would be manifestly unjust to the lessor if relief were granted. The learned trial judge in the present case apparently felt that there was a doubt concerning the respondent's resources, and that it was therefore a case, not for withholding relief, but for granting it on "fairly strict terms". On this topic he said in his judgment:

> "When the issue of the Government (grant?) was being negotiated the defendant appeared to be in a particularly good financial position. He had been promised the support of his father Sheikh Fazal Ilahi in respect of whom a bank reference was produced to the effect that he was good for any amount. He was also promised the support if necessary of his brother Sheikh Abdul Rashid and in addition to private property of his own the defendant was managing director of Sheikh Brothers Limited which appeared to be a wealthy and influential concern. Subsequently however the defendant appears to have quarelled with one of his brothers a fellow director of Sheikh Brothers Limited and his father Sheikh Fazal Ilahi has died and was probably not on the best of terms with the defendant shortly before his death. The management of Sheikh Brothers Limited appears to have become completely disorganised and will need putting together considerably but this will be difficult so long as there is serious dissension among the directors. The defendant still has property of his own but some of it is encumbered. He still has the support of his brother Sheikh Abdul Rashid. In these circumstances the doubts which were entertained by the plaintiff as to the defendant's financial ability to carry through the project were not without substantial reason but the course adopted was not one which was likely to be helpful."
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>
>
> "Were it not for the fact that there is a doubt about the defendant's resources I would certainly grant relief from forfeiture on terms. As it is I think that the defendant should be allowed the chance to complete if he can. I do not think that the plaintiff will be seriously prejudiced if the defendant is granted relief but I think the relief should be on fairly strict terms."

This approach by the learned judge was in my respectful opinion entirely justified, but, as has been said earlier in this judgment, evidence of certain subsequent events has been admitted in an effort to show that the respondent's financial position has now further deteriorated to a substantial extent. I should,

perhaps, say here that the respondent's failure to comply with the terms imposed by the learned trial judge is not to be held against him in any way, as the judgment was successfully appealed from and has only recently been restored by the judgment of the Privy Council. The respondent was, of course, permitted to call evidence in reply to the new material. It is now for this court to say whether, in the light of the new evidence, relief should, for financial reasons alone, be withheld or granted on terms, and, if so, upon what terms.

I propose to refer only to what I consider to be the salient points of the new evidence. One of the assets relied upon by the respondent at the trial, was an item of 32,000 motor vehicle skid chains valued by Mr. A. Tisdale-Jones at £50,000. Affidavits by Mr. E.E. Lister and Mr. D. Rappaport were relied upon as showing purchases of what were probably portions of these chains at prices indicating that the total was worth about £7,000. This evidence lacks particularly but in the absence of answer or explanation can be accepted as indicating a substantial over-valuation of the chains.

Two sisal estates Pananga and Kedai were at the trial, valued (unencumbered) by Mr. Tisdale-Jones at £10,000 and £95,000 respectively. Affidavits by Mr. J. D. Hunter and Mr. A. Julian showed that the two estates were put up for public auction (but without machinery) in May, 1958, and brought only £7,750. It is common ground that they were bought in on behalf of the respondent. This evidence was countered by two witnesses called before this court by counsel for the respondent. The first, Mr. Mahomed Din, was present at the auction, and said in effect that the sale was sabotaged by a number of statements made at the time of the auction by one Sheikh Abdul Gafur, which led those present to believe that to purchase the property might well result in being involved in litigation. In the witness' opinion the estate, with machinery, was worth over £100,000; the properties were offered in fact without machinery which apparently is of very substantial value. The second witness was Mr. J.D. McCririck, who had had extensive experience with the sisal industry, and who had inspected the estates immediately prior to giving evidence. His estimate of value (unencumbered but including substantial amounts for machinery) was substantially in excess of £100,000. It is of course common ground that the value of such estates may fluctuate with the price of sisal. It would appear from the affidavit of Mr. Hunter that, as at August 2, 1960, the only registered charge against these properties was for the sum of Shs. 59,500/-. So far as these properties are concerned I find nothing in the fresh evidence which should weigh against the respondent.

An affidavit by Mr. Abdul Khalil was filed and gave details of various dealings with plots of land in the Nairobi area. I do not consider them material. The evidence which, to my mind, does tell rather heavily against the respondent, comprises affidavits indicating that since the date of the trial, both the respondent personally and corporations in which he and his family are interested, have been repeatedly sued and suffered judgment, often by consent or default, for debt. To an affidavit by Mr. G. Waddell, Deputy-Registrar of the Supreme Court of Kenya are annexed schedules of these proceedings; I do not propose to consider them in detail but it is not conducive to faith in the respondent's financial resources to find among the entries consent judgments against the respondent in favour of Messrs. Jackson and Hill (the architects concerned) and Mr. A. Tisdale-Jones (the respondent's valuer) both marked as payable by instalments. There are eight Supreme Court judgments against the respondent personally for the payment of money, and though two of them are marked "settled", execution in others has gone as far as warrants of arrest. In the magistrate's court ten judgments for comparatively small amounts have been given by consent or default against the respondent personally, of which one is marked "satisfied", one "settled", and one "unsatisfied to the extent of Shs. 95/16". A further affidavit by Mr. Waddell shows that in April, 1960,

three bankruptcy notices were issued against the respondent by the Legal Secretary of the High Commission; the total debt alleged exceeded Shs. 160,000/-. A copy of a judgment of the Supreme Court annexed to the affidavit shows that these notices were set aside on July 29, 1960, on grounds entirely technical and unconnected with the question whether the money was owing. This question is still of course an open one, but the whole picture presented by this record of litigation indicates that the respondent has difficulty in meeting acknowledged obligations. He has perhaps had to find fairly substantial sums in relation to the present litigation and the appeal to the Privy Council, but that has not been argued and, in the absence of information on the point, it is unwise to speculate.

In addition to calling evidence on the subject of the sisal estates counsel for the respondent called as a witness Sheikh Abdul Rashid, a brother of the respondent, who was mentioned by the learned trial judge as being prepared to support the respondent. He reiterated his willingness to do that and said he could provide more than £100,000. He claimed to own a half share in Masongaleni Sisal Estate which estate he estimated to be worth £200,000. He had also valuable potential assets in two family trusts (the "family" trust and the "marriage" trust) which he claimed to own extensive assets. He said also that he was entitled to a share in the estate of his father. He produced evidence that he could (at present) find £25,000 in cash. It would appear however that there is a dispute with Sheikh Brothers Ltd. concerning the Masongaleni Sisal Estate and that there are family disputes which have tied up all the family assets, and continue to do so. If the building of the hotel were undertaken it was Sheikh Abdul Rashid's idea that he would go in with the respondent on some sort of partnership or joint account basis. So far as this witness is concerned I was left with the impression that he could probably provide a moderately substantial measure of support for the respondent, but, though there is no reason to doubt the witness' sincerity, the value of support of this nature, in a family already divided by disputes, can only be tested by the event.

The respondent's ability to carry through the project was in doubt when the learned judge gave judgment and appears to have further deteriorated. Nevertheless, the respondent has actual or prospective assets, and among them is this valuable plot in the centre of Nairobi at a rental which, for quite a number of years to come, is extremely low. I do not feel that, in equity, the respondent should be deprived of the opportunity afforded him by the Supreme Court some three years ago (a right lost on appeal to this court and re-established by appeal to the Privy Council) of demonstrating that he is able to comply with the building covenant, unless it is manifest that he is unable to do so. I do not think that it is so manifest, but at the same time his position is such that it would be unfair to the appellant that relief should be granted, except upon terms designed to ensure that the respondent's financial ability is demonstrated at the earliest possible moment and that the appellant be protected against further prolonged deprivation of possession, if the respondent fails. I will annex as a schedule to this judgment the text of the terms which I would impose, but counsel will be given an opportunity of being heard on these before they are finally embodied in an order. They are modelled, in part, upon the terms imposed by the learned trial judge. I would allow the appeal only to the extent that the terms imposed by the learned judge are varied.

As to costs the appellant has succeeded only to the extent that the terms imposed as a condition of relief are intended to be somewhat more strict. That arises, however, mainly from the evidence of subsequent facts adduced at the hearing of the appeal, particularly those indicating inability or reluctance on the part of the respondent to meet his current obligations. If there had been no appeal the respondent would have had the opportunity of complying with

the original conditions before his position deteriorated, and I do not therefore consider such measure of success as the appellant has had in this respect should deprive the respondent of an order for a proportion of his costs of this hearing of the appeal in which he has otherwise been successful. Nevertheless, the order granting the respondent relief is based to some extent upon his insistence that, if granted relief, he will be in a financial position to proceed. If this should prove to be contrary to the facts, the basis of his claim to costs disappears. Accordingly, it is, in my judgment, reasonable to make payment of costs by the appellant conditional upon fulfilment by the respondent of condition No. 2 in the schedule to this judgment. I would therefore order that the appellant pay two-thirds of the respondent's costs of this hearing (which their lordships of the Privy Council designated "the further hearing"), but only if and not until the respondent complies with condition No. 2 above-mentioned. I would certify for two counsel.

Their lordships' order as to costs was mentioned by counsel for the respondent. It reads, in part, "The order as to costs made in the Supreme Court will not be disturbed". Counsel for both parties were agreed that it was probably over-looked that the order in the Supreme Court had been varied on the first appeal to this court, which ordered that the

> "plaintiff should have four-fifths of the costs of the suit as between party and party, to be taxed";

this order is stated to be more favourable to the respondent than that made in the Supreme Court. This court was asked to reinstate its original order and counsel for the appellant stated that he was prepared to consent to an order having that effect. I regret that I am unable to see that this court has jurisdiction to do what is asked; if the parties cannot arrange the matter by agreement, no doubt an application to the Privy Council would put the matter right if there has been a slip.

Sir Kenneth O'Connor P: I agree. There will be orders in the terms proposed by the learned Acting Vice-President.

Crawshaw JA: I also agree.

Order

November 18. **Gould JA:** To the judgment of the learned Acting Vice-President delivered in this appeal on October 4, 1960, was annexed a schedule of conditions upon which it was proposed to grant relief to the defendant, subject to counsel being heard upon them and to their being embodied in their final form in an order. We have now heard the submissions of counsel for both parties and received further evidence upon technical matters. Having taken time for further consideration, we now order that the conditions upon which relief is granted are those in the order schedule annexed to and forming part of this order. The costs of the proceedings subsequent to the delivering of the judgments in this appeal, save as otherwise already ordered, will form part of the general costs of the appeal and be subject to the order made therein.

Order Schedule

Conditions of relief of the defendant against the judgment of the Supreme Court for recovery of possession by decree dated May 2, 1957, in substitution for the conditions set out in the order schedule to that decree.

(1) That, subject to the provisions of condition 14 hereof, the defendant do erect a building on the said

land in accordance with the plan already

approved by the City Council and the Commissioner of Lands, at a cost of not less than £350,000.

(2) That the defendant do pay to the plaintiff the sum of £15,000 within fourteen days from the date of the pronouncement of these conditions, as security for the due performance of conditions 3, 4, 5, 6 and 7 hereof and such security shall, without prejudice to any other remedy which the plaintiff may have, be forfeited to the plaintiff absolutely if the defendant shall not duly and punctually comply with the said conditions or any one of them, but shall be returned by the plaintiff to the defendant in the event of due and punctual compliance with all of the said conditions. The said sum shall be placed in a bank on fixed deposit by the plaintiff at the best rate of interest currently available or may at the option and risk of the plaintiff be invested in any other form of investment returning a higher rate. All interest earned by the said sum shall be added to the security thereby provided and shall be subject to forfeiture therewith or returnable therewith according to the event.

(3) That all necessary excavation shall be completed and structural work commenced not later than March 31, 1961.

(4) That the basement shall be completed structurally not later than December 15, 1961. The phrase "completed structurally" in this condition and in conditions 5, 6, 7 and 8 hereof shall mean "completed structurally to the satisfaction of the Nairobi City Council".

(5) That the ground floor shall be completed structurally not later than May 8, 1962. The use of the word "floor" in this condition and in conditions 6, 7 and 8 hereof, has relation to the floor levels indicated on drawing 161/54/1 dated November, 1954, exhibited in this action, and imports construction up to the top or ceiling of the floor mentioned.

(6) That the mezzanine and first floors shall be completed structurally not later than November 30, 1962.

(7) That the second, third and fourth floors shall be completed structurally not later than August 31, 1963.

(8) That the fifth, sixth and seventh floors shall be completed structurally not later than May 31, 1964.

(9) That the building shall be entirely completed to the satisfaction of the Nairobi City Council not later than May 31, 1965.

(10) That the work will be supervised by a registered architect who shall be approved by the plaintiff.

(11) That the defendant shall employ continuously on the site at least one clerk of works who shall have been approved by the plaintiff.

(12) That the plaintiff or his representative shall have full right of access and inspection at any time.

(13) That the defendant shall be at liberty to let the shops on the ground and mezzanine floors subject to the necessary occupation certificates being obtained, provided that pending the completion of the whole building no such tenancy shall extend beyond the day fixed for the completion of the whole building without the consent of the plaintiff.

(14) That if the defendant shall obtain the consent of the Nairobi City Council and of the plaintiff to the erection of the said building to six

storeys only, erection of the building and completion thereof at that level shall be deemed sufficient compliance with condition I hereof; provided always that nothing in this condition and no application made in pursuance thereof and nothing arising out of any such application shall permit or excuse non-compliance with the requirements as to time of all or any of these conditions save as in this condition provided. In the event of the consent of the Nairobi City Council and of the plaintiff being obtained to the erection of the building to six storeys only as aforesaid, any modification or variation of the dates herein provided for the completion of the building and the various stages thereof agreed by the parties, reduced to writing, signed by the plaintiff and the defendant and filed in court, shall be deemed incorporated in these conditions in substitution pro tanto for the requirements as to time herein contained. Nothing in this condition is to be construed or taken as implying that there is any obligation upon the Nairobi City Council or the plaintiff to consent to the erection of the building to six storeys only.

(15) The defendant may make an inter partes application to a judge of Her Majesty's Court of Appeal for Eastern Africa for an extension of time for completing any stage of the work on the ground that substantial delay has been or is being caused.

(i) by force majeure or

(ii) by exceptionally inclement weather or

(iii) loss or damage by fire or

(iv) civil commotion local combination of workmen strike or lockout affecting any of the trades employed upon the works

and the judge may make such order as he thinks fit upon any such application. Any such application must be made as soon as reasonably possible after the occurrence of the event forming the basis of the application and before the date provided in these conditions for the completion of the particular stage of the work during which the delay is encountered.

In the event of the defendant failing or being unable to perform any of these conditions or to continue and complete the building of the hotel in a regular and business-like manner or if the defendant shall be adjudicated bankrupt or make any composition with his creditors or suffer any execution to be levied on the piece of land described in the statement of claim as L.R. No. 209/4279 comprised in grant No. L.R. 9210 dated January 8, 1953, or on any building, machinery, equipment or materials, or things thereon, then or at any time thereafter the plaintiff shall be entitled to determine the said grant and to enter upon the property thereby granted and take possession of the buildings or any part thereof then constructed or under construction without payment of compensation, which buildings will then become the absolute property of the plaintiff, and shall further be entitled to take possession of all such materials, plant, machinery, equipment and things (being the property of the defendant) as are intended or proposed to be used in the construction of the hotel and either:

(*a*) have possession and use of the machinery of the defendant on the site necessary for carrying out the construction and completion of the hotel and cause the construction of the hotel to be completed using at the plaintiff's option such of the said materials, plant, machinery and equipment as he shall think fit for the purpose of

such completion until the construction of the hotel shall be completed; or

(*b*) cause to be removed at the expense and risk of the defendant any materials, plant, machinery or equipment then upon the site.

Appeal allowed by variation of the terms of the Supreme Court order.

For the appellant:
The Attorney-General, Kenya
Humphrey Slade and *F. Mallon* (Crown Counsel, Kenya)

For the respondent:
Shah, *Gautama*, *Maini & Patel*, Nairobi
Dingle Foot, *Q.C.* (of the English Bar), *C. W. Salter*, *Q.C.*, *S. C. Gautama and Swaraj Singh*

Abdalla Ladha Jivraj v Ali Kassam Virani Limited
[1960] 1 EA 842 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of judgment:	29 October 1960
Case Number:	58/1960
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from	H.M. High Court of Tanganyika – Law, J.

[1] Limitation of action – Account – Mutual open current account between merchants – When mutual account is open and current – Indian Limitation Act, 1908, *First Schedule*, *art.* 85 – *Indian Evidence Act*, 1872, *s.* 58.

Editor's Summary

The plaintiff and the defendant company had reciprocal dealings in produce and other goods on open current account from 1951 to January, 1955. The plaintiff then claimed that on balance the defendant company owed him Shs. 28,102/99 which the defendant company disputed. The plaintiff sued on September 3, 1958, and the defendant company on November 1, 1958, filed a defence and counterclaim whereby, in addition to allegations that if the plaintiff had given the defendant company credit for cash advanced to him he would be the debtor upon the open current account between the parties, the defendant company pleaded that the plaintiff's action was barred by limitation and counterclaimed the balance said to be due by the plaintiff. The plaintiff in his reply claimed that the account annexed to the plaint was complete and that the counterclaim was barred by limitation. At the beginning of the trial before

Simmons, J., there was an adjournment during which the parties adjusted certain of their claims and the plaintiff applied for leave to amend his pleadings. In a reserved interlocutory judgment Simmons, J., who was soon afterwards transferred from Dar-es-Salaam to Mwanza refused this application and the trial was resumed before Law, J., who delivered a ruling whereby judgment was entered for the defendant company for Shs. 68,350/04. The plaintiff then entered an appeal against both the interlocutory judgment and ruling but at the hearing of the appeal his counsel abandoned the appeal against the interlocutory judgment.

Held –

(i) although the parties had before Simmons, J., agreed to abandon their respective pleas of limitations, such abandonment did not relieve the court from taking notice of the issue of limitation. *Tzamburakis and Another v. Rodoussakis*, [1958] E.A. 400 (P.C.), followed.

(ii) the account between the parties was a mutual account; it was also an open account since no balance had been struck or agreed; further it was a running or current account; accordingly art. 85 of the First Schedule to the Indian Limitation Act, 1908, applied and since the term of three years there-under ran from December 31, 1955, the defendant company's counterclaim was not barred by limitation.

Appeal dismissed.

[**Editorial Note:** this report is by direction confined to the issue of limitation.]

Cases referred to in judgment:

(1) *Tzamburakis and Another v. Rodoussakis*, [1958] E.A. 400 (P.C.).

(2) *Satappa Jakappa Kochcheri and Others v. Annapappa Basappa Patil and Others* (1923), 47 Bom. 128.

(3) *The Firm Gumdas Ramkaturam v. Bhagwan Das and Others* (1922), A.I.R. Lah. 182.

(4) *Firm Bhagwan Das-Kanhaya Lal v. Firm Nand Singh-Hari Singh* (1927), A.I.R. Lah. 848.

(5) *Karsondas Dhunjibhoy v. Surajbhan Ramrijpal and Others* (1933), A.I.R. Bom. 450.

(6) *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (1931), 58 Cal. 649.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is an appeal from the High Court of Tanganyika. It is expressed to be an appeal

> "from the ruling and decree of Mr. Justice E. J. Law dated May 25, 1960, and from the interlocutory judgment and order of Mr. Justice E. B. Simmons dated December 31, 1959, in Civil Case No. 102 of 1958";

but at the hearing of the appeal Mr. Master, who appeared for the appellant, abandoned the appeal against the decision of Simmons, J., dated December 31, 1959. The appeal as argued, therefore, was only against the decision of Law, J., of May 25, 1960.

The appellant, who was the plaintiff in the suit, is a merchant and commission agent carrying on business at Morogoro. The respondent company is a limited liability company carrying on business at Morogoro and Dar-es-Salaam. The appellant brought this action against the respondent company claiming Shs. 28,102/99, "being the balance of a mutual open and current account between the parties – ", together with interest and costs. There was an alternative claim, but that claim is not material to this appeal. The material part of the plaint reads as follows:

> "3. The defendant company was incorporated on the 31st day of December, 1951, for the object, among others, of taking over the undertaking and business, assets and liabilities of Messrs. Ali Kassam Virani, a registered partnership firm which until the year 1951 carried on business at Morogoro. The said partnership firm is hereinafter referred to as 'the firm'.
>
> "4. In pursuance of a verbal agreement entered into between the plaintiff and the firm in the year 1950 the plaintiff agreed to supply to the firm various types of produce from time to time and in consideration

of the plaintiff agreeing to do so the firm agreed to make to the plaintiff cash

advances from time to time and to supply to the plaintiff various types of produce and other goods from time to time.

"5. In accordance with the said agreement the plaintiff supplied to the firm and on the formation of the defendant company to the said defendant company at their request and order various types of produce from time to time up to and during the year 1955 and the firm and thereafter the defendant company supplied to the plaintiff at his order and/or request various types of provisions and other goods from time to time and at times also made cash advances to him up to and during the year 1955.

"The goods supplied by each to the other were at an agreed and/or reasonable price and each gave the other credit in respect of the transactions above referred to and entered into in the manner aforesaid. Each of the said transactions was independent.

"6. The rights and liabilities of the firm under the agreement above referred to were taken over by the defendant company which adopted the said agreement, and the plaintiff accepted the said change and continued to carry on business with the defendant company on the same lines on which he had carried on business with the firm during its existence.

"7. As a result of the said reciprocal dealings between the parties in the manner aforesaid between January, 1950, and January, 1955, a sum of Shs. 83,959/41 became due to the plaintiff from the defendant company and a sum of Shs. 55,856/42 became due to the defendant company from the plaintiff, thus leaving the balance of Shs. 28,102/99 due and owing by the defendant company to the plaintiff which was payable on demand.

"8. A statement of credits given by the parties to each other during the said period and showing the said balance in favour of the plaintiff is annexed hereto and marked 'A' to which the plaintiff craves leave to refer.

"9. The aforesaid mutual accounts between the parties were kept according to the English or Christian calendar year and the last item in the account is dated the 26th day of January, 1955.

"10. The plaintiff therefore claims from the defendant company a sum of Shs. 28,102/99 being the balance of a mutual open and current account between the parties in respect of transactions entered into between them as referred to in para. 3 and para. 4 supra."

The plaint was presented for filing on September 3, 1958.

In its written statement of defence the respondent company expressly admitted paras. 3, 4, 5 and 6 of the plaint. The written statement of defence continued:

"3. As to para. 7 of the plaint the defendant denies the allegation (1) that the sum of Shs. 82,771/01 became due to the plaintiff as alleged or at all, (2) that the sum of Shs. 55,856/42 only became due to the defendant company from the plaintiff and (3) that a balance of Shs. 26,914/59 became due to the plaintiff from the defendant.

"4. The defendant states that at the closing of the current mutual account between the parties on February 11, 1955, the plaintiff was indebted to the defendant in the sum of Shs. 74,137/61 owing as appears from the four next following paragraphs.

"5. The defendant states that the sum of Shs. 96,522/05 has been paid or credited to the plaintiff by cheques, cash vouchers and money paid to the plaintiff's use during the years 1951 to 1953 inclusive, on the mutual

open and current account between the parties, as shown on the list annexed hereto as Appendix '1'.

"6. The defendant claims that the plaintiff should have credited the said sum of Shs. 96,522 cts. 05 to the defendant but such credit has not been made or included in Appendix 'A' to the plaint.

"7. The said 'Appendix "A"' to the plaint is also defective in that it includes various items to the value of Shs. 5,818/55 which are not chargeable to the defendant as alleged or at all; the items referred to are those printed in red in the copy of Appendix 'A' to the plaint annexed hereto as Appendix '2'. After deducting these items from the plaintiff's statement of account (Appendix 'A' to the plaint) the balance thereon is Shs. 23,141 cents 41 which is not admitted.

"8. The defendant claims that after receiving credit for the sum of Shs. 96,522 cents 05 and deduction of the said sum of Shs. 23,141 cents 41 there remains a balance due to the defendant from the plaintiff of Shs. 73,380/64."

There followed a plea (para. 9) that the appellant's claim was barred by limitation; and the respondent company counterclaimed for

"the sum of Shs. 74,137/61 as being due and owing by the plaintiff to the defendant on the mutual, open and current account between the parties."

The written statement of defence and counterclaim was presented for filing on November 1, 1958.

In January, 1959, the appellant filed a reply to the written statement of defence and a written statement of defence to the counterclaim which I will set out in full:

"Reply to Written Statement of Defence

"Save in so far as the defence consists of admissions the plaintiff joins issue with the defendant on his defence.

"Written Statement of Defence to Counterclaim

"1. The plaintiff will submit that the counterclaim is barred by limitation.

"2. In the alternative the plaintiff denies each and every item referred to in the Appendix 1 to the defence and will put the defendant to a strict proof thereof.

"3. The plaintiff states that the only transactions that ever took place between the parties are those that are given in the Annexure 'A' to the plaint.

"4. The plaintiff denies the liability to pay the sum claimed by the defendant or any part thereof as alleged or otherwise and submits that the counterclaim be dismissed with costs."

The hearing of the action commenced on May 25, 1959, before Simmons, J. After some minor amendments to the written statement of defence had been effected by consent, it was apparently agreed between the parties that the issue on limitation be "eliminated".

His lordship then referred to the course which the action had taken on other issues and went on to quote from the ruling of Law, J., in which he gave judgment for the respondent company for Shs. 68,350/04 with costs. The judgment of Law, J., ended with the following passage:

"Mr. Patel has also argued that in any event the defendant company's counterclaim should be dismissed having regard to the law of limitation.

> That claim is in respect of payments made under a mutual open and current account. According to the plaintiff's own pleading, the last transaction under that account took place on January 26, 1955. By art. 85 of the Schedule to the Indian Limitation Act, a suit for the balance due on such an account must be brought within three years of the close of the year in which the last item is entered in the account; the defendant company's counterclaim was filed within that period. It follows that in my view the plaintiff's contentions fail; and judgment must be entered in accordance with the pleadings and with the admissions made by the parties."

It is this decision which is the subject of the present appeal.

The grounds of appeal set out in the memorandum of appeal to this court, omitting the ground relating to the decision of Simmons, J., of December 31, 1959, are as follows:

"1. That the learned judge Mr. Justice Law should have held:

(*a*) That the sum of Shs. 96,522/05 in Annexure "I" to para. 5 of the written statement was not on a mutual open and current account.

(*b*) That the counterclaim of Shs. 74,137/61 or Shs. 68,350/04 is not on or a mutual open and current account.

(*c*) That the whole of the respondents' claim or a substantial part of it is time-barred if it is held not to be on a mutual open and current account.

"2. That the learned Mr. Justice Law erred in giving judgment for the respondent for the sum of Shs. 68,350/04 without any evidence to prove that the said sum was due and owing by the appellant.

"3. That the learned Mr. Justice Law has failed to take into consideration the annexures to para. 10 of the plaint which are not denied in the written statement."

Before us, as I understood him, Mr. Master for the appellant argued that on the pleadings and facts before the court either (*a*) the admitted payments of Shs. 95,522/05 to the appellant constituted a separate account and were not part of the mutual, open and current account between the parties, or (*b*) if all the transactions did constitute a single account between the parties, it could not on the face of it, have been a mutual, open and current account; and that in either case the respondents claim would be time-barred. Mr. Master further submitted that if there was a mutual, open and current account between the parties, it was closed by a letter from the respondent company's advocate dated November 3, 1955, claiming payment of an alleged balance of Shs. 8,416/85 (to which I will refer more fully later); that accordingly there was no mutual, open and current account between the parties at the time the suit was filed; and that the authorities indicated that for an action to be brought on a mutual, open and current account, the account must be open up to the filing of the suit. He conceded that if this latter submission was correct, the appellant's claim must also fail.

It is clear that notwithstanding the abandonment by counsel for the respective parties of their respective pleas of limitation, such abandonment does not relieve the court from taking notice of the issue of limitation (*Tzamburakis and Another v. Rodoussakis* (1), [1958] E.A. 400 (P.C.)); and in fact Law, J., did deal with the issue of limitation in the course of the passage from his ruling which is set out above. His lordship here referred to a submission made on behalf of the appellant with which this report is not concerned, and continued:

I come now to the question whether, notwithstanding the pleadings, it should be held that the account could not have been a mutual account within the meaning of art. 85 of the First Schedule to the Indian Limitation Act, 1908, which applies in Tanganyika. That article provides the period of limitation in respect of mutual, open and current accounts as follows:

Description of suit	*Period of limitation*	*Time from which period begins to run*
For the balance due on a mutual, open and current account, where there have been repricol demands between the parties.	Three years.	The close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.

Mr. Master contended that if the sum of Shs. 95,522/05 formed part of the account there could not have been "reciprocal demands between the parties" and that therefore art. 85 could not apply. I incline to the view that the appellant is bound by his pleading that the account between the parties was a mutual, open and current account. But apart from the pleadings, I would accept the interpretation put upon art. 85 in *Satappa Jakappa Kochcheri and Others v. Annapappa Basappa Patil and Others* (2) (1923), 47 Bom. 128. In the course of his judgment in that case, at p. 135, Shah, C.J., said:

> "It is urged by Mr. Desai that the defendants have been debtors throughout and that, therefore, it could not be treated as an account within the meaning of art. 85. I do not think, however, that any decision has laid that down as a conclusive test of a mutual, open and current account in which there have been reciprocal demands between the parties. It depends upon the nature of the dealings between the parties. It is sufficient if the dealings are such that the balance might have been in favour of either party: it is not essential that the balance should in fact have been in favour of the defendants at some stage."

Similarly, Crump, J., said, at p. 136 of the report:

> "I agree that this account is within the definition contained in art. 85. That it is open and current cannot be doubted, and it is mutual because there are items upon either side independent of one another which clearly gave rise at one time or another to independent obligation . . .
>
> "The words 'where there have been reciprocal demands between the parties' in art. 85 taken literally may no doubt give rise to some difficulty, but those words have been interpreted as meaning that the nature of the accounts is such as to create reciprocal demands. They are in fact words in the nature of a definition, but are not intended to postulate that there should have been reciprocal demands in fact."

In the instant case it is, in my opinion, clear from the account, Appendix "A" to the plaint, that the account was a mutual account. It is true that if the advances totalling Shs. 95,522/05 are incorporated into the account the balance throughout remained in favour of the respondent company. But the nature of the dealings were such that a balance in favour of the appellant might have been achieved. I am not prepared to say, that on the face of the pleadings, and notwithstanding the express terms of the pleadings, this account was not a mutual account.

Mr. Master's final point, namely, that the account was closed by the letter from the respondent company's advocates of November 3, 1955, and that therefore the account was not an open account when the suit was filed, is one

of some difficulty owing to the conflict of authority in the Indian courts. Mr. Master drew attention to *The Firm Gumdas Ramkaturam v. Bhagwan Das and Others* (3) (1922), A.I.R. Lah. 182; *Firm Bhagwan Das-Kanhaya Lal v. Firm Nand Singh-Hari Singh* (4) (1927), A.I.R. Lah. 848; and *Karsondas Dhunjibhoy v. Surajbhan Ramrijpal and Others* (5) (1933), A.I.R. Bom. 450. These cases are considered by the learned author of Rustomji's Law of Limitation (5th Edn.) at p. 825 and p. 826. The relevant part of the decision in the last mentioned case is summarised at p. 826 of Rustomji as follows:

> "In a recent Bombay case the learned judges held that in order to apply art. 85 the account must be *open* down to the date of the suit. If at the date when the plaintiff brings the suit there is in fact no open account (i.e. when the account was closed prior to the suit), the suit cannot be said to be for the balance of an *open* and current account. In the course of his judgment in the Bombay case last cited (58 Bom. 200) Rangnekar, J., observed: 'If a person says to another, "From today I shall not have any business dealing with you; I have made up my account which according to me is correct, and if you do not accept it, do what you like".' If after this nothing further happens between the parties, the account must be said to have been closed *whether the other party accepts the correctness of the account or not*. The test is, not whether the account which has ben sent to the party is correct or not, but whether one party closes the account to the knowledge of the other."

However, the learned author continues as follows:

> "It is submitted, however, that where an account between two parties has throughout been an open and current account it is not competent for one of them to arbitrarily close that account so as to deprive the other from availing himself of the benefit of art. 85. The fact that on the date of the suit there was no running account does not necessarily affect art. 85. An account is open when the balance is not struck, or, though struck, *is not accepted or acknowledged to be correct by the parties concerned*."

Of the cases referred to by the learned author of Rustomji in support of this latter proposition, I will only refer to *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (6) (1931), 58 Cal. 649. At p. 678 Ghose, J., says in relation to art. 85:

> "An account is open when the balance is not struck or, though struck is not accepted or acknowledged to be correct by the parties concerned; and an account is current when it has been going on as a continuous account between the parties. A running or continued account between two or more parties is an account current. A shifting balance may be a test of mutuality, but its absence is not a conclusive proof against mutuality."

I have considered carefully the conflicting propositions which emerge from the Indian cases and have reached the conclusion that I prefer the decision of Ghose, J., in *the Tea Financing Syndicate* case (6). If the Bombay case is to be taken literally, it would seem that a suit could hardly ever be brought to which art. 85 would apply; since a suit would normally be preceded by a demand for payment of a balance alleged to be due on the account in question, and that, as I read the decision, would result in the closing of the account so that art. 85 would not be applicable.

Following the decision in *Tea Financing Syndicate Ltd. v. Chandrakamal Bezbaruah* (6), it is clear that the account in this case was not closed, since the respective balances struck by the parties were never accepted or acknowledged to be correct by the other party.

If I am right as to this, the period of limitation of three years under art. 85 applies, and runs from December 31, 1955, that is, the close of the year in which the last item admitted is entered in the account; and the respondent company's counterclaim is accordingly not barred by limitation.

For these reasons I would dismiss the appeal with costs.

Gould JA: I agree and have nothing to add.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:
H. Dharani & Co., Dar-es-Salaam
K. A. Master, Q.C., and *H. R. Dhanani*

For the respondent:
Dodd & Co., Dar-es-Salaam
H. G. Dodd

Sultan Gillani v R
[1960] 1 EA 849 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	31 October 1960
Case Number:	933/1960
Before:	Sir Ronald Sinclair CJ and Rudd J
Sourced by:	LawAfrica

[1] Weights and measures – Sale of bread – Total overweight of some loaves exceeding total short weight of others – Whether deficiency made good within proviso to s. 4 *of the Bread Ordinance – Bread Ordinance* (*Cap.* 199), *s.* 4 *and s.* 16 (*K.*).

Editor's Summary

The appellant was prosecuted under the Bread Ordinance for offering loaves for sale in his shop which were deficient in weight. The prosecution was begun by a document headed "Weights and Measures Department" and "Charge Sheet" which was signed by an officer of the department and contained the name and address of the appellant and a number of counts of alleged offences. This document was presented to the magistrate who signed it and issued a summons to which a copy of the document was attached. The facts proved were that the appellant had, from part of his premises which had been

partitioned off from the bakery, sold to an officer of the department twelve loaves of which eight were deficient in weight and four overweight. The aggregate overweight exceeded the aggregate deficiency. Having been convicted the appellant filed an appeal on the grounds that there had been no proper complaint under s. 16, that the loaves were not offered for sale in a shop and that the shortfall had been made good under the second proviso to s. 4 of the Bread Ordinance.

Held –

(i) there was a valid complaint which was adopted as a charge by the magistrate and this procedure caused no prejudice or injustice to the appellant;

(ii) it was quite clear that at least part of the premises was used as a shop;

(iii) a deficiency in the weight of one loaf cannot be made good by selling another loaf above the minimum weight specified for its denomination; a fortiori, an aggregate of such deficiencies cannot be made good by an aggregate of such excesses;

(iv) as the loaves which were overweight were not sold for less than the ordinary price, no bread was supplied to make up the deficiencies in the underweight loaves.

Appeal dismissed.

Judgment

Sir Ronald Sinclair CJ, read the following judgment of the court: The appellant appeals from conviction on eight counts of offences against s. 4 of the Bread Ordinance (Cap. 199) of offering for sale in his shop a loaf of bread which was deficient of its due weight when weighed in the shop at the time it was offered for sale and which had been baked within twenty-four hours of its being offered for sale. Substantially three grounds were put forward in support of the appeal which were as follows:

> First that the requirements of s. 16 of the Bread Ordinance in regard to the making of a complaint within the prescribed time were not complied with.
>
> Secondly that the loaves of bread in question in these counts were not offered for sale in a shop.
>
> And thirdly that the shortfall was made good in accordance with the second proviso contained in s. 4 whereby any baker or seller of bread may in the event of the weight of a loaf being found to be deficient make up the deficiency by the addition of bread cut from another loaf baked within twenty-four hours next preceding the time of sale.

Under s. 16 of the Ordinance it is provided inter alia that no person shall be convicted of any offence under this Ordinance unless the complaint be made within forty-eight hours next after the time the offence shall have been committed.

No question of time is involved in this appeal but it was argued that there was no proper complaint. The prosecution was instituted by a document headed “Weights and Measures Department” “Charge Sheet” which was signed and presented to the lower court by the acting assistant superintendent of weights and measures. This document set out the name and address of the appellant and a number of counts of alleged offences against the Ordinance set out in the form which is appropriate to a charge sheet. Upon presentation it was signed by the magistrate and treated by him as the charge sheet and the magistrate issued a summons to which a copy of this document was attached.

In our opinion there was a valid complaint which was adopted as a charge by the magistrate. There was no prejudice or injustice to the appellant and therefore the first ground of appeal which we have mentioned fails.

With regard to the second of the appellant’s arguments the facts are that the appellant had premises which he used as a bakery in which he baked loaves of bread. Most of the loaves which he baked were then sent off the premises and distributed to various customers but part of the premises was partitioned off and in this part of the premises it was the appellant’s practice to sell some loaves of bread to customers who called there to buy bread. In our opinion it is quite clear that at least this part of the premises was used as a shop. All the loaves in question in this case were sold to the acting superintendent of weights and measures in this part of the premises. We think that this ground of appeal must fail.

The facts in regard to the third point argued in support of the appeal are that the appellant sold to the acting superintendent eight nominally one-pound loaves of bread each of which was deficient in weight by amounts which varied from 8 drams to 1 ounce 11 drams and the appellant also sold to the acting

superintendent four loaves of bread which he said were 2 3/4 pound loaves. Each of them was overweight on that basis. The total overweight of these loaves exceeded the total deficiency in weight of the eight nominal 1-pound loaves which were bought by the acting superintendent.

In this appeal we are not concerned with the fact that s. 4 of the Ordinance forbids the sale or offer for sale of loaves of the denomination of 2 3/4 pounds weight. This was the subject of another count and there is no appeal from the decision of that other count.

It was argued for the respondent that the proviso to s. 4 should be given a strict literal interpretation and that the proviso in question had no application to the offer for sale of a short-weight loaf unless the deficiency be made up at the time of the offer and that that had not been done in this case. It was further argued that the deficiency in respect of each loaf must be made up separately if the proviso is to apply.

We are not prepared to go quite as far as that. For instance, in our opinion the fact that certain loaves are in a shop for sale does not of itself constitute an offer for sale of each of the individual loaves without addition. The offer for sale would only arise when the shopkeeper attempted to sell a loaf. Nor do we consider that where a number of short-weight loaves are offered for sale the deficiency in respect of each loaf must be made up by a separate piece which is actually cut from another loaf. That would not be in the public or indeed in anyone's interest if the aggregate shortfall could be made up by the addition of an uncut loaf. However, we are satisfied that the deficiency on one loaf cannot be made good by selling another loaf which happens to be above the minimum weight specified for its denomination.

A fortiori an aggregate of such deficiencies cannot be made good by an aggregate of such excesses. It would be different if say a 2-pound loaf were sold at the price of a 1-pound loaf, or if an extra loaf or part of a loaf were added without charge in order to make good a deficiency or an aggregate of deficiences.

Although there was a suggestion that the 2 3/4-pound loaves were sold at the price of a 2 1/2pound loaf, such a contention cannot stand in fact since the 2 3/4-pound loaves were invoiced at Shs. 1/50 each, and the appellant stated that his 2 3/4-pound loaves were made to sell at Shs. 1/50 each.

It is therefore clear that the 2 3/4-pound loaves were not sold for less than their ordinary price and consequently no bread was supplied to make up the deficiencies in the one-pound loaves.

The appeal is dismissed.

Appeal dismissed.

For the appellant:
Verjee & Verjee, Nairobi
J. R. Verjee

For the respondent:
The Attorney-General, Kenya
K. C. Brookes (Crown Counsel, Kenya)

Vallabhdas Hirji Kapadia v Thakersey Laxmidas
[1960] 1 EA 852 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	3 October 1960
Case Number:	282/1960
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Practice – Security for costs – Action brought by plaintiff in Kenya – Few assets in Kenya – Plaintiff ordinarily resident at Zanzibar – Place of business at Zanzibar with branch at Dar-es-Salaam – Whether defendant entitled to security – Civil Procedure (*Revised*) *Rules*, 1948, *O. XXV*, *r.* 1 (*K.*) – *Judgments Extension Decree* (*Cap.* 23), *s.* 3 (*Z.*).

Editor's Summary

The defendant applied for security for costs on the ground that the plaintiff was ordinarily resident at Zanzibar and outside the jurisdiction of the court. The plaintiff submitted that no order should be made as by s. 3 of the Judgments Extension Decree, Cap. 23, Laws of Zanzibar, a decree obtained in any court in Kenya could be transferred to Zanzibar for execution as if the decree had obtained in Zanzibar.

Held –

(i) in view of the provisions of the Judgments Extension Decree of Zanzibar the evil against which the rule for security sought to guard largely disappeared;

(ii) the defendant would be at no material disadvantage, if successful, in taking steps to recover his costs either in Zanzibar or in Tanganyika where the plaintiff also had property;

(iii) *Farrab Incorporated v. Robson and Another*, [1957] E.A. 441 (K.), did not decide that in all such cases, and no matter what the circumstances, security should be given.

Application refused.

Cases referred to in judgment:

(1) *Ebrard v. Gassier* (1885), 54 L.J. Ch. 441; (1885), 28 Ch. D. 232.

(2) *In re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co.* (1876), 2 Ch. D. 531.

(3) *Raeburn v. Andrews* (1874), L.R. 9 Q.B. 118.

(4) *Farrab Incorporated v. Robson and Another*, [1957] E.A. 441 (K.).

Judgment

Edmonds J: In this application by the defendant that the plaintiff be ordered to give security for costs, it is not contested that the plaintiff is ordinarily resident in Zanzibar and therefore outside the jurisdiction of this court. While the plaintiff has shares of some value in a company incorporated in Kenya, I do not consider that such can be said to amount, no matter how valuable, to "substantial property of a fixed and

permanent character" – the requirement necessary before a plaintiff resident abroad can escape the liability to provide security for costs (*Ebrard v. Gassier* (1) (1885), 54 L.J. Ch. 441; (1885), 28 Ch. D. 232). However, it is contended for the plaintiff that no order for security should be made in view of the provisions of the Judgments Extension Decree, Cap. 23, Laws of Zanzibar, by s. 3 of which a decree obtained in any of the courts of Kenya may be transferred for execution to the High Court of Zanzibar or to any first class court subordinate thereto, and execution thereon obtained as if the decree had been a decree originally obtained in one of those

courts. Sir George Jessel, M.R., in *In re Percy and Kelly Nickel, Cobalt and Chrome Iron Mining Co*. (2) (1876), 2 Ch. D. 531 spoke thus of the principle underlying the requirement of a foreign plaintiff to provide security:

> "The principle is well established that a person instituting legal proceedings in this country, and being abroad, so that no adverse order could be effectually made against him if unsuccessful, is by the rules of the court compelled to give security for costs."

It seems to me that the evil against which the rule as to security seeks to guard largely disappears in view of the provisions of the Zanzibar Judgments Extension Decree, as under that enactment an order adverse to the plaintiff could as effectually be executed against him in Zanzibar as if he were a resident in Kenya. The judgment of Blackburn, J., in *Raeburn v. Andrews* (3) (1874), L.R. 9 Q.B. 118 at p. 120 is noteworthy:

> "I think that there ought to be no rule. When we look at the origin of the practice of calling on a plaintiff resident abroad to give security for costs, as established in *Pray v. Edie*, the point becomes quite clear. In that case, the plaintiff being a foreigner residing abroad, the court stayed proceedings till he gave security for costs, and Buller, J., said: 'for this reason, that if a verdict be given against the plaintiff he is not within the reach of our law so as to have process served upon him for the costs.' The same point was afterwards, for the same reasons, decided in *Fitzgerald v. Whitmore*, in the case of a plaintiff residing in Ireland, and the rule was afterwards extended to a plaintiff resident in Scotland. But since the passing of the Judgments Extension Act, 1868 (31 and 32 Vict. c. 54), that reason has completely ceased. The effect of that enactment is that when a judgment has been obtained in England a certificate of such judgment can be registered in the proper office in Scotland, and the court in Scotland can issue process on such judgment. It is true that the process in Scotland may perhaps be not like the process of our courts, but we must take it that it is as effective as our own. In Ireland if the writ of ca. sa. be not taken away an execution under this Act would be more effective than in England. The reason, therefore, for compelling a plaintiff resident in Scotland to give security for costs having ceased, this rule must be refused."

My attention has been drawn to the case of *Farrab Incorporated v. Robson and Another* (4), [1957] E.A. 441 (K.). In that case the defendants applied for security for costs on the ground that the plaintiff was resident abroad, namely, in Tanganyika. The application was resisted on the ground that the plaintiff owned substantial property in Tanganyika and that in view of the Judgments Extension Ordinance of Kenya and Tanganyika, the defendants, if successful, could proceed against the plaintiff's property in Tanganyika. My learned brother Connell, J., decided, for reasons which he gave, to exercise his discretion in favour of the defendants and ordered provision by the plaintiff of security for costs. The learned judge did not, however, decide that in all such cases and no matter what the circumstances, security should be given. In the instant case, the plaintiff has his principal place of business in Zanzibar with a branch in Dar-es-Salaam. The defendant will be at no material disadvantage, if successful in this suit, in taking proceedings for the recovery of his costs in Zanzibar and Tanganyika. I will therefore exercise my discretion in favour of the plaintiff and decline the application. I order, however, that the costs of the application will be costs in the cause.

Application refused.

For the applicant:
Inamdar & Inamdar, Mombasa
I. T. Inamdar

For the respondent:
G. R. Mandavia, Nairobi
N. M. Budhdeo

Pyaralal Melaram Bassan and Another v R
[1960] 1 EA 854 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	15 November 1960
Case Number:	101/1960
Before:	Sir Kenneth O'Connor P, Sir Alastair Forbes VP and Crawshaw, JA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Pelly Murphy, J.

[1] Criminal law – Trial – Summing – up – Murder – Trial with assessors – Circumstantial evidence – Emphasis on falsity of defendant's story – Insufficient direction upon an affirmative prosecution case – Whether misdirection material – Criminal Procedure Code, s. 354, *s.* 378, *s.* 381 (*K.*) *– Eastern Africa Court of Appeal Order in Council*, 1950, *s.* 16 (1) *– Eastern Africa Court of Appeal Rules*, 1954, *r.* 41.

Editor's Summary

The appellants were convicted on circumstantial evidence of the murder of the first appellant's wife. The appellants appealed against conviction on the grounds that the trial judge had critically examined the defence case before the prosecution case and, having demolished the first appellant's story to his own satisfaction and in effect, directed the assessors thereon, had treated the falsity of the defence case as a pillar of the prosecution case. It was further contended that in the summing-up an affirmative prosecution case was not developed at all and the assessors were given the impression that they could give their opinions in favour of a conviction on the falsity of the defence story.

Held –

(i) in the summing-up the attention of the assessors was continuously concentrated, not on an affirmative prosecution case, but on exhibiting the falsity of the first appellant's statement; an impression must have been built in the minds of the assessors that if they found the first appellant's story to be false that would be a primary factor in establishing his guilt;

(ii) while it was an important part of the Crown's case to negative the first appellant's story and show that the murder could not have occurred as he described it, this circumstance did not establish his guilt; it was essential that the Crown established affirmatively that the first appellant either murdered or instigated the murder of his wife. *Tumahole Bereng v. R.*, [1949] A.C. 253 applied;

(iii) the statement by the trial judge that "all that the accused has to do is to show you that his version

may possibly be true" was, in the context, seriously misleading; there is no obligation on an accused person to show anything at all, unless a prima facie case has been established against him; and then it is sufficient for him to raise a doubt as to his guilt;

(iv) the trial judge put the case to the assessors in such a way as to leave them little or no room for reaching an independent conclusion on the evidence and the suggestions made by him to them were so forcible that it would require assessors of very strong character to come to an independent opinion notwithstanding that they were told that they might disregard his views; the trial judge thereby ran the risk of depriving himself of the benefit of their independent advice.

Appeal allowed. Re-trial ordered.

Cases referred to in judgment:

(1) *Tumahole Bereng v. R.*, [1949] A.C. 253.

(2) *Rafaeri Munya v. R.* (1953), 20 E.A.C.A. 226.

(3) *Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462.

(4) *Davies v. Director of Public Prosecutions,* [1954] 1 All E.R. 507.

(5) *R. v. V. L. Dossani* (1946), 13 E.A.C.A. 150.

(6) *Alfred Granville Ross v. R.* (1956), 23 E.A.C.A. 616.

Judgment

Sir Kenneth O'Connor P, read the following judgment of the court: The first appellant is an Asian. He was, at the material time, a salesman for the East African Tobacco Company at Nyeri. The second appellant is a Kikuyu who was employed formerly in cultivating a plot of ground and selling vegetables in Nyeri and latterly by various people on odd jobs. On May 25, 1960, both appellants were convicted by the Supreme Court of Kenya of the murder, on March 11, 1960, on Airfield Road, Nyeri, of Satyavati the wife of the first appellant. They were both sentenced to death. Against these convictions and sentences they appeal to this court.

On March 11, 1960, a Dr. Boon who was living in a house the drive of which leads to Airfield Road, Nyeri, left his house in his car about 8.35 p.m. He saw a vehicle coming towards him in the drive. The first appellant got out of the vehicle (it was a van) and said "My family has been murdered by a number of Africans". Dr. Boon told him to get back into the van and to follow him to the Civil Hospital. There, at approximately 9 p.m., the first appellant was handed over to Dr. Helm. The first appellant had no serious injuries, but inside the car on the front seat or on the floor in front were the bodies of three children. In the back of the van was the body of a woman – the first appellant's wife Satyavati. She was dead. Two of the children were dead: one was alive and was taken to the operating theatre. The appellant said that he had been returning to Nyeri on the Airfield Road: he had had to slow down as three Africans were standing in front of his car. His engine had stalled. As soon as the car had stopped one of the Africans had hit the driver's side of the windscreen with what the first appellant thought was a panga. The glass had become opaque and he was unable to see. The African had then chopped at the driver's window and broken it. The first appellant had got out and struggled with the Africans. One of them had held his jacket and he (the first appellant) had slipped out of it and run away. The Africans did not pursue him. He had run some distance and hidden in the bushes. While running and while hiding he had heard screams from his wife and children. After some time the screams had ceased and he had returned to the vehicle. He had found the body of his wife on the ground and had picked it up and placed it in the rear of the van.

The police arrived at the hospital. The van was removed to police control and subsequently carefully examined. The first appellant was medically examined and was found to have eight cuts and scratches 1 1/2" to 1" long and 1/8" to 1/4" deep on his left outer arm from 4" to 2" below the point of the shoulder, three cuts on the left inner arm (mid-axillary line) from 1" to 1/2" long, each 1/8" deep. These cuts had bled, but were not bleeding when Dr. Helm saw them. In addition the first appellant had a cut 1" long and 1/4" deep on the left side of his back about 2" from the point of the shoulder going inwards towards the spine. He also had seven superficial scratches 5" to 8" in length on his back. He did not appear to be shocked.

The bodies of the first appellant's wife and children had been slashed with a panga or other similar sharp instrument. Terrible wounds had been inflicted. The appellant's wife had sustained more than thirty-five injuries, including a large wound on the right side of the neck from which blood would have spurted. This must have been inflicted from the right side and from the back and was caused by a sharp

weapon such as a panga. This injury could have

been inflicted upon someone sitting in the front passenger seat by someone in the back of the van. The wife's right hand also had been amputated at the wrist.

Superintendent Baker of the C.I.D. took a statement from the first appellant at the hospital at 10.10 p.m. on March 11 in which the first appellant repeated with more detail the statement which he had made to Dr. Boon. On March 13 the first appellant made another statement. In neither of those statements did he say anything about having picked up an African (the second appellant) on the way back from Nanyuki and having given him a lift in the back of the van. At 9 a.m. on March 16 the first appellant made another statement. In this he did mention having picked up an African (whom, he said, he did not know) and having given him a lift but only as far as Burguret. He said that his wife had told him that she knew this man as he had sold fowls and eggs to her on one or two occasions.

On March 16 about 6 p.m. information reached the police from various persons including Kinyua s/o Njuguna (referred to at the trial and hereinafter by his nick-name "Tanganyika") and one Mwangi both of whom were afterwards called as witnesses at the trial. As a result of the information which they gave, the appellant was sent for and further statements were taken from him that night. These were excluded from evidence by the learned trial judge on the ground that they did not conform to the Judges' Rules.

The appellants were arrested and charged with the murder of Satyavati. The trial was a joint trial.

The case for the prosecution at the trial rested, learned Crown Counsel said in his final address, largely on the evidence of Tanganyika. He was a store-boy at the East African Tobacco Company's godown in Nyeri. He testified that he had been approached by the first appellant in January, 1960, and asked to come to the first appellant's house. The first appellant had then made an appointment to meet him on the road and had picked him up in his car and driven to the football ground, where he had stopped the car and confided to Tanganyika that he was much worried because of his father-in-law and his wife who had taken his money and property and tried to poison him. The first appellant gave Tanganyika Shs. 5/-. Later there was another meeting at which the first appellant said that he wanted a witch-doctor so that he could bewitch his wife and children. Later Tanganyika sent the second appellant (Wathobia) to cut firewood for the first appellant. Tanganyika said that he had thereafter been told that the second appellant had agreed to kill the first appellant's family. The three met and, in the presence of Tanganyika, the first appellant offered the second appellant Shs. 1,500/- to kill his (the first appellant's) family. Tanganyika went away from Nyeri for about two weeks. When he returned, he was told by the first appellant that, in pursuance of a plan, the second appellant had gone to the first appellant's house and had taken some money which had been left there for him, but had not slashed the first appellant's family as had been arranged: the first appellant had accordingly found another man, who, he said, would not lie to him and would do the job. This man was one Mwangi who was called as a witness at the trial. The general plan was that the first appellant was to take his wife and Tanganyika in the car to Meru. Mwangi was to stop the car on the road and ask for a lift. This was duly carried out. The party went to Meru. The next day the first appellant, Tanganyika and Mwangi met. The first appellant said he would indicate a spot for the killing. Mwangi said it would be better to take the family about two miles out of the town. Mwangi then demanded money and the first appellant gave him Shs. 30/- for buying a raincoat, knife and food. The first appellant went off to borrow a vehicle. Mwangi, having got the money, disappeared. The appellant and Tanganyika returned to Nyeri. According to Tanganyika, there followed various attempts by the first appellant to get his family killed

and for this purpose abortive trips were made to Embu and to Nairobi (a spot near Embakasi Airport) with the second appellant who had again been assigned to the role of killer. It is unnecessary to describe these in detail. Finally, after a meeting in early March at which the second appellant demanded money for himself and Tanganyika, the first appellant said that after the killing he would leave his wallet in his coat with Shs. 300/- in it which the second appellant would find. The second appellant was instructed to go by bus to Nanyuki.

Tanganyika said that he saw the first appellant in Nyeri (at 4.30 p.m.) on March 11 driving the van, with his family (apparently en route for Nanyuki). Tanganyika stopped him and got Shs. 10/- from him so that he (Tanganyika) could go and drink with friends in Nyeri and so establish an alibi. Tanganyika said that throughout he disapproved of the plan and was not prepared to join in the killing: he did not want to kill: neither had he wanted Mwangi to kill.

Mwangi, when called as a witness, supported in the main Tanganyika's evidence of the conspiracy to kill the first appellant's wife and family and of the trip to Meru. He said that he had only pretended to agree to the killing. He admitted having taken Shs. 30/- from the first appellant to buy a coat and knife, but said that, when he got the money, he took the bus back to Nyeri.

The Crown case was that the previous attempts having proved abortive, the first appellant finally arranged to take his wife and family to Nanyuki on the evening of March 11 in a borrowed van (which would not be driven by the company's driver Stephen) having previously arranged for the second appellant to go to Nanyuki by bus. The second appellant was to ask for a lift and be picked up on the return journey and be in the back of the van, and was to carry out the killing en route after darkness had fallen. The Crown alleged that this was, in fact, what took place and they sought to establish this by evidence of prior preparation and intent given by Tanganyika and Mwangi; by circumstantial evidence derived from the condition of the car, the wounds, the bloodstains, the clothing, the position of glass from the windscreen and the like; by evidence about a pair of overalls alleged to have been worn by the second appellant and, as regards the second appellant, by statements made by him to the police. The Crown also sought to show from the trivial nature of the first appellant's injuries, from the condition of his clothing and from the other circumstantial evidence, that his account of how the incident had taken place could not be true.

The first appellant, in an unsworn statement in court, denied that he had murdered anyone. He said that he had been happy with his wife and said that there was no motive for him to murder her. He denied Tanganyika's story of seeking someone to bewitch or kill his wife. He denied that he had arranged for the second appellant to enter his house in Nyeri to attack anyone there. He admitted having given Mwangi a lift to Meru, but said that that was a result of a chance meeting on the road. He stated that he had transported Tanganyika and the second appellant to Nairobi, but said that this also was a casual lift. He denied having been near Embakasi and said that Tanganyika had invented that story. He said that on March 11 he had gone with his wife and children on a pleasure drive to Nanyuki. Starting back before dark they had seen the second appellant on the road and he had asked for a lift as far as a farm near Burguret. The first appellant had allowed him to travel in the back of the van. As they were returning to Nyeri after the second appellant had got out, the attack on them had taken place as he had described to Dr. Boon and to the police. He said that he had never given or promised any money to Tanganyika or the second appellant at any time.

The second appellant also gave an unsworn statement in court. He said that he had been taken to the first appellant's house one day to cut firewood and had received Shs. 5/- from the first appellant's wife.

He had never spoken with the first appellant in Nyeri about killing his wife. He had been in Nairobi

with Tanganyika and the first appellant. On March 11 he had been given a lift by the first appellant from Nanyuki to Burguret where he had wanted to visit a friend. After seeing the friend he had got a lift to Nyeri in another vehicle. He did not know Mwangi. The statements he had made to the police were the result of ill-treatment by them and were false.

The learned judge summed up at length to the assessors. He gave them impeccable directions on, among other things, the necessity for deciding only on the evidence heard in court, the necessity for considering the case against each accused separately and for ignoring the extra-judicial statements of one against the other, and on the burden of proof.

He was more than fair to the appellants on occasions, for instance when he said (at p. 230 of the record)

> "and before you come to the conclusion that either is guilty you must come to the conclusion that the evidence leads you irresistibly to that conclusion."

That, if it referred to the evidence as a whole, as apparently it did, and not only to the circumstantial evidence, was to require a standard of proof higher than is necessary in a criminal case. So also where, at p. 258, the learned judge said that the assessors must be "satisfied beyond all doubt" that the first appellant was a party to the crime before they could think that there was some substance in the general story told by Tanganyika. On the other hand, his direction to the assessors on circumstantial evidence left something to be desired. Although the learned judge ascribed primary importance in the case to the circumstantial evidence, and (at p. 248) instructed the assessors what circumstantial evidence was and when an inference of guilt could be drawn from it, he omitted to tell them that an inference of the guilt of an accused person should only be drawn from circumstantial evidence when there is no rational explanation of the circumstances consistent with his innocence. Not only was this proper direction omitted; but, at p. 245, the direction was apparently inverted. It had been argued as a point of great importance in the prosecution case that some drops of blood found on the first appellant's coat were splashes and not smears and the court had been asked to infer from this that the first appellant had been seated in the front of the van when his wife was slashed from behind by the second appellant, and had got splashed with her blood and it was argued that the first appellant could not have been out of the van and have left his coat in the hands of an assailant as he had stated. Mr. Kapila, for the defence, had argued that it was not known what the assailant had done with the coat: he could have thrown it out on the mudguard or elsewhere – e.g. the floor of the car or on the road where a few drops of blood might have spurted or dropped on to it. The learned judge said:

> "Now it is perfectly true, as Mr. Kapila says, that we do not know what happened to that coat after it had been dragged off the first accused or he had wriggled out of it, if in fact, that is what happened. But do you think that the African who got hold of that coat, either at the right-hand side or the back of the van, according to the accused, brought it round to the other side of the van from where the accused was allegedly being attacked, and got blood spots on it? Is that the compelling inference from the presence of these spots of blood?"

Mr. Kapila's argument was an argument for the *defence*, and there is, of course, no obligation on the defence to establish "compelling" inferences from circumstantial evidence. Unless the learned judge meant to refer to the inference which the prosecution had put forward (which would not be the ordinary sense of the passage and not the way in which it would be understood by the

assessors) it was an inversion of the true rule regarding circumstantial evidence and could hardly fail to confuse the assessors. As the learned judge attached the greatest importance to these blood spots and invited the assessors (at pp. 248-249) to conclude from them that the first appellant had been present, probably in the van, when his wife or one of the children was first struck a blow with a panga or similar weapon, by someone in the back of the van, and that "as a result he got spots of blood on his coat", a misdirection or a confusing direction on this point was serious.

Mr. Kapila's main complaint about the summing-up was that the learned judge had closely and critically examined the defence case before the prosecution case, and having demolished the first appellant's story to his own satisfaction and, in effect, directed the assessors as to the view that they should take of it, had treated the falsity of the defence case as a pillar of the prosecution case. Nowhere, Mr. Kapila submitted, was an affirmative prosecution case put forward or reviewed in the summing-up, but the assessors were given the impression that they could give their opinions in favour of conviction on the falsity of the defence story.

It is correct that from the stage of the summing-up when (at p. 234 of the record) the learned judge, having finished his general remarks, commenced to review the evidence relating to March 11 as affecting the first appellant, he devoted the following seven pages of the summing-up to a critical examination of the first appellant's statements to Dr. Boon and to the police. It seems also that where affirmative evidence was mentioned by the learned judge, it was in the context that it went to prove that the first appellant's account of the incident could not be true. The whole emphasis is not upon an affirmative prosecution case, but upon the falsity of the first appellant's statements. To illustrate this in more detail: The learned judge suggested to the assessors that the right way to consider the evidence in the case was not to consider first the evidence of conspiracy but first to consider the events of March 11 in isolation. The learned judge began by reviewing the evidence of the first appellant's journey with his family in the van to Nanyuki on March 11. He pointed to evidence which, he suggested to the assessors, led to an inference that the lift given by the first appellant to the second appellant was by appointment and was not, as the first appellant alleged, the result of a chance meeting. The learned judge then reviewed what the first appellant had said to Superintendent Baker on March 11 at the hospital. He said that he thought it important that the appellant had made no mention of giving a lift from Nanyuki to an African. He suggested that the first appellant might deliberately have suppressed that fact. The learned judge then drew attention to the fact that in a long and detailed statement to Superintendent Baker on March 13 the first appellant had again made no mention of having given a lift to an African; but that, on March 16, when, the learned judge suggested, the police had information about the second appellant, the first appellant for the first time mentioned in a statement given to Inspector Harbans Singh that he had given a lift to an African. The next two pages of the summing-up are devoted to contrasting the first appellant's statement to Inspector Harbans Singh as to his lack of knowledge of the second appellant with his statement in court in which he admitted having given lifts to the second appellant before March 11. The whole emphasis is not on the fact that an African, the second appellant, had been taken into the back of the van on the crucial journey by the first appellant as an important part of an affirmative prosecution case; but this fact is used to exhibit the falsity of the first appellant's statement.

Then the learned judge, having reviewed what the first appellant had said to Dr. Boon and Dr. Helm about the incident, continued: "Now let us look at what the accused told the police about the attack". The learned judge proceeded to make a critical analysis of what the first appellant had said on

March 11 to Superintendent Baker, again apparently to exhibit the falsity of the appellant's statement. He pointed out, inter alia, that the first appellant had said

> "Both men struck me on the same spot on my arm, one when I had my coat on and one when I had slipped out of my coat."

The learned judge commented:

> "Well, you have seen that coat, gentlemen. Perhaps it surprises you that there is no apparent mark on it from a blow with a panga which produced a cut on the left upper arm".

Mr. Kapila complained that this statement was a misdirection. This is true, and we will refer to it later. But what was much more important was that the attention of the assessors was continuously being concentrated, not on an affirmative prosecution case but on exhibiting the falsity of the first appellant's statement. An impression must have been building up in the minds of the assessors that if they found the first appellant's story to be false that would be a primary factor in establishing his guilt.

The learned judge went on to review what the first appellant had said to Superintendent Baker in his statement of March 13 with a view to showing that the first appellant's account of how he received the injuries on his body must be false. This part of the summing-up also contains a misdirection on the evidence to which we will refer later. But the important thing is that the circumstantial evidence relating to the injuries to the first appellant was put to the assessors from the point of view of establishing the falsity of the first appellant's story, and not from the point of view of establishing affirmatively the prosecution case; the emphasis was on contradicting the first appellant's story.

The evidence that the blood-stains were drop-stains and not smears was then dealt with, and the evidence relating to the glass, the lack of blood-stains on the road, and cuts in the fabric of the roof of the car inside. All this may well have supported the prosecution theory that an attack had been made on the woman and children while sitting in the front seat by someone in the back of the van, but the emphasis is on the falsity of the first appellant's story.

It may be mentioned that Dr. Rogoff does not seem to have been asked whether, if the first appellant had been in the driver's seat or in the van wearing his coat when the woman next him was cut in the neck, he would not have got much more than three spots of blood on his coat.

The learned judge, having directed the assessors on the nature and use of circumstantial evidence (with the important omission already noticed) said:

> "Applying those tests to the facts of this case, do you not think that the only inference which can be drawn is that the first accused's version of this attack is false? Do you think that he was present, probably in the van, when either his wife or one of his children was first struck a blow with a panga or similar weapon? A blow struck by somebody in the back of the van, and that as a result he got spots of blood on his coat? I have reminded you of the cuts in the lining of the roof of the car. Do you think that his injuries were self-inflicted? Or inflicted by somebody with his consent when he had not got his shirt on – possibly with the blunt end of a panga? Do you think it is true, as the accused would have us believe, that Mrs. Bassan finally died on the road: or if not died, he did say that he found her body lying there. Do you not think that if that were true there would have been far more blood on the road? Do you not think that he, if

it was he, carried her body from the front seat or floor of the car and put it in the back?

> "Do you think that the accused's version of the attack is completely false? That the whole story is bogus? It is perfectly correct, as Mr. Kapila has told you, that it is not for the accused to explain how this killing was done. Once again I remind you that it is for the Crown to prove the guilt of the accused. As Mr. Kapila has said, all the accused has to do is to show you that his version may possibly be true – possibly be true in the light of all the evidence. Do you think that his story can possibly be true? Do not the facts, on the contrary, compel you to inferences which all point to the falsity of his story? The ultimate inferences being that he was not, and was never intended to be, a victim of this attack. And to the fact that he was there, present aiding and abetting this crime? Again, I stress that those are inferences which I suggest that you should draw from the facts but that you may disregard my suggestions in the matter if you think that they are not correct."

Emphasis throughout is placed on the falsity of the first appellant's story. The reminder that the Crown had to prove the guilt of the accused would have been of more avail if the assessors had been told that this could not be done by showing the falsity of the defence unless there was an affirmative Crown case which would justify conviction, and if an affirmative Crown case had been put to the assessors in the summing-up. Up to this stage, however, the major portion of the summing-up had been devoted to criticising the statements of one of the accused, and the medical and other evidence had been reviewed in the context of exhibiting the falsity of his statements. An impression must have been created that for the Crown to show the falsity of the defence case was a primary factor in proving the guilt of an accused person. No doubt it was an important part of the Crown's case to negative the first appellant's story and show that the murder could not have occurred as he described it, but this circumstance did not establish the guilt of the appellant. It was essential that the Crown establish affirmatively that the first appellant either murdered or instigated the murder of his wife. The law has been stated by Lord MacDermott in the judicial committee in *Tumahole Bereng v. R.* (1), [1949] A.C. 253 at p. 270:

> "It is, of course, correct to say that these circumstances – the failure to give evidence or the giving of false evidence – may bear against an accused and assist in his conviction if there is other material sufficient to sustain a verdict against him. But if the other material is insufficient either in its quality or extent they cannot be used as a make-weight."

Lord MacDermott was there dealing with a case where the court below had held that silence on the part of an accused person could amount to corroboration of the evidence against him by an accomplice. This was held to be wrong. Lord MacDermott treated the giving of false evidence on the same basis as silence and said that neither could be used as a make-weight if the other material against the accused was insufficient to sustain a verdict against him. Lord MacDermott was speaking of using silence by an accused person or the falsity of his evidence as corroboration of accomplice evidence; but it is difficult to see how, if the falsity of the evidence of an accused person may not be used as corroboration of evidence against him, it may be used otherwise against him, except to support material which is in itself sufficient to sustain a conviction.

Our attention was drawn by Mr. Havers, for the respondent, to a case in this court, *Rafaeri Munya v. R.* (2) (1953), 20 E.A.C.A. 226, in which it was held:

> "The force of suspicious circumstances is augmented whenever the

> person accused attempts no explanation of facts which he may reasonably be expected to be able and interested to explain; false, incredible or contradictory statements given by way of explanation, if disproved or disbelieved, become of substantive inculpatory effect. Even in such circumstances, however, guilt cannot be safely inferred, unless a substratum of evidence has been laid so as to create an independent prima facie case against the accused."

In the judgment in that case reliance was placed on a passage at p. 112 of the seventh edition of Wills' Principles of Circumstantial Evidence. The authority for that passage is a case decided in 1831 at a time when it was thought that the burden of proof in an ordinary criminal case could shift to an accused person. The seventh edition of Wills was published in 1936. *Woolmington's* case (3), [1935] A.C. 462 was decided in 1935; but that edition of Wills may have gone to press before *Woolmington's* case (3) was published, as there is no mention in it of that case. We are not suggesting that the extract from Wills is incorrect or that *Rafaeri Munya's* case (2), was wrongly decided. They seem to say much the same as Lord MacDermott said in *Bereng's* case (1); but we respectfully prefer the rule as stated by Lord MacDermott. It is quite plain that false statements made by an accused person do not have substantive inculpatory effect and cannot be used as a make-weight to support other material, unless the other material would be sufficient independently to sustain a verdict against the accused. The complaint against the summing-up in the present case is that it directed so much attention to establishing the falsity of the first appellant's case that, in the minds of the assessors, the necessity for the prosecution to make a sufficient affirmative case against the appellants independently of the falsity of the defence case must, if it was ever realised at all, have become completely obscured.

The statement in the above passage that

> "all that the accused has to do is to show you that his version may possibly be true"

is, in the context, seriously misleading. The assessors should have been told that there is no obligation on an accused person to show anything at all, unless a prima facie case has been established against him: it is only then that an obligation to show anything may arise and it is then sufficient for him to raise a doubt as to his guilt. Mr. Havers argued in this court that a prima facie case arose from the fact that the appellant was admittedly present when the murders were committed and from the circumstantial evidence, and that the evidence of the previous procuring of hired assassins clinched the case against the first appellant. That may well be so. In the light of the action we are taking, we express no opinion. At least it was a legitimate approach. But that was not how the case was put to the assessors.

Mr. Kapila also complained that the learned judge put the case to the assessors in such a way as to leave them little or no room for reaching an independent conclusion on the evidence. We think there is force in this contention. The suggestions made by the learned judge to the assessors were so forcible that it would require assessors of very strong character to come to an independent opinion notwithstanding that they were told that they might disregard the judge's views. We are not suggesting that a judge may not indicate his own view of the evidence, provided he tells the assessors, as the learned judge did, that they can disregard his views; but when a judge, with all the authority of a judge, suggests to assessors that a certain conclusion is "inescapable" or "inevitable" or suggests to them in such forcible language what inferences they should draw from the evidence, he runs the risk of depriving himself of the benefit of their independent advice.

The learned judge, having dealt with the events of March 11, went on to review the evidence of Mwangi. He said:

> "He is, I suggest, an unpleasant person. And you must consider his evidence with the utmost caution. But in my opinion, he is not an accomplice. And if you think he is telling the truth you may accept his evidence without any corroboration."

Mr. Kapila attacked this passage on the ground that the question "accomplice vel non" is a question for the jury and ought not to have been removed from the assessors. If, however, there is no evidence that a witness was a participant in the crime the judge is justified in so ruling: *Davies v. Director of Public Prosecutions* (4), [1954] 1 All E.R. 507, 514. Mwangi was certainly not a participant in the killing on March 11, and the fact that he had in February pretended to agree, or had agreed, to do the killing, but had disappeared as soon as he had got some money from the first appellant, would not make him a participant in the killing on March 11. We think that the learned judge was justified in directing the assessors that if they believed Mwangi, he was not an accomplice. Mr. Kapila argued that Tanganyika whom the judge had treated as an accomplice was not a participant in the killing either: if he was an accomplice, was not Mwangi an accomplice also? The cases, however, are not quite parallel. We desire to express no opinion whether the learned judge was right in treating Tanganyika as an accomplice without putting the question expressly to the assessors. If the learned judge erred in this respect, his error favoured the appellants, and would not be a ground for upsetting the conviction.

Mr. Kapila was on firmer ground when he took exception to the following passage in the summing-up:

> "Nobody has given evidence that the accused committed this crime; and the accomplice has certainly not given evidence that the accused committed this crime; but there is circumstantial evidence, and if you believe that evidence to which I have referred and draw what I suggest are inevitable conclusions from it, then you may think that the first accused did commit that crime. Let us look at Tanganyika in this way. A very great deal of what he has said has been contradicted over and over again by himself and by the evidence of other witnesses. He is, I think you will agree, a liar, and a person of no character. And certainly I suggest to you that you should place no reliance whatsoever on his detailed descriptions of events or conversations. It may well be that you should disregard his evidence completely. But let us reverse the usual picture of the accomplice, and put the position in this case in this way. If in the light of all the other evidence, the evidence of Mwangi, Stephen and the circumstantial evidence, you are satisfied beyond all doubt that the first accused was a party to this crime, then and I suggest and then only, you might think that there is some substance in the general story that Tanganyika tells of the plot by the first accused to kill his wife."

With the greatest respect, it is difficult to follow the reasoning in the last sentence of this passage. If, in the light of the other evidence, the assessors were "satisfied beyond all doubt" (or even beyond reasonable doubt) "that the first accused was a party to the crime", then there was no necessity for Tanganyika's evidence. If, however, Tanganyika was a liar and a person of no character so that no reliance whatsoever could be placed on his detailed descriptions of events or conversations, he should not be relied on even for the general story of the plot. We think that the learned judge may, in effect, have been saying that Tanganyika should not be relied on at all. But the assessors would never have understood that from what was said. If the learned judge had said that Tanganyika was unreliable and should not be believed

except where corroborated by some independent testimony implicating the accused, that would have been a perfectly intelligible direction. With the greatest respect, we do not think that the direction which the learned judge did give can be supported.

Mr. Kapila complained of misdirections by the learned judge on specific points in the evidence. The following are examples: In relation to the lift given by the first appellant to the second appellant on March 11, the learned judge rightly considered it important that a witness in Nanyuki, one Shah, had seen the first appellant, before he started back to Nyeri, stop and let an African into the back of the van. He also suggested to the assessors that from the facts that the first appellant, though he said to Shah that he was in a hurry, was seen still in Nanyuki fifteen minutes later and then was seen to have waited stationary for about five minutes and not to have driven off towards Nyeri until after the African had been picked up, they might infer that the lift was by appointment. Mr. Kapila complained that the explanation which the defence had given for this delay, namely that the first appellant's wife was buying bread, was never put to the assessors. It is correct that the first appellant's explanation of the delay, whether credible or not, should have been put to the assessors in this connection; but we cannot regard this as a very serious omission, particularly as the alleged purchase of bread was mentioned when the first appellant's statement to Superintendent Baker was being reviewed.

Then, in discussing the first appellant's detailed statement to Superintendent Baker on March 13, the learned judge said:

> "Next, let us see what the first accused said to Inspector Harbans Singh on March 16 by which time the police had information, if not more, about Wathobia, the second accused."

The first appellant did in that statement mention that he had given Wathobia a lift to Burguret. Mr. Kapila said that the evidence showed that the first appellant had volunteered information about the lift to Inspector Harbans Singh, having previously forgotten to mention it, and Mr. Kapila objected to the passage "by which time the police had information, if not more, about Wathobia". He pointed out that the first appellant had given his statement to Inspector Harbans Singh at 9 a.m. on March 16, whereas Wathobia was not then under arrest and was not even brought to the C.I.D. office for questioning until about 12 noon on the 16th. This was correct. It is, however, a probable supposition that the police had information about Wathobia before his arrival at the C.I.D. office since they had sent for him, but there is no evidence what information they had or whether or not they had it before 9 a.m. If this was a misdirection, we do not consider it serious. As the learned judge pointed out, the first appellant in his statement to Inspector Harbans Singh said that he did not know Wathobia and made no mention of his having given him a lift before the occasion on March 11.

As regards the injuries which the first appellant suffered, we have already referred to the passage in the summing-up where the learned judge, after pointing out that the first appellant had said

> "Both men struck me on the same spot on my arm, one when I had my coat on and one when I had slipped out of my coat",

commented

> "Well, you have seen that coat gentlemen, perhaps it surprises you that there is no apparent mark on it from a blow with a panga which produced a cut on the left upper arm."

Mr. Kapila correctly pointed out that this comment was erroneous, since, on

the appellant's statement, he received one blow when he had his coat on and one when he had it off, and the cut could have been produced by the latter without marking the coat. Mr. Havers, for the Crown, admitted that this was a misdirection, but said that it was unimportant. We think, however, that it was a substantial misdirection.

Again, in considering what the first appellant had said to Superintendent Baker in his statement of March 13, the learned judge made a misdirection. The first appellant had said that one of his assailants "began to hit me on my arms"; the assailant, the first appellant said, had a grip on his coat, but he slipped out of the coat leaving it in the assailant's hands. He went on: "As I ran I received two further blows". Part of the learned judge's comment is "But in this version it appears he had his coat on when he received these blows". The appellant, however, had said that he had received "two further blows" as he ran after leaving the coat in the African's hands. The fact that there was no cut in the fabric of the coat did not prove (as the learned judge had suggested) that the appellant's story was false. The fact that there was no cut in the fabric of the shirt (which the learned judge dealt with later) was much more important.

Mr. Kapila further attacked a passage in the summing-up in which the learned judge dealt with the evidence of Stephen the driver. The learned judge said:

> "Stephen may have made mistakes of fact and recollection in giving evidence. But I suggest that fundamentally he is an absolutely truthful witness. And although, with reference to this safari to Meru on February 18, Stephen gave a different version about picking up Mwangi than the version he gave at the preliminary enquiry, I suggest that you should accept his evidence here."

Mr. Kapila asks why, when a witness has given discrepant stories both on oath, he should be described as absolutely truthful, and why his later, should be preferred to his earlier, recollection?

The learned judge went on to review the evidence against and for the second appellant (who was not represented by counsel on the appeal) and, reverting to the case against the first appellant, stressed the unlikelihood of a gang of Africans attacking and killing the woman without robbing her of her jewellery. He finished in an unexceptionable passage, by telling the assessors again that they could, if they wished, ignore his comments and that it was for the Crown to prove the guilt of the accused, and that if they had any doubt, they must give the benefit of it to the accused.

The assessors unanimously advised that both appellants were guilty of murder.

In his judgment the learned judge said, inter alia:

> "Analysing the evidence as I did in my summing-up, I am convinced beyond any doubt that the first accused's version of the events which took place when his van was stopped on the Airfield Road is completely false. That conclusion does not imply that it is for him to explain the killing – for him to disprove that he was a party to it. I bear in mind that the burden of proof lies on the Crown. But, the circumstantial evidence (to which I referred in detail in my summing-up), not only convinces me that his story is false, but also that he was not, and was never intended to be, a victim of the attack; it convinces me that he was present aiding and abetting the crime; and that, after it was perpetrated, he fabricated evidence in an attempt to divert suspicion from himself and to produce a scene which might lead others to believe his story.
>
> "The evidence of Mwangi (P.W. 8) who, in my judgment, never took any active step in furtherance of the conspiracy even though he took money for that purpose – in fact he had nothing to do with any of the

> conspirators after February 19 – satisfied me that during the month of February the first accused was planning to kill his wife and family. I believe Mwangi's evidence.
>
> "Stephen (P.W. 22), who I am sure was a completely truthful and reliable witness, was insistent that it was contrary to anything he had known prior to February for the first accused to give lifts on the road to strangers who signalled to him when he was driving his van on his various journeys thoughout the district. I accept his evidence without hesitation. I believe that he tried to dissuade the first accused from giving a lift to Mwangi on February 18; and on all the evidence I am satisfied that the first accused gave this lift by prior arrangement in furtherance of his plans. I believe that Stephen tried to dissuade the first accused from giving a lift to the second accused on February 26 – a lift given after dark – and I am satisfied that this lift also was pre-arranged by the first accused in furtherance of his plans.
>
> "I am satisfied that, on the day of the murder, the first accused met the second accused by arrangement in Nanyuki and there let him into the back of the van. I do not believe that the second accused got out of the van at Burguret.
>
> "The four statements made by the first accused to the police, when considered with the statement he made from the dock, convinced me that he endeavoured to conceal the fact that he ever had any dealings with the second accused because he knew that the second accused was the hired assassin. I am satisfied that he admitted that he had given the second accused a lift from Nanyuki on the day of the murder only when he realised that the police had got that information from the second accused and that he then invented the story of having parted from the second accused at Burguret.
>
> "In arriving at my conclusion that the first accused plotted to kill his wife, I have disregarded the evidence of 'Tanganyika' (Kinyua – P.W. 7). But, having decided on all the other evidence that the first accused's guilt has been established, I consider that the substance of Tanganyika's evidence fills in the general background of the crime. I regard his evidence as of less importance than that of Vidyotma Sharma (P.W. 23), and her evidence has not influenced me in coming to my conclusions."

Vidyotma Sharma was an unmarried Asian woman who testified that she and the first appellant were in love and had had illicit relations during 1959 and 1960. This had been advanced by the prosecution as a possible motive for the first appellant wishing to get rid of his wife and family.

It will be observed that in this passage, while the learned judge correctly directs himself as to the burden of proof and says it is not for the accused to explain the killing, the falsity of the first appellant's story is again put in the foreground, though it is said that the circumstantial evidence not only convinces the learned judge that his story is false, but that he was present aiding and abetting the crime. There is the at least doubtful assumption that the first appellant had only admitted giving the second appellant a lift because he realised that the police had got that information from the second appellant. Again there is no mention of the very high criterion to be applied to inferences depending on circumstantial evidence. There is the apparently anomalous statement that once the first appellant's guilt has been established aliunde, the substance of the evidence of Tanganyika (described in the summing-up as a liar and a person of no character) "fills in the general background of the crime".

The judgment, however, is not open to very serious criticism. The difficulties in this appeal arise from the summing-up, and the effect on the minds of the assessors which the wrong approach to the evidence with its premature emphasis

on exhibiting the falsity of the defence and the other defects which we have mentioned, must have had.

We have considered s. 381 of the Criminal Procedure Code; but in our opinion, the matters complained of in this appeal are too fundamental to permit of that section being invoked.

Our view is that there was evidence on the record which might support the convictions of both appellants; but as there were certain unsatisfactory features connected with the trial resulting in the first appellant not having had a satisfactory trial, the order which should be made in his case is an order for a re-trial: *R. v. V. L. Dossani* (5) (1946), 13 E.A.C.A. 150, 151.

We have considered also the grounds of appeal put forward by the second appellant and are of opinion that none of them would justify our interfering with his conviction. As, however, the trial was a joint trial and he may have been prejudiced indirectly by some of the matters which we have mentioned in discussing the first appellant's appeal, we think that the fairest order to make is to direct a re-trial in his case also.

Accordingly, we set aside the convictions and sentences of the appellants and, acting under s. 16 (1) of the Eastern Africa Court of Appeal Order-in-Council, 1950, read with s. 354 and s. 378 of the Kenya Criminal Procedure Code, and under r. 41 of the Eastern Africa Court of Appeal Rules, 1954 (see *Alfred Granville Ross v. R.* (6) (1956), 23 E.A.C.A. 616), we order that the appellants be re-tried by a court of competent jurisdiction.

No opinion expressed by this court or by the learned trial judge, based on the evidence in the present case, as to the admissibility of evidence or as to the status – accomplice or not – of any witness, should affect in any way the discretion of the judge at the new trial who should decide all such questions in his unfettered discretion according to the evidence adduced at that trial.

Appeal allowed. Re-trial ordered.

For the first appellant:
S. R. Kapila & Kapila, Nairobi
A. R. Kapila

For the respondent:
The Attorney-General, Kenya
J. K. Havers (Crown Counsel, Kenya)

The second appellant appeared in person.

R v John Francis Tansley
[1960] 1 EA 868 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	8 December 1960
Case Number:	196/1960

Before: Templeton J

Sourced by: LawAfrica

[1] Criminal law – Practice – Rights of accused – European accused requested to attend court merely to plead – Accused not informed of right to be tried as a European – Whether rights relinquished by the plea – Criminal Procedure Code, s. 221 *and s.* 249 (*K.*) *– Penal Code, s.* 43 (1) (*K.*).

Editor's Summary

The accused who was to be charged with an offence under the Traffic Ordinance was requested on the telephone by a police officer to attend court for plea. When he appeared unrepresented before a magistrate the police officer told the accused that all that was required of him was to plead. He then pleaded not guilty and stated that he would be represented at the hearing. When the trial opened before another magistrate the accused who was then represented claimed to be tried as a European whereupon the magistrate proceeded to hold a preliminary inquiry and committed the accused for trial in the Supreme Court. The depositions came before the deputy public prosecutor who, being of the opinion that the case might suitably be tried by a subordinate court, returned the depositions to the magistrate, pursuant to s. 249 of the Criminal Procedure Code, and requested that the case be re-opened, tried and determined as if the accused had not been committed for trial. The senior resident magistrate considered that s. 249 was not applicable and referred the matter to the Supreme Court for consideration in revision. At the hearing the deputy public prosecutor submitted that by pleading not guilty to the charge before the first magistrate, the accused had submitted to the jurisdiction of the court, and that since the accused had not then claimed to be tried as a European, he had relinquished his right to be so treated. It was submitted for the accused that if it were held that the accused had by pleading not guilty relinquished his rights as a European, it would amount to a denial of justice.

Held –

(i) the police officer's instructions to the accused to plead, though without any ulterior motive, amounted to a misrepresentation, however innocent, of the accused's position; therefore,

(ii) it would almost amount to a denial of justice if the accused were deprived of his right to be tried as a European which he had asserted at the earliest opportunity after his plea of not guilty was recorded;

(iii) there was no irregularity in the proceedings before the second magistrate and the accused was properly committed for trial before the Supreme Court.

No order in revision.

Case referred to:

(1) *R. v. Pope and Sciarra* (1951), 18 E.A.C.A. 134.

(2) *R. v. Searle* (1955), 22 E.A.C.A. 443.

(3) *R. v. George Horsfall*, Kenya Supreme Court Criminal Appeal No. 102 of 1955 (unreported).

Judgment

Templeton J: In this case the accused John Francis Tansley was committed to the Supreme Court on a charge of driving a motor vehicle whilst under the influence of drink contrary to s. 43 (1) of the Traffic

Ordinance 1953, after a preliminary inquiry held by Nairobi resident magistrate Mr. Ball on October 6, 1960, the accused having previously appeared before Nairobi resident magistrate Mr. Steven on September 8, 1960, when he was charged with the offence and pleaded not guilty.

Upon receipt of the depositions the deputy public prosecutor, being of the opinion that the case was one which might suitably be tried by a subordinate court, returned the depositions to the resident magistrate in accordance with s. 249 of the Criminal Procedure Code with a request that the case be reopened, tried and determined in the same manner as if the accused person had not been committed for trial. The senior resident magistrate, Nairobi, considered that the provisions of s. 249 were not applicable because the accused had elected to be tried as a European and referred the matter to the Supreme Court for consideration in revision and MacDuff, J., directed that the matter be listed for argument.

It is not disputed that the accused is a European but Mr. Webber, deputy public prosecutor, submitted that by pleading not guilty to the charge when before Mr. Steven on September 8, the accused submitted to the jurisdiction of the court and the effect of his not claiming at that stage to be a European is that he has relinquished the right to be dealt with as a European conferred by s. 221 of the Criminal Procedure Code which is in the following terms:

> "If an accused person does not claim to be a European when before the subordinate court before which he is tried or by which he is committed for trial, or if when such claim has been made and disallowed by the committing magistrate it is not made again before the Supreme Court, he shall be held to have relinquished his right to be dealt with as a European and shall not assert it at any subsequent stage of the same case."

and that the case is therefore one which may be dealt with under s. 249.

In support of his submission Mr. Webber has referred to the decisions of the Court of Appeal for Eastern Africa in *R. v. Pope and Sciarra* (1) (1951), 18 E.A.C.A. 134 and *R. v. Searle* (2) (1955), 22 E.A.C.A. 443, and the judgment of the Supreme Court in *R. v. George Horsfall* (3), Kenya Supreme Court Criminal Appeal No. 102 of 1955 (unreported).

Sir William Lindsay who appeared for the accused submitted that the decisions referred to have no application to the facts of the present case which were that the alleged offence occurred on August 7, 1960; nothing was heard about the matter until September 6, when Chief Inspector Ross telephoned the accused and told him to appear on September 8, to answer a charge of driving a motor vehicle whilst under the influence of drink. No summons was issued but accused appeared on September 8, as requested and was told by a police officer who was present that all that was required was for him to plead guilty or not guilty as he thought fit. No mention was made of any rights of trial as a European and the accused pleaded not guilty and said he would be represented at the hearing.

The relevant part of the record of the subordinate court reads as follows:

"8/9/60.

I/P Mangan for Prosecution.

Accused present, represented.

> "The substance of the charge and every element of it has been explained by the court to the accused who, on being asked whether he admits or denies the truth of every element of the charge, replies 'Not guilty'.

For hearing 6/10/60, Court 11, 9 a.m.

> "Summons for doctor and Government chemist to refer to their reference number which is P.S. 1142/1960 in each case.

H. I. Steven.”

On October 6, 1960, accused appeared before the resident magistrate, Mr. Ball, being on this occasion represented by Sir William Lindsay. He claimed to be tried as a European and the resident magistrate proceeded to hold a preliminary inquiry.

These facts are quite different from those in the three cases cited since the appellants in all three cases had, when before the subordinate court, expressly waived their rights to be tried as Europeans.

In *R. v. Pope and Sciarra* (1), it was held that if Europeans do not claim to be such, for the purposes of Part VII of the Criminal Procedure Code they can relinquish their right to trial under Part VII; and in *R. v. Searle* (2), the relevant part of the headnote reads:

> "Held (5/4/55).
>
> (2) Approving *R. v. Pope and Sciarra*, s. 221 and s. 224 aforesaid require that a claim shall be made before the special provisions relating to the trial of Europeans afforded by Part VII aforesaid become applicable."

There is no reference in the judgments of either of these cases to the stage at which the claim must be asserted, but Mr. Webber relies particularly on the judgment of the Supreme Court in *R. v. George Horsfall* (3), in which the following passage occurs:

> "Section 221 states clearly that if an accused person does not claim to be a European he shall be held to have relinquished his right to be dealt with as a European and shall not assert it at any subsequent stage of the same case. A passive attitude on the part of an accused is all that s. 221 requires, and from that passive attitude two results follow as a matter of course: (1) the accused is deemed to have relinquished his right, and (2) he is forbidden to assert that right at any subsequent stage of the same case. If a passive attitude, namely a mere failure to assert his claim, deprives an accused person of his right to assert it at any subsequent stage of a case, how much more so when he has expressly relinquished the claim."

It is clear from the judgment of the Supreme Court that the question for consideration was whether the subordinate court was correct in refusing to allow the appellant to withdraw the waiver of his right to be tried as a European so that part of the passage quoted above would appear to be obiter.

The Supreme Court did not find it necessary to decide what is the true meaning of the words "subsequent stage" in s. 221 but the judgment sets out various steps which were taken in the proceedings before the application to withdraw the waiver was made and goes on:

> "In effect, therefore, he was allowed to change his plea from one of guilty to one of not guilty and the case had passed the plea stage."

It was submitted that there is no duty upon a magistrate to inform an obvious European of his rights, and that would appear to be correct, but it is significant that in the cases to which reference has been made each accused waived his right to be tried as a European after such right had been explained to him by the magistrate. This was referred to by the Court of Appeal in *R. v. Pope and Sciarra* (1), in the following passage on p. 136:

> "Coming to the particular facts of this case as revealed by the record of the proceedings in the magistrate's court we would point out that no claim was made by the appellants. They did not claim to be 'Europeans' for the purposes of Part VII. There was no evidence led to prove that they were Europeans. The magistrate apparently assumed, possibly from their physical appearance, that they were *in fact* Europeans and then – in our view quite properly – the magistrate explained that under s. 221 by not

> *claiming* to be Europeans for the purpose and effect of Part VII they could relinquish their rights to be tried as Europeans under Part VII and quite expressly they did so relinquish their rights, whereupon the magistrate, quite rightly in our view, proceeded with the trial in the ordinary way."

and in the judgment in *R. v. Searle* (2), in dealing with this point the Court of Appeal said at p. 446:

> "if subordinate courts will read and digest the judgment of this court in *Pope's* case, magistrates will see that what they have to discover where an obvious European is before them, is whether he wishes to be considered as a European for the purposes of claiming special privileges afforded to Europeans by Part VII of the Code."

In the instant case the accused was merely informed that all he had to do was to plead guilty or not guilty, and having pleaded not guilty nothing further took place until he appeared before another magistrate for the hearing. Can it be said that by following the instructions of the police officer to plead to the charge the accused was electing not to claim to be tried as a European? I feel quite sure that the police officer gave these instructions without any ulterior motive but his words amounted to a misrepresentation, however innocent, of the accused's position, and in these circumstances I consider that it would almost amount to a denial of justice if the accused were to be deprived of his right to be tried as a European which he asserted at the earliest opportunity after his plea of not guilty was recorded and a date fixed for the hearing.

I am fortified in this view by Note 3 of the commentary on s. 528B of the Indian Code of Criminal Procedure (which is similar to our s. 221) appearing in Sohoni's Commentaries (13th Edn.), at p. 1139 which reads as follows:

> "3. Waiver may be revoked. – In *Sterling's* case, 1 P.R. 1908 – 4 P.W.R. 1908 – 136 P.L.R. 1908 – 7 Cr. L.J. 274, the Punjab Chief Court, *held* that the waiver was not irrevocable; and if the withdrawal of the waiver was made promptly, shortly after the waiver had been made and if substantially, nothing had been done in the interval on the abandonment of the privilege, the withdrawal of the waiver should be allowed."

No report of *Sterling's* case is available here but the principle set out above is one which in my view should be applied in this case in order that justice should manifestly appear to be done.

I therefore find that there was no irregularity in the proceedings before the resident magistrate, Mr. Ball, and that the accused was properly committed for trial before the Supreme Court and I make no order in revision.

No order in revision.

For the Crown:
The Attorney-General, Kenya
J. P. Webber (Deputy Public Prosecutor, Kenya)

For the accused:
Hamilton, Harrison & Mathews, Nairobi
Sir William Lindsay

Jashbhai P Patel & Co v The Commissioner for Transport
[1960] 1 EA 872 (CAD)

Division:	Court of Appeal at Dar-es-Salaam
Date of ruling:	10 November 1960
Case Number:	87/1960
Before:	Sir Alastair Forbes VP, Windham CJ and Crawshaw JA
Appeal from:	H.M. High Court of Tanganyika – Law, J.

[1] Customs – Refund of duty paid in advance of arrival of goods – Goods lost in transit – Practice that damaged cargo must be placed in "breakage cage" to satisfy Customs – Damaged cargo not placed in "breakage cage" – Whether duty paid recoverable – Whether harbour authority under duty to ensure that practice is followed – East African Railways and Harbours Act (*Cap.* 3 *of Revised Edition of the Laws of the East African High Commission*), *s.* 4 *– East African African Harbours Regulations*, 1952, *r.* 57, *r.* 59 *and r.* 224 *– East African Customs* (*Management*) *Act*, 1952, *s.* 23 *and s.* 124.

Editor's Summary

The appellants, as clearing agents for an importer of goods, sued the respondent for Shs. 115/54 damages in respect of import duty which they had had to pay on certain goods lost in transit. The respondent was sued as the authority responsible for receiving goods landed from ships at harbours in East Africa. The goods in question, which were in two cases, were unloaded from the ship into lighters. One of the two cases was broken before it was unloaded, but it was not put into a portable "breakage cage", as no request for a cage had been made by the shipping agents, but a "defective package receipt" was subsequently issued for the broken case by the shipping company certifying the actual contents, but it was not signed by either a customs officer or the ship's agent. The Customs Department rejected the claim for a refund of the duty paid. It was common ground that the Customs Department, in order to obtain reliable proof that goods lost or damaged had been lost or damaged before arrival in East Africa, had instituted a practice, with the agreement of the respondent and the shipping companies, whereby defective packages were to be placed either in a "breakage cage", when a ship is discharging on to a wharf, or if the ship is discharging into a lighter, into a portable "breakage cage" on board the ship. The appellants contended that by reg. 59 (since amended) of the East African Harbours Regulations, delivery of cargo to the respondent was only complete when the cargo is removed from the slings in which it is landed, and by reg. 224, delivery of defective cargo is not considered to have been made until a check of the goods has been completed, and further, that it was the duty of the respondent to ensure that defective cargo discharged from a ship into lighters is placed in a portable "breakage case" on the ship, whether or not the ship's agents have made a request for such a cage. The magistrate who first tried the action dismissed the claim, and his decision was sustained on first appeal to the High Court.

On further appeal

Held –

(i) the court was not required to consider whether or not the Customs Department were justified in refusing to entertain an application for refund of duty unless the package in question had been placed in a portable "breakage cage" on board the ship, but there was evidence and it was admitted that the practice was to require this to be done before a refund of duty was granted.

(ii) it followed that once goods had been discharged into a lighter it was too late to take any action which could affect the question of refund of duty.

(iii) there was no doubt that the respondent assumed obligations to the importer when it took delivery of the goods from the ship but this did not impose any duty on him to take steps in relation to goods before the goods come into his or his agent's custody.

(iv) while s. 23 of the East African Customs (Management) Act, 1952, may have some bearing on the justification or otherwise of the practice of the Customs Department in relation to breakage cages, it could not affect the duty and liability of the respondent in relation to existing Customs practice.

Appeal dismissed.

The following judgments were read by direction of the court:

Judgment

Sir Alastair Forbes VP: This is a second appeal against a judgment and decree of the resident magistrate, Dar-es-Salaam, dismissing a claim by the appellants against the respondent for Shs. 115/54 damages being the amount of import duty on certain goods which the appellant had to pay notwithstanding that the goods in question had been lost in transit to Tanganyika. The learned resident magistrate's decision was upheld by the High Court on first appeal, and the appellants now challenge the decisions of both the resident magistrate and the High Court. The case, I understand, is in the nature of a test case.

There is little dispute as to the facts, and a statement of agreed facts was put before this court at the hearing. The facts are as follows:

The appellants are a firm of merchants in Dar-es-Salaam who act as clearing agents for importers of goods. The respondent is a corporation solely incorporated under s. 4 of the East African Railways and Harbours Act (1951 Revised Edition of the Laws of the High Commission, Cap. 3). As such he is responsible for the East African Railways and Harbours Administration (hereinafter referred to as "the Administration"). The Administration is responsible for receiving goods landed from ships at harbours in East Africa. In Dar-es-Salaam the Administration employs as its agents for this purpose the Tanganyika Landing and Shipping Coy. Ltd. (hereinafter referred to as the "Landing and Shipping Coy."). Ships arriving in Dar-es-Salaam discharge their cargo either on to a wharf or into lighters. The cargo is handled on board the ship by stevedores employed by the shipping company. The Landing and Shipping Coy., on behalf of the Administration, normally takes delivery of cargo being discharged from a ship upon the removal of the cargo from the slings, etc. in which it is landed – see reg. 59 of the East African Harbours Regulations, 1952 (hereinafter referred to as the "Harbours Regulations"). It may be remarked that reg. 59 has since been amended and now makes it clear that delivery is only complete when cargo has been landed on to quay or into lighters, as the case may be.

In the case of defective cargo, reg. 224 of the Harbours Regulations (which is set out in full below) provides, inter alia, that delivery of the goods shall not be considered to have been made until a check of the goods has been completed. The Customs Department, however, require to be satisfied that goods lost or damaged have been lost or damaged before arrival in East Africa before they are prepared to refund customs duty paid in advance upon the importation of such goods; and they will not be so satisfied unless the defective packages have been placed, either in a "breakage cage" when the ship is discharging on to a

wharf, or in a “portable breakage cage” on board the ship when the ship is discharging into lighters. The system of breakage cages was

introduced by agreement between the Administration, the Customs Department and the shipping companies. The breakage cages are supplied by the Landing and Shipping Coy. on request by the ship's agents.

It is the appellants' contention that it is the duty of the Administration or its agents to ensure that defective cargo discharged from a ship into lighters is placed in a portable breakage cage on the ship whether or not the ship's agents have made a request for such a cage.

In the instant case two cases of bed covers and pillows imported by Moolji Naranji & Sons arrived by the s.s. "Mohamedi" on or about October 7, 1958. The bill of lading was endorsed to the appellants to enable them to clear the goods. The appellants filled up the usual Customs and Port declaration forms and paid customs duty before arrival of the goods; presented the bill of lading to the shipping company and obtained a delivery order; presented two copies of a delivery and disposal order and the bill of lading to the Administration; and paid the port dues. It was then the duty of the Administration through its agents to receive the goods from the ship. The goods were unloaded from the ship into lighters. One of the two cases was broken before it was unloaded, but it was not put into a portable breakage cage, no request for one having been made by the ship's agents. A "defective package receipt" (exhibit E) was subsequently issued for the broken case by the Landing and Shipping Coy. certifying the actual contents found in the case. This "defective package receipt" was signed only "L. & S. Co.", and was not signed by either a Customs Officer or the ship's agent notwithstanding reg. 224 (1) of the Harbours Regulations. However, the owners of the s.s. "Mohamedi" admitted responsibility for the lost goods on the basis of the loss having occurred on the ship before reaching East Africa, and paid the c.i.f. value of the lost goods to the appellants. The appellants applied to the Customs Department for refund of the duty paid in respect of the goods which had been lost, i.e. Shs. 115/54. This claim was rejected by the Customs Department because the broken case had not been placed in a portable breakage cage on board the ship; the Customs Department's contention being that unless the broken case had been placed in a portable breakage cage on board the ship they

> "would not be in a position to know if the shortages or breakage had occurred wholly outside East Africa."

In these circumstances the appellants sued the respondent in the district court for the amount of the customs duty which they had paid in respect of the goods which had been lost and which the Customs Department refused to refund alleging breach of:

> "the Administration's (defendant's) duty in the premises as common carriers and/or its own or its servants' or agents' or contractors' negligent and careless stowage of the said goods and not putting in the breakage cage as required . ."

As already stated the learned resident magistrate dismissed this claim and the appellant appealed to the High Court. On the appeal to the High Court the allegation of breach of duty by the Administration as a common carrier was abandoned. The learned judge in dismissing the appeal dealt with the points argued as follows:

> "The allegations, as I understand them, are now –
>
> 1. that the Administration failed to use reasonable diligence and skill as agents of the appellants, in accepting a broken case instead of insisting upon its being placed in a breakage cage; and
> 2. that the Administration acted in breach of its duty as laid down

in the East African Harbours Regulations, 1952, and in particular under reg. 224 thereof.

"On the first point, the evidence adduced at the hearing fully supports the learned resident magistrate's finding that the only stage at which the broken case could have been put in a cage was when it was on the ship; that his was prior to any time at which the Administration had control over the goods, and that the Administration clearly could not be responsible for anything that happened or failed to happen prior to the delivery of the goods to itself.

"The second point was not argued before the learned resident magistrate except on the basis of the Administration's duty as a common-law carrier. The appellants now rely upon the Administration's duty under the East African Harbours Regulations, 1952. Mr. Master relies chiefly upon reg. 224, which reads as follows:

'224 (1) Where any goods have been landed in packages of a defective or leaky character notwithstanding the provisions of reg. 59 of these Regulations or the fact that the Administration has given a receipt for the goods, delivery of the goods shall not be considered to have been made to the Administration until such packages have been repacked, rebagged or repaired in a reasonably sound condition and such goods have been checked in the presence of the ship's agent or a Customs officer, and the Administration shall be deemed to have accepted delivery of only such goods as are found upon such check.

'(2) Notwithstanding the provisions of sub-s. (1) the Administration may decline to accept any goods which are tendered for landing in packages of a defective or leaky character until such packages have been properly repaired or the goods rebagged or repcked, to the satisfaction of the Administration, on board the carrying vessel.'

"Sub-section (2) does no more than express in legislative form the principle that common-law carriers have a right to refuse to accept defective packages for carriage, a recognised exception to the primary duty of common carriers to accept all goods which are offered to them for carriage; a principle which was correctly stated by the learned resident magistrate in the prepenultimate paragraph of judgment.

"As regards sub-s. (1), Mr. Master submits that it imposes a duty upon the Administration to have defective packages repaired before accepting them. With respect, I do not agree. In my opinion, Mr. Fraser Murray is clearly right in submitting that, far from imposing any duty on the Administration, reg. 224 (1) is designed for the protection of the Administration, by specifying that if goods are received by the Administration in defective packages, delivery shall not be deemed to have been made to it until such packages have been repacked and the contents checked, whereupon delivery only of such goods as are found upon such check shall be deemed to have been made.

"That is precisely what happened in this case. The broken box was accepted for landing; it was repaired and the contents checked; and the Administration are only deemed to have accepted delivery of those goods found upon such check. The appellants have failed to satisfy me that the respondents were negligent or in breach of any duty, statutory or otherwise, in accepting the broken box for landing, or in failing to insist upon the broken box being placed in a breakage cage."

The grounds of appeal to this court as set out in the memorandum of appeal are as follows:

> "1. The learned judge erred in holding that evidence adduced at the hearing fully supported the learned resident magistrate's finding that the only stage at which the broken case could have been put in a cage was when it was on the ship.
>
> "2. The learned judge erred in finding that the broken box was repaired.
>
> "3. The learned judge should have held that respondent should have discovered that the case was broken at the time of taking the tally sheet or at the time of putting in the lighter or after it was brought to the wharf and should have requested to the shipping company to put it in a portable breakage cage.
>
> "4. The learned judge erred in holding that the respondent clearly could not be responsible for anything that happened or failed to happen prior to the delivery of goods to the respondent.
>
> "5. The learned judge erred in the interpretation of the reg. 224 of the East African Railways and Harbours Regulations, 1952.
>
> "6. The learned judge ought to have held that the respondent was negligent."

As to ground 1, this would appear to have been abandoned as Mr. Master who appeared for the appellants, stated that he was not challenging findings of fact except in one instance (referred to in ground 2); and in any case it is inconsistent with para. 6 of the statement of admitted facts put before the court, which reads as follows:

> "6. If goods are lost or damaged Customs do not refund duty unless they are satisfied that they are lost or damaged before arrival in East Africa. They will not be satisfied unless the goods are placed in a portable breakage cage on the ship before they are discharged into a lighter or breakage cage when the ship anchors at the wharf."

Refund of customs duty which has been paid is authorised by s. 124 of the East African Customs Management Act, 1952 (No. 12 of the Acts of the High Commission, 1952) (hereinafter referred to as "the Customs Act"), the relevant part of which reads as follows:

> "124 (1) Subject to the provisions of this section, and of any regulations, the commissioner may grant a refund –
>
> (*a*) of any import duty, or part thereof, which has been paid in respect of goods which have been damaged or pillaged during the voyage, or damaged or destroyed while subject to Customs control;"

Whether or not the Customs Department are justified in refusing to entertain an application for refund of duty unless the package in question has been placed in a portable breakage cage on board the ship is not a matter which the court is required to consider; but the evidence is clear, and it is now admitted, that it is the present practice of the Customs Department to require this to be done before they will grant a refund of duty. It follows that once goods have been discharged into a lighter it is too late to take any action which could affect the question of refund of duty. No doubt the goods could be placed in a portable breakage cage while in the lighter; but to do so would be a useless waste of time as the Customs Department do not accept this as satisfactory evidence that the loss has not occurred in East Africa. Mr. Master referred to s. 23 of the Customs Act, which provides that goods unloaded and landed into a transit shed or Customs area deemed to be still in the vessel until delivered from such transit shed. Such section may have some bearing on the

justification or otherwise of the practice of the Customs Department in relation to breakage cages, but cannot affect the present question which is that of the duty and liability of the Administration in relation to the existing Customs Department practice.

As to ground 2 of the memorandum of appeal, Mr. Master contended that there was no evidence to support the learned judge's statement towards the end of the passage from his judgment set out above that:

> "The broken box was accepted for landing; it was repaired and the contents checked;"

It is true that there seems to have been no evidence as to whether or not the broken case was repaired. That the contents were checked is to be inferred from the "defective package receipt" (exhibit E) which certifies the contents found upon examination; but it does not appear from the defective package receipt that the check was carried out in the presence of either a Customs officer or the ship's agent as required by reg. 224 of the Harbours Regulations, nor does the receipt state that the case was repaired. To this extent the learned judge may be said to have made a finding of fact which is not supported by evidence. I will consider whether this finding was material to the decision when I deal with ground 5 of the memorandum of appeal.

Ground 3 of the memorandum of appeal really concerns the time of taking the tally sheet. As already indicated, the putting of the broken case in a portable breakage cage after the case had been put in a lighter or on the wharf would not have satisfied the Customs Department. Mr. Master's argument with regard to the tally sheet was based on reg. 57 of the Harbours Regulations, sub-reg. (1) of which reads:

> "57(1) Unless otherwise specially agreed upon between the Administration and the master of the ship, the Administration shall grant a receipt to the master of the ship for all cargo received, subject to each item being properly marked and being discharged in an orderly manner, provided that where in the opinion of the Administration cargo is of such a nature as to preclude an accurate tally at the time of discharge, then a receipt shall be granted at the time of sorting and stacking wherever such sorting and stacking takes place."

Mr. Master suggested that this regulation means that employees of the Landing and Shipping Coy. must go on board a ship in order to tally the cargo; and that therefore the Landing and Shipping Coy. were in a position to know the case was damaged before it left the ship, and could then have called for a portable breakage cage or asked the ship's agent to call for one. There was no evidence to support the suggestion that employees of the Landing and Shipping Coy. go on board a ship for the purpose of tallying cargo which is being discharged, and I do not think that such a practice is to be inferred from reg. 57. The regulation merely speaks of "an accurate tally at the time of discharge"; and the natural inference appears to me to be that the tally is made where delivery is effected; that is, where the cargo is removed from the slings – see reg. 59. No doubt the fact that the case was broken was discovered at the time of making the tally; but I do not see that this would have enabled the Landing and Shipping Coy. to call for a cage in time to satisfy the Customs Department.

Mr. Master did suggest that in view of s. 23 of the Customs Act, notwithstanding reg. 59 of the Harbours Regulations, delivery from the ship would not be complete until all formalities had been completed, and that therefore the Landing and Shipping Coy. could have sent the broken case back to the ship to be put in a portable breakage case after it had been discharged into the lighter. The evidence is clear, however, that such action would not have

satisfied the Customs Department, and in any case I do not think s. 23 of the Customs Act affects the operation of reg. 59 of the Harbours Regulations. Section 23 would appear to be directed to the question of responsibility for goods which have been landed in so far as liability for payment of customs duty on such goods is concerned. Regulation 57 and reg. 59 of the Harbours Regulations are concerned with the delivery of cargo from the ship to the Administration or its agents, who in fact handle the cargo after it has left the ship. In view of the admitted fact that the Customs Department will not be satisfied that goods have been lost from a case before arrival in East Africa unless the case has been placed in a portable breakage cage on the ship before it is discharged into a lighter, it seems to me that s. 23 is irrelevant.

As regards ground 4 of the memorandum of appeal, Mr. Master's argument, as I understood it, was to the effect that goods on a ship must be tendered for landing before the actual landing on to a wharf or into a lighter; that upon such tender the goods should be checked by the Administration; that apart from the Harbours Regulations the shipper himself could go and get the check made, but that that right has been taken away from the shipper by the Regulations; that therefore the Administration or its agents are the only persons in a position to make such a check; and that therefore it is the duty of the Administration to make such a check or have it made, and to take appropriate action, i.e. provide a portable breakage cage, if the check reveals damaged cargo.

No provision was, however, brought to our attention which indicated that tender of goods for landing must be made on board the ship prior to discharge, and no evidence was given on the subject. Having regard to reg. 57 and reg. 59 of the Harbours Regulations, the tender of goods for landing would appear to occur when the goods arrive over the side of the ship in the slings or other appliances provided, and I see nothing in reg. 224 (2), to which Mr. Master referred, to contradict this view.

Mr. Master stressed that the breakage cage system was introduced by agreement between the Customs Department, the Administration and the shipping companies, and that the appellants were not parties to the agreement. That may be so; though I think Mr. Thornton, who appeared for the respondent, stated the situation more accurately when he described the arrangement as an administrative arrangement instituted by the Customs Department, with the co-operation of the Administration and the shipping firms, to overcome the difficulties of getting reliable proof that goods from damaged cargo had actually been lost before arrival in East Africa. Nevertheless, I cannot see that the Administration is placed under any obligation to take steps in relation to goods before the goods are received by the Administration or its agents. The shipping company has contractual relationship with the importer, and at the time the Customs Department require a portable breakage cage to be used, the goods are still in the custody of the shipping company. Whether it can be said that the shipping company has committed a breach of duty to the importer which could be the basis of an action for damages is not a matter which is before the court. The Administration no doubt assumes obligations to the importer when it takes delivery of the goods from the ship. But I can see nothing which imposes any duty on the Administration to take steps in relation to the goods before the goods come into the custody of the Administration or its agents.

The fifth ground of appeal relates to reg. 224 of the Harbours Regulations. Mr. Master argued that that regulation was for the protection of the shipper who could rely on the check so made to claim a refund of duty; and that the failure of the Administration or its agents to have the check made in the presence of a Customs officer or the ship's agent or to have the broken box repaired was a failure of duty which would render it liable for the customs duty which the Customs Department had refused to refund.

This argument, however, is not consistent with the evidence to the effect that the Customs Department would only have been satisfied that the goods had not entered East Africa if a portable breakage cage had been brought into use on the ship. I would respectfully agree with the learned judge that reg. 224 (1) is obviously designed for the protection of the Administration. If it was a fact that the check was not carried out in the presence of either a Customs officer or the ship's agent, and that the broken package was not repaired (and no evidence as to this aspect of the matter was given at the trial) that might possibly affect the question of liability for the missing goods as between the shipping company and the Administration; but I do not see that it can have any relevance to the question of customs duty under the existing practice of the Customs Department.

It follows from what I have already said that as regards ground 6, I see no ground on which the learned judge ought to have held that the respondent was negligent in relation to the subject of the claim.

For these reasons I would dismiss the appeal with costs.

Windham CJ: I agree and have nothing to add.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellants:
Patel, Desai & Jhaveri, Dar-es-Salaam
K. A. Master, Q.C., and *K. L. Jhaveri*

For the respondent:
Fraser Murray, Thornton & Co., Dar-es-Salaam
R. S. Thornton

Herbert Wilson and Another v Jack Bryant
[1960] 1 EA 880 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	4 November 1960
Case Number:	90/1959
Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Harley, J

[1] Negligence – Collision – Contributory negligence – Car accident in which both parties to blame – Whether Law Reform (*Miscellaneous Provisions*) *Ordinance*, 1956 *has retrospective effect – Law Reform* (*Miscellaneous Provisions*) *Ordinance*, 1956, *Part II, s.* 3 *of Part III, s.* 4 *of Part IV and Parts V and VI*

(*K.*) – *Law Reform* (*Contributory Negligence*) *Act*, 1945.

Editor's Summary

The first appellant was driving his wife, the second appellant, and their two children in a Jaguar car along St. Austin's Road, Nairobi, towards Sclaters Road, while the respondent was driving a Standard Vanguard estate car along the same road in the opposite direction. A collision occurred when the respondent was turning right into Northumberland Avenue across the path of oncoming traffic as a result of which one of the appellant's children and a passenger travelling with the respondent, one Mrs. Middleton, were killed, the appellants and the respondent were injured and both vehicles became total losses. The accident occurred at or about 7.25 p.m. There was no street lighting near the scene of the accident but visibility was good. The road had a tarmac surface which was dry and was subject to a speed limit of 30 m.p.h. No skid or brake marks were found on the road. Both the first appellant and the respondent who were sued by Mrs. Middleton's husband and infant son under the Fatal Accidents Ordinance admitted liability for the purpose of that case only and damages were awarded in the sum of Shs. 59,493/- against them both jointly and severally. Subsequently, the first appellant sued for special and general damages against the respondent including an indemnity for the Shs. 59,493/- referred to above and the second appellant also claimed damages from the respondent. The respondent in turn sued the first appellant for special and general damages and an indemnity for a like amount. The actions were consolidated and the trial judge assessed the damages but, on the issue of liability, was unable to reach any conclusion. Both appellants had stated that they were suffering from amnesia and could not recollect how the accident occurred. The respondent's version was that he was travelling slowly, turned right, across the traffic, to enter Northumberland Avenue, having first made sure that there was nothing in his way, that he had not seen the appellant's car approaching and his only explanation for this was that it must have been approaching very fast with no lights. It was suggested that the appellant's son, aged seven, who was sitting between the appellants on the front seat must have turned off the lights at the crucial moment. There was, however, evidence of an independent witness that, as he was approaching the scene of the accident, he saw the Jaguar travelling fast with its headlights on. The trial judge rejected the respondent's evidence and stating that he was left in the realm of conjecture and hypothesis, dismissed both claims. On appeal the appellants contended that the trial judge misdirected himself in failing to decide the issue of negligence, and argued that, having disbelieved and rejected the respondent's account of the accident, he should have found that he (the respondent) was negligent. In his cross-appeal the respondent averred that the trial judge was wrong in failing to accept his evidence which was not contradicted by any other direct evidence and that he should have found the first appellant negligent. The

appellate court was asked, if the opinion that the trial judge was wrong in not deciding the issue of negligence, to decide this issue and not to remit the matter for a new trial.

Held –

(i) once the judge had found that the accident occurred on the Jaguar's side of the road and that its lights were not off, the driver of the Vanguard was fixed with prima facie liability for negligence in attempting to cut across approaching traffic without keeping a proper look-out, or, if he did keep a look-out and saw the Jaguar, in performing the manoeuvre dangerously; that liability the respondent had failed to discharge, and on those facts, a verdict that neither side had been negligent was not open;

(ii) the trial judge should have found that the respondent had been negligent and should have proceeded to consider whether there had also been negligence on the part of the first appellant and, if so, whether the effective cause of the accident was the negligence of the respondent or the first appellant or both;

(iii) both drivers were negligent, the first appellant for driving at a speed which was not only prohibited but dangerous and the respondent in cutting across a traffic line without keeping a proper look-out, or if he did, in driving in a dangerous manner across the path of a vehicle approaching on its proper side;

(iv) it was not possible to apportion the liability for the damage as s. 4 of the Law Reform (Miscellaneous Provisions) Ordinance did not operate retrospectively; therefore, the liability fell to be decided under the common law;

(v) since both the first appellant and the respondent were negligent, but were not joint tortfeasors, they were not entitled to contribution each from the other.

Appeal of the first appellant dismissed. Appeal of the second appellant allowed; judgment entered for Shs. 700/- special damages and Shs. 7,000/- general damages against the respondent. Appeal of the respondent dismissed.

Cases referred to in judgment:

(1) *Bray v. Palmer*, [1953] 2 All E.R. 1449.

(2) *Stapley v. Gypsum Mines Ltd.*, [1953] A.C. 663; [1953] 2 All E.R. 478.

(3) *Berrill v. Road Haulage Executive* (1952), 2 Lloyds Rep. 490.

(4) *London Passenger Transport Board v. Upson*, [1949] 1 All E.R. 60.

(5) *Smith v. Callander*, [1901] A.C. 297.

(6) *Kalyanji v. Mohamed Athar*, Kenya Supreme Court Civil Case No. 275 of 1955 (unreported).

(7) *Boy Andrew v. St. Rognvald*, [1948] A.C. 140; [1947] 2 All E.R. 350.

(8) *Swadling v. Cooper*, [1931] A.C. 1.

(9) *The Koursk*, [1924] P. 148.

(10) *Merryweather v. Nixan* (1799), 8 Term Rep. 186; 101 E.R. 1337.

(11) *Palmer v. Wick & Pultneytown Steam Shipping Co. Ltd*., [1894] A.C. 318.

(12) *Mills v. Armstrong*, The Bernina (1888), 13 App. Cas. 1.

(13) *Mathews v. London Street Tramways Co*. (1888), 5 T.L.R. 3.

The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This appeal and cross-appeal arise out of a judgment and decree dated June 13, 1959, of the Supreme Court of Kenya in two consolidated suits (No. 1367 and No. 1368 of 1957) resulting from a collision, on November 14, 1955, in St. Austin's Road, Nairobi, between a Jaguar car driven by the first appellant and a Standard Vanguard estate car driven by the respondent. As a result of the accident Denise Wilson, who was one of two children of the appellants who were passengers in the Jaguar, and

a Mrs. Middleton, who was a passenger in the Vanguard, were killed, the appellants and the respondent suffered injuries, and very extensive damage, amounting to total loss, was done to both cars.

The following is a statement of the agreed facts:

"1. On November 14, 1955, a collision occurred,

2. at or about 7.25 p.m.,

3. between a red Jaguar XK. 120 open two-seater sports car fitted with competitive exhausts, registered No. KBS.485 driven by Captain H. Wilson,

4. in which Mrs. Wilson, their son aged seven, and their daughter Denise aged two and a half were passengers,

5. and a metallic blue Vanguard estate car registered No. KAE.197 driven by Mr. J. Bryant,

6. in which a Mrs. Middleton was a passenger, sitting beside Mr. Bryant in front.

7. No. KBS.485 was travelling along St. Austin's Road towards Sclater's Road.

8. No. KAE.197 was also in St. Austin's Road, having come from Sclater's Road, i.e. from the opposite direction.

9. The collision occurred at the junction of St. Austin's Road and Northumberland Avenue (referred to on occasions as Westfield Drive).

10. There was no street lighting on or near the scene of the accident.

11. The road surface was tarmac in good condition, and perfectly dry.

12. (*a*) St. Austin's Road was subject in common with all roads in the municipality to a speed limit of thirty miles per hour.

12. (*b*) St. Austin's Road at the scene of the accident was thirty feet six inches wide, and with a stone kerb along both sides. The dimensions shown on the plans are agreed.

13. (*a*) At the time of the accident it was dark, but there was no mist or fog to obscure visibility, which was normal for that time of night at that time of year.

13. (*b*) The sky was practically cloudless. The moon had set at 7.10 p.m. The last rain recorded at Dagoretti Observatory had been on November 10, when 0.25 inch was recorded. Sunset was at 6.21 p.m.

14. At the time of collision No. KAE.197 was turning to its offside into Northumberland Avenue from St. Austin's Road.

15. The position in which the vehicles were found after the accident are as shown in the photographs and on plan II.

16. No brake or skid marks were found on the road after the accident. There were however certain graze and oil marks as shown on plan II.

17. The main seat of damage resulting from the accident to No. KBS.485 was on the front left hand side, as shown in photographs Nos. 8, 9 and 10.

18. The probable point of impact on No. KAE.197 was on the front left wheel.

19. As a result of the accident, Denise Wilson and Mrs. Middleton were killed.

20. In Supreme Court Civil Case No. 695 of 1956, Mr. Brian Middleton and Roger Duncan Middleton (an infant) brought an action against both Wilson and Bryant for damages under the Fatal Accidents Ordinance. For the purpose of that case only, both defendants admitted liability, and the damages awarded were Shs. 59,493/- against both defendants jointly and severally."

In Civil Suit No. 1367 of 1957 the first appellant (first plaintiff) claimed against the respondent (defendant) Shs. 30,000/- special damages made up mainly of the value of the Jaguar car, and hospital and medical expenses. He also claimed general damages and indemnity in the sum of Shs. 59,493/-, being the amount of the judgment recovered in Civil Suit No. 695 of 1956 by the husband and infant son of Mrs. Middleton (the passenger in the Vanguard) against him and the respondent, and costs. In the same suit the second appellant (second plaintiff) claimed against the respondent (defendant) Shs. 700/- special damages, general damages and costs.

In Civil Suit No. 1368 of 1957 the respondent claimed from the first appellant indemnification in the said sum of Shs. 59,493/-, general damages and special damages amounting to Shs. 13,500/- (being the value of the Vanguard and convalescence expenses).

Leaving aside for the moment the question of liability, the learned judge assessed the figures of special damages as follows:

(*a*) for the respondent, Shs. 14,169/30;

(*b*) for the first appellant, Shs. 29,988/25; subject to a possible deduction of Shs. 5,115/- for a payment already made to the first appellant by his employer in a medical scheme. I understood, at the hearing in this court that that deduction was no longer claimed. The judge omitted to assess the special damages of the second appellant, but I understood that the amount claimed was not disputed.

The learned judge assessed the general damages at the following amounts:

For the first appellant, £500;

For the second appellant, £350;

For the respondent, £1,000.

On the question of liability, the learned judge was unable to come to any conclusion. The appellants, as both alleged that they were suffering from amnesia, were unable to be of much assistance as to the circumstances of the accident. The respondent's version was that he was travelling at slow speed and turned right, across the traffic, to enter Northumberland Avenue, having made sure that there was nothing in his way to make such a course of action dangerous. He did not see the appellants' car approaching. The only explanation which he put forward for this was that it must have been approaching very fast with no lights, and the suggestion was made that the appellants' young son, aged about seven, who was sitting between the appellants on the front seat, must have turned off the lights at the crucial moment. There were no brake marks on the road and it seems that neither car took any avoiding action. The learned judge dealt with this as follows:

"Mr. Bryant does seriously suggest that the Jaguar was travelling at seventy-five miles per hour with lights off. If Mr. Wilson so drove, he must have been insane; and if Mr. Wilson's small son switched off the lights at a distance of four hundred feet from the turning, Mr. Wilson's reaction must surely have been to apply the brakes. I think that Mr. Bryant has been trying to tell the truth, but I find myself unable to accept his account and explanation. Some form of amnesia may have affected Mr. Bryant's

> memory as well as that of the Wilsons: in any event I reject his reconstruction of events as quite incredible."

The judge said that he was then left in the realm of conjecture and hypothesis and, after referring to a dictum of Jenkins, L.J., in *Bray v. Palmer* (1), [1953] 2 All E.R. 1449, continued:

> "I deplore all the more being unable to conclude whether one or other (if either) of the drivers was negligent, because the passenger, at least Mrs. Wilson, is an entirely innocent sufferer. I ask myself: As this court does not accept Mr. Bryant's explanation, can Mrs. Wilson apply against Mr. Bryant the doctrine of res ipsa loquitur? I think not, moreover the court's finding that each driver may or may not have been guilty of any negligence does not, in relation to Mrs. Wilson, put on Mr. Bryant the burden of disproving negligence on his part: it is sufficient for him to say that the accident could have been due solely to Mr. Wilson's negligence. The issue of negligence or no negligence is evenly tilted between the two drivers, and the maxim res ipsa loquitur cannot to my mind be applied in this case.
>
> "In the result I must dismiss both suits, and the normal rule of costs following the event will apply."

The appellants appeal to this court on the grounds that the learned judge misdirected himself in failing to decide the issue of negligence. They aver that, having disbelieved and rejected the respondent's account of the accident, the judge should have found that the respondent was negligent, that the accident was caused by his negligence, and that the first appellant was not guilty of negligence.

In his cross-appeal the respondent avers that the judge was wrong in failing to accept his, the respondent's, evidence of the accident which was not contradicted by any other direct evidence, and that the judge should have found negligence on the part of the first appellant. The respondent also says that the judge failed to consider, on the issue of speed, that the evidence of Mr. Ward (who saw the Jaguar before the accident and the position of the cars after the accident) contradicted the first appellant's evidence, and he alleged that the judge had failed to evaluate the evidence of a technical witness, a Mr. Blakeman.

The learned judge seems to have accepted the first appellant's evidence to the effect that he remembered nothing of the actual accident. I think I am bound by that acceptance.

The dictum of Jenkins, L.J., in *Bray v. Palmer* (1), on which the learned judge relied was as follows:

> "Oliver, J., did not simply reject the plaintiffs' and the defendant's evidence and say: 'I do not believe that the accident happened in the way claimed by either side.' If he had done that, his decision would not so far as I can see, be open to any criticism."

Bray v. Palmer (1), was a case differing in an important particular from the present case. In *Bray v. Palmer* (1), a head-on collision took place in the middle of the road. It was not a case of a vehicle attempting to cut across traffic moving on its own side of the road. Moreover, it was a case where the judge took the view that the accident must have been due to the exclusive negligence of one driver or the other. The learned judge in the present case did not take that view: he merely refused to make a finding, which, he said would be based on conjecture. I do not understand the dictum of Lord Justice Jenkins in *Bray v. Palmer* (1), to apply to a case where one driver was clearly negligent or to a case where the accident was due to the negligence of both drivers. If by the phrase

> "the issue of negligence or no negligence is evenly tilted between the two drivers"

the learned judge meant that both were equally to blame, then, with respect, he should have so stated in unequivocal terms and worked out the consequences to the parties. He had already held in a previous case that Part IV of the Law Reform (Miscellaneous Provisions) Ordinance, which (following the Law Reform (Contributory Negligence) Act, 1945 of England, allowed apportionment of liability in cases of contributory negligence), though it did not come into force until December 18, 1956, operated retrospectively. If that decision was correct, that Ordinance could apply to this case. If, however, the learned judge meant by the above-quoted phrase that it was a possible verdict on the facts of this case that the collision occurred without negligence on the part of either driver, then, with the utmost respect, I think that he was wrong. It was found by the judge that the accident occurred on the Jaguar's near side of the road, straight along which the Jaguar was proceeding, when the Vanguard turned to its off-side to go across and enter Northumberland Road. The Vanguard was about to cut across in front of traffic, if any, moving in the opposite direction. It was for the driver of the Vanguard to see that he could perform that manoeuvre safely. It was his duty to assure himself that there was no traffic moving in the opposite direction which would be jeopardised by his turn across the road and, if there was, to wait until it had passed. There was traffic – the appellant's car – moving in the opposite direction. The respondent, however, said that he failed to see it. If the Jaguar had lights showing, and if the respondent was keeping a proper look-out, he must have seen them. There is no allegation that he was temporarily unconscious or blinded. The learned judge disbelieved his story that the Jaguar's lights were not on, and he gave his reasons in the passage from his judgment which I have quoted. There was also the evidence of a Mr. Ward who, from his car travelling in the opposite direction, saw a red Jaguar going towards the scene of the accident and only about 1,200 feet from it with headlights on, though Mr. Ward thought that they were dipped. There was evidence on which the learned judge could reasonably disbelieve the respondent's story that the Jaguar's headlights were not on, and I see no reason to differ from the learned judge's conclusion on that point.

By far the most likely explanation of the accident is that the respondent was concentrating on finding his turning (Northumberland Avenue) in the dark and either did not see the lights of the Jaguar or saw them some way off and, not realising how fast the Jaguar was approaching, thought that he could get across in time. It is unnecessary, however, to speculate to this extent. Once it was found that the accident occurred on the Jaguar's side of the road and that its lights were not off, the driver of the Vanguard was fixed with prima facie liability for negligence in attempting to cut across approaching traffic without keeping a proper look-out or, if he did keep a look-out and saw the Jaguar, in performing the manoeuvre dangerously. That liability the respondent failed to discharge. On those facts, a verdict that neither side had been negligent was not open. The learned judge should have found that the respondent had been negligent, and should have gone on to consider whether there had also been negligence on the part of the first appellant and, if so, whether the effective cause of the accident was the respondent's negligence or the appellant's negligence or both.

Mr. Salter, for the appellants, asked this court if it were of opinion that the learned judge had been wrong in not deciding the issue of negligence, not to remit the matter for a new trial involving the parties in further heavy costs, but to decide that issue itself. Mr. Bechgaard, for the respondent, did not dissent. The facts are for the most part agreed: the learned judge has not said that he relied on the demeanour of the witnesses. I think that, in this case, a Court of

Appeal is in nearly as good a position to evaluate the evidence as was the learned judge. I, therefore, propose to accede to counsel's request and to attempt to decide the issue of negligence and to work out the results to the parties. I take as a guide the principles laid down by Lord Reid in *Stapley v. Gypsum Mines Ltd*. (2), [1953] A.C. 663 at p. 681:

> "To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it.
>
>
>
> "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

His lordship went on to indicate that it was enough to fix a party with liability for contributory negligence if there were a "sufficiently high degree of probability" that but for his omission, the accident would have been prevented. I take the same principle to apply in a case where the negligence alleged is not an omission but a positive act.

I have already expressed an opinion that the respondent was clearly negligent. Was there also negligence on the part of the first appellant?

The particulars of negligence alleged against the first appellant in the two suits are virtually identical and are:

> "(*a*) Failing to keep any or proper look-out;
>
> (*b*) Driving at an excessive speed in the circumstances and/or at a speed excessive to the speed limit;
>
> (*c*) Failing to have his vehicle properly lit and/or to make proper use of the lights of his car or at all in the circumstances;
>
> (*d*) Failing to brake adequately or at all;
>
> (*e*) Driving upon an improper part of the road in the circumstances;
>
> (*f*) Failing to stop, or turn aside so as to avoid a collision;
>
> (*g*) Colliding with the near side of the defendant's vehicle."

As to (*a*) and (*d*), it did not appear whether the first appellant saw the Vanguard or not. If he did not, he was not keeping a proper look-out. The respondent, on whom the onus lay to prove that the first appellant was negligent, did not prove that the first appellant did not see the Vanguard. If the first appellant did see the Vanguard, he was not necessarily negligent in proceeding without applying his brakes. If he realised that the Vanguard was intending to turn into Northumberland Avenue (and, as the Vanguard had no illuminated traffic indicator in working order on the off-side, it is possible that he did not realise this) he was entitled to assume that it would wait and not cut right across his front. Though the first appellant was not entitled to drive at a dangerous speed or to drive upon the footing that other users of the road would exercise reasonable care, he was not bound to foresee every extremity of folly: *Berrill v. Road Haulage Executive* (3) (1952), 2 Lloyds Rep. 490, 492.

> "A prudent man will guard against the possible negligence of others when experience shows such negligence to be common":

London Passenger Transport Board v. Upson (4), [1949] 1 All E.R. 60, 72. There was no evidence that turning to the off-side and cutting across the front of approaching traffic was common in Nairobi and, without such evidence (or agreement by the parties), I would not so find.

As to (*b*), the question of speed will be noticed hereafter.

The learned judge negatived allegations (*c*) and (*e*).

As to (*f*), there was no evidence that the first appellant had time to stop or turn aside so as to avoid a collision. It was not shown that, at the speed at which the first appellant was travelling, if the first appellant had applied his brakes when the respondent started to move across his path, the accident could have been avoided though it seems highly probable that if the first appellant's speed before the impact had been considerably less, the Vanguard could have crossed in time.

As to (*g*), it would not necessarily be negligent to collide with the near side of the Vanguard. If that vehicle turned across the road in front of the Jaguar, that is where the collision would take place.

As to (*b*), it will be convenient now to deal with the question of speed and the respondent's allegations that the learned trial judge failed to consider and evaluate some of the evidence bearing on this question.

The evidence relating to the question of speed may be summarised as follows:

The first appellant said that the Jaguar could easily do seventy miles an hour on St. Austin's Road: seventy miles an hour would be "an effortless crawl"; but the first appellant maintained that he was not travelling at seventy miles an hour before the accident: he was travelling at thirty miles an hour: he had children in the car and fragile gramophone records in the boot.

Mr. Ward, an independent witness, saw the Jaguar in St. Austin's Road as it was approaching the scene of the accident and about four hundred yards from it: it passed him going in the opposite direction to that in which his car was travelling: he formed the impression that it was travelling fast: he himself was going at forty to forty-five miles an hour. He said that while he would rather not estimate the speed of the Jaguar, he would say that it was travelling faster than he (Ward) was: he could not be mistaken about this.

Mr. Blakeman, an associate member of the Institute of Automobile Assessors, who had been in the motar trade for twenty-seven years, examined the Jaguar about a week after the accident and took photographs. He also examined the Vanguard. He had seen both cars at the scene on the night after the accident, but had not then got out of his car to examine them. He described the damage and the condition of the vehicles. The gear lever of the Jaguar was jammed in top gear. This witness said, inter alia, that if the Jaguar had been doing as much as fifty miles an hour he would have expected more damage. He deduced the point of impact from scrape marks and said that the Vanguard, whose body was virtually sheared from the chassis, had been pushed back forty feet from the point of impact.

Mr. Liddell, an inspector of motor vehicles, who had had ten years' army experience in charge of the workshops section and who said that he had reported on thousands of accidents, went to the scene in November, 1955, and inspected both vehicles on the road. He thought that the Jaguar had been "going quite fast" and would say that speed at the point of impact might be seventy miles an hour. (I understand

this to mean the Jaguar's speed, not the combined speed.) The gear lever of the Vanguard was in second gear and he deduced that the car had been in second gear at the time of the accident. Second gear would normally involve fifteen to twenty miles an hour though forty miles an hour

could be reached. This witness gave it as his opinion that when the Jaguar hit the Vanguard, it (the Jaguar) was travelling at "much more than thirty miles an hour".

Mr. David Barber, a motor claims assessor with twenty-five years' experience in motor engineering, said that he investigated an average of four claims a day. He said inter alia:

> "On December 7, I examined Vanguard. Main point of impact was to rear of near side front wing. Body was virtually torn from chassis and car was a total loss. Weight of Vanguard is twenty-five and a half hundred-weight. Later I saw Jaguar – April 15, 1956. Speed of Jaguar was in excess of sixty to seventy miles an hour. One never sees such violent and vicious damage when vehicle travels at less than that speed. Vanguard's rear wheel had been ripped from hub, others buckled. Chassis frame revealed violence of impact. Little, if anything, could be salvaged. Jaguar was also a total loss. Wheel and gear box specially constructed to stand big strains had been broken right off. I do not agree that near side door flew open or made major marks on road. Those marks were too vivid to be caused by aluminium door. Aluminium is a soft metal. I know how cars finished on road. Vanguard was travelling nought to fifteen miles an hour. I judge from damage and flow of damage Jaguar was travelling straight in region of seventy miles an hour, plus. That is a cruising speed on such a road . . . combined impact speed may be ninety miles an hour. I do not accept D. 3" (Liddell) "as a man of experience. Jaguar weighs twenty-four and a half hundredweight. Jaguar did go practically through Vanguard. Gear lever was not disconnected. I say lever had snapped off short. Whole assembly was broken off – gear lever and attachment were broken off. Indentation to screen was from inside, to the non-metal surround. I do put angle of impact at thirty degrees. I heard Blakeman say thirty miles an hour was consistent. His evidence on this point is hopelessly wrong.
>
> "Re-Examined. Combined speed comes into operation at head-on or near head-on. Vanguard's speed would not contribute to combined speed."

With regard to the speed of the Vanguard, the respondent said:

> "I turned into St. Austin's Road. We passed the Apple Cross turning (off to right). It is a bad track and turning is largely concealed. I aimed to turn at Northumberland Avenue from the start. I passed Apple Cross Road at thirty miles an hour. I had full headlights on. I was looking for white notice board beyond cross roads sign. Mrs. Middleton was next to me. I was driving on my near side. I saw notice board on my off side. As I approached cross roads sign on near side I changed into middle gear, moved into centre of road, dipped my lights and continued towards Northumberland Avenue. When I was near cross roads sign I saw lights on brow of hill approaching. There was no other traffic. Before turning right I had another look. I slowed down to not more than fifteen miles an hour. Off-side traffic indicator was not working. I signalled with right hand. I started a right turn and looked for entrance to Northumberland Avenue."

The learned judge dealt with this evidence as follows:

> "There is no doubt that the Jaguar was travelling in a straight line on his near side. Also we know that the Standard (Vanguard) travelling in the opposite direction turned to his off-side intending to enter Northumberland Avenue. The cars met at thirty degrees to head-on. A lot of the technical evidence, which Mr. Bechgaard (for Mr. Bryant) rightly classified as 'hypothetical and conjectural' was directed to the speed of the cars at the moment of collision. The damage resulting was appalling,

> and it was argued hotly whether such damage could or could not result if the Standard was travelling at fifteen miles an hour and the Jaguar at thirty miles an hour. The cars weigh over a ton each and, as I have said, no brakes apparently ever checked the momentum. Mr. Blakeman, P. 4, said that in spite of the damage, the Jaguar could still have been travelling at only thirty miles an hour."

With respect, I cannot consider this satisfactory. The allegation that the Jaguar was being driven by the first appellant at excessive speed was one of the allegations of negligence preferred against the defendant in Suit No. 1368 and, clearly, it arose on the pleadings in both suits. The technical witnesses, some of them experts of great experience, in addition to advancing opinions as to how the accident occurred gave factual evidence, clearly bearing on the question of speed, of the positions and conditions of the cars after the collision. With respect, I think the learned judge, being required to decide the issue of speed, should have evaluated this evidence instead of merely dismissing it as "hypothetical and conjectural". He did not say that he disbelieved any of the technical witnesses, but he mentioned only one of them – Mr. Blakeman – and omitted to record that Mr. Blakeman's evidence to the effect that the damage to the Jaguar could have been caused if it had been travelling at only thirty miles an hour was directly contradicted by Mr. Barber. The learned judge failed to resolve that conflict. He did not mention the evidence of Mr. Ward at all. I am compelled to the view that the respondent's allegation that the learned judge failed to evaluate some of the evidence on the issue of speed and to decide the question of negligence is well-founded.

If we are not to send the case back for a new trial (which was the course adopted by the Court of Appeal in *Bray v. Palmer* (1), and the course which I should prefer) we must evaluate the evidence and decide the issue of speed ourselves. On the issue of the speed of the Jaguar, having taken all the evidence into consideration, I find it quite impossible to believe that the damage and the position of the cars after the accident which the oral evidence establishes and the photographs reveal could have been caused if the Jaguar had been travelling at only thirty miles an hour at the time of the collision. If Mr. Blakeman was right as to the point of impact and was correct in saying that the Vanguard was pushed back forty feet from the point of impact, this would reinforce my conclusion. I find it impossible to believe that a Standard Vanguard estate car in second gear, itself moving at an angle of about thirty degrees to the line of impact, would be pushed backwards (or sideways) forty feet by another car of roughly equivalent size and weight travelling at only thirty miles an hour. Having carefully considered all the evidence bearing on the question of speed, I have come to a clear conclusion that the Jaguar was at the time of the collision travelling at a speed very greatly in excess of the limit of thirty miles an hour applicable to St. Austin's Road, and I would so find.

In my view, both drivers were negligent – the first appellant in driving at greatly excessive speed, a speed which was not only prohibited but dangerous; the respondent in cutting across a traffic line without keeping a proper look-out, or, if he did keep a proper look-out, in driving in a dangerous manner across the path of a vehicle approaching on its proper side. In my opinion, the respondent was far more negligent than the first appellant. If it were open to me to apportion the liability, I would apportion it seventy-five per cent on the respondent and twenty-five per cent on the first appellant.

I must now consider whether it is open to the court to apportion the liability for the damage between the drivers. This depends on whether the Law Reform (Miscellaneous Provisions) Ordinance, 1956, which came into force on December 18, 1956, does or does not apply to this case. Section 4 (1) (which occurs in Part IV headed "Contributory Negligence") reads as follows:

> "4(1) Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:"

There follow provisos not material to the present case. The word "fault" for the purposes of the section is defined as

> "negligence, breach of a statutory duty or other act or omission which gives rise to a liability in tort or which would apart from this section, give rise to a defence of contributory negligence".

In considering "fault" what must be ascertained is the fault causing the damage which may not be the same as the fault causing the accident which in turn caused the damage: Charlesworth on Negligence (3rd Edn.), p. 522.

The accident in this case took place on November 14, 1955. The provisions of s. 4 of the Law Reform (Miscellaneous Provisions) Ordinance can have no application to damages arising out of that accident, unless those provisions operate retrospectively. The plaints in the two suits, notwithstanding that the accident took place in 1955, were, for some reason, not issued till November 13, 1957.

The Law Reform (Miscellaneous Provisions) Ordinance is, as its name implies, an Ordinance which reformed the law of Kenya by enacting certain miscellaneous provisions which were intended to bring the local law in various respects into line with the law of England. Part II of the Ordinance deals with survival of causes of action; Part III deals with joint tortfeasors; Part IV with contributory negligence; and Part V with the abolition of the doctrine of common employment. Part VI substituted the issue of orders for the issue of prerogative writs of mandamus, prohibition and certiorari.

Part II by express words applies only to survival of causes of action and deaths occurring after the commencement of the Ordinance and is clearly not retrospective.

Part III (s. 3) contains a provision to the effect that nothing in that section is to apply with respect to any tort committed before the commencement of the Ordinance and is clearly not retrospective.

Part V by express words avoids certain provisions in contracts entered into before the commencement of the Ordinance relating to the doctrine of common employment.

Parts IV and VI contain no express words indicating whether or not they are to operate retrospectively.

The ordinary rule is, of course, that no statute is to be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the statute or arises by necessary and distinct implication: *Smith v. Callander* (5), [1901] A.C. 297, 305.

In the case of *Kalyanji v. Mohamed Athar* (6), Kenya Supreme Court Civil Case No. 275 of 1955 (unreported), the learned judge who tried the present suit had decided that Part IV of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, must be applied retrospectively to that case. Several of the authorities there cited were cases in which proceedings had been commenced under the old law before the relevant statute came into force and others were cases in which the question was what law applied after a statute had expired. It is not clear from the judgment in *Kalyanji's* case (6), whether those authorities were there strictly applicable; but clearly they would not be applicable in the

present case. There is no question here of proceedings having been commenced under the old law. In my opinion, the question whether or not Part IV of the Law Reform (Miscellaneous Provisions) Ordinance applies retrospectively must be answered by applying the ordinary and well-known rule mentioned above. There is nothing in the terms of Part IV of the Ordinance which says that it is to be applied retrospectively. On the contrary, the words of s. 4 (1)

> "Where any person suffers damage . . . a claim in respect of that damage shall not be defeated . . . but the damages . . . shall be reduced . . ."

in their ordinary significance are prospective and apply to damage to be suffered in futuro. Neither am I able to find any necessary or distinct implication, from Part IV or from the rest of the Ordinance, indicating that Part IV is to operate retrospectively. Section 4 (3) seems, if anything, to indicate that retrospective operation was not intended. None of the recognised exceptions to the general rule applies. This is not a matter of procedure, neither action was pending when the Ordinance was passed and, so far as I can see, there were no vested rights. I am, therefore, compelled to hold that Part IV does not operate retrospectively so as to apply to the present case. I regret having to reach this conclusion as it would obviously be equitable and convenient to apportion the liability between the drivers in this case.

If I am right that the Law Reform (Miscellaneous Provisions) Ordinance does not apply, then liability falls to be decided under the common law and the inquiry must be "Whose act caused the wrong?": per Lord Simon, L.C., in *Boy Andrew v. St. Rognvald* (7), [1948] A.C. 140, 149. That act may be the sole act of one of the parties or a combination of the acts of both parties: *Stapley v. Gypsum Mines Ltd*. (2). When both parties are negligent, liability at common law depends on whose negligence was the real or substantial cause of the accident: the inquiry is whose negligence was it that substantially caused the injury? *Swadling v. Cooper* (8), [1931] A.C. 1. I think that the evidence in this case points irresistibly to the conclusion that a combination of acts caused the wrong: on the one hand, the negligence of the respondent in turning across the road in front of the Jaguar either without keeping a proper look-out, or if he did keep a proper look-out and saw the Jaguar, in attempting dangerously to get across in front of it: and, on the other hand, the excessive speed of the Jaguar, but for which there is a very high probability that the collision would not have taken place because the Vanguard would have got across in time. The speed of the Jaguar is not a fault which should be discarded as "too remote" within the wording of the extract from Lord Reid's opinion in *Stapley v. Gypsum Mines Ltd*. (2).

The drivers of the respective cars are not joint tortfeasors. There was no similarity of design, but independent wrongful acts resulting in one damage: *The Koursk* (9), [1924] P. 148, 156. The drivers are independent wrongdoers.

If I am wrong in holding that Part IV of the Law Reform (Miscellaneous Provisions) Ordinance, 1956 does not apply to this case, then, as I have said, I would apportion the liability as to seventy-five per cent thereof to the respondent and as to twenty-five per cent to the first appellant. But if I am right and the provisions of Part IV of the Ordinance do not apply, then the consequences of my finding that the cause of the accident was a combination of the acts of both appellants would appear to be as under:

(1) The first appellant has succeeded on grounds 1 and 3 of his memorandum of appeal. He has partially succeeded on paragraphs (i) and (ii) of ground 2; but has failed on paragraph (iii). That is to say, he has established that the respondent was guilty of negligence and that the accident was in great part caused by that negligence; but he has failed in resisting the allegation that he himself was guilty of contributory negligence. In the result, under the rigours of the common law before it was altered, he cannot succeed in Suit No. 1367

of 1957 on his claim for special damages or general damages or costs. As to his claim for indemnity, since he was guilty of contributory negligence, he is clearly not entitled to be indemnified by the respondent as to the whole amount payable by him under the judgment in Civil Case No. 695 of 1956. If it were open to me to give him contribution on the basis of an aliquot share, I would give the first appellant judgment against the respondent for contribution to the extent of seventy-five per cent of any amount paid or to be paid by him in respect of the judgment in Civil Case No. 695. But I do not think that it is open to me to award contribution to either side. Part III of the Law Reform (Miscellaneous Provisions) Ordinance, 1956, does not apply to this case and under the common law I am precluded by the rule in *Merryweather v. Nixan* (10) (1799), 8 Term Ref. 186; 101 E.R. 1337, from awarding contribution between tortfeasors. *Merryweather v. Nixan* (10), was a case of contribution between joint tortfeasors; but in *The Koursk* (9), at p. 158 Scrutton, L.J., said:

> "If there is no contribution between joint tortfeasors, there is of course no contribution between independent tortfeasors."

It is not clear to me why, in principle, there should be no contribution between independent tortfeasors if by "contribution" is meant the right of A. to recover from B., a co-defendant who is an independent tortfeasor, the proportion of any judgment paid by A. which is attributable to B.'s independent tort. But I am not prepared to ignore a dictum of Scrutton, L.J., I respectfully agree with the criticisms of the rule in *Merryweather v. Nixan* (10), made by their lordships in *Palmer v. Wick & Pultneytown Steam Shipping Co. Ltd.* (11), [1894] A.C. 318, but the rule is binding upon me and I hold that, in this case, neither driver is entitled to contribution from the other of an aliquot share of sums paid in satisfaction of the judgment in Suit 695 of 1956. A fortiori neither is entitled to indemnification for the whole amount.

I would dismiss the first appellant's appeal. The respondent should have three-quarters of the costs of that appeal.

(2) The second appellant has succeeded and failed on the same grounds of appeal as the first appellant; but the consequences to her are different. She is not guilty of contributory negligence and is not disabled from recovering damages against the respondent. She is, therefore, entitled to recover against the respondent, the defendant in Civil Case No. 1367, Shs. 700/- special damages and Shs. 7,000/- general damages. She was entitled to elect to sue the respondent for the whole of the damages, notwithstanding that the driver of the vehicle in which she was travelling was guilty of some negligence contributing to the accident: Halsbury's Laws of England (2nd Edn.), Vol. 23, p. 687; *Mills v. Armstrong, The Bernina* (12) (1888), 13 A.C. 1; *Mathews v. London Street Tramways Co.* (13) (1888), 5 T.L.R. 3. I would award her her costs of the appeal to be paid by the respondent.

(3) In the cross-appeal the respondent has succeeded on the issue of speed, but has otherwise failed. This success and failure will be reflected in the variations of the decree to be made in Suit 1367. The first appellant (first respondent to the cross-appeal) should have three-quarters, and the second appellant (second respondent to the cross-appeal) the whole, of the respective costs of each of them of the cross-appeal.

(4) The decree dated June 13, 1959, should, as regards Suit No. 1367 be maintained with respect to the claim of the first appellant (first plaintiff) that is to say, his claim should stand dismissed with costs. As regards the second appellant (second plaintiff), the decree should be varied. She should have judgment against the respondent (defendant) for Shs. 700/- special damages; Shs. 7,000/- general damages; interest at court rates; and costs.

(5) In Suit No. 1368 the respondent, as he was guilty of negligence which was a cause of the accident, cannot recover against the first appellant. No variation of the decree is required with respect to this suit.

(6) There should be a set-off of the costs ordered to be paid to and by the first appellant and the respondent respectively.

I would certify for two counsel in this appeal.

Gould JA: I agree with the judgment of the learned President and have nothing to add.

Crawshaw JA: I also agree, and would only observe that even though the first appellant may have committed an offence by exceeding the statutory speed limit, and by exceeding it substantially, that does not in itself prove negligence although in certain circumstances it might well be a relevant factor. Each case must be judged on the conditions prevailing at the time, such as the amount of traffic, the state of the road, the presence of side roads and so on. It is particularly difficult at night to estimate from its headlights the speed of an approaching car, and therefore especial care was required before crossing its path. It would not have been sufficient for the respondent to have said,

> "if the oncoming car is travelling at a reasonable speed I shall have time to pass in front of it",

he should have made sure before attempting the crossing. At the same time I am satisfied that the speed of the Jaguar was so excessive in the circumstances that the first appellant should have appreciated the danger of another user of the road failing to anticipate it, and that the first appellant therefore neglected to exercise due care.

Appeal of the first appellant dismissed. *Appeal of the second appellant allowed*; *judgment entered for Shs*. 700/- *special damages and Shs*. 7,000/- *general damages against the respondent. Appeal of the respondent dismissed*.

For the appellants:
Archer & Wilcock, Nairobi
Clive Salter, *Q.C.* and *J. D. M. Silvester*

For the respondent:
Buckley Hollister & Co, Nairobi
K. Bechgaard Q.C. and *D. F. Shaylor*

Bhaichand Bhagwanji Shah t/a Shukla & Company v D Jamnadas & Sons Limited

[1960] 1 EA 894 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1960
Case Number:	103/1959
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA

Sourced by: LawAfrica

Appeal from: H.M. Supreme Court of Kenya – Wicks, J.

[1] Money-lender – Memorandum of contract – Interest – Interest stated at rate per annum – Interest payable in advance – Interest calculated after loan made – Error in calculation – Error based on computation of thirty-day month – Whether memorandum accurately reflects bargain – Money-lenders' Ordinance (*Cap*. 307), *s*. 11, *s*. 17 (*K*.).

Editor's Summary

The respondents, as money-lenders, sued the appellant as the maker of four promissory notes. The appellant had made the notes in favour of R.G. & Co. Ltd., which, to secure a loan, had endorsed them to the respondents. The appellant's defence to the action was that the memorandum of contract did not comply with the Money-lenders' Ordinance, in that the rate of interest at 15 per cent per annum expressed in the memorandum was not the true rate because the respondents had imposed on the borrowers the obligation to pay in addition certain disbursements. The appellant relied upon the stamp duty on the memorandum of contract and a sum of Shs. 10/- paid for telegrams to advise the respondents of the fate of the notes. The trial judge rejected this argument and gave judgment for the respondents. On appeal the main point taken, which had not been pleaded in the defence, was that the sum actually paid in advance as interest was not exactly 15 per cent per annum.

Held – the memorandum of contract was evidence of bargain between the parties, but was not conclusive; on the evidence the true bargain was that interest was to be charged and paid at 15 per cent per annum, and although the calculation of interest made on the basis of a thirty-day month gave rise to a difference of rather less than Shs. 4/- to the detriment of the borrower, the bargain was accurately reflected in the memorandum because, the loan having been made before the interest was calculated, the borrower did not have to acquiesce in the calculation of interest actually made.

Appeal dismissed.

Cases referred to in judgment:

(1) *Allingham v. London and Westminster Loan and Discount Co.*, [1940] 3 All E.R. 530.

(2) *Parkfield Trust Ltd. v. Curtis*, [1934] 1 K.B. 585.

The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Kisumu in an action in which the respondent company (hereinafter called "the respondent") successfully sued the appellant as the maker of four promissory notes for a total of Shs. 11,300/-. Payment of interest at court rates from the filing of the plaint was also decreed.

The respondent is a licensed money-lender and the action arose out of a transaction in which the respondent lent to Rugnath Gokaldas & Company Limited, a limited company with its registered office at Kisumu, the sum of Shs. 19,275/60 with interest at a rate to be discussed later in this judgment. The promissory notes in question were made by the appellant in favour of Rugnath Gokaldas & Company Ltd. and endorsed by that company to the respondent as security for the loan. Rugnath Gokaldas & Company Ltd. was also made a defendant in the action, but, no doubt as it is stated to be in liquidation, the proceedings were not continued against it. Judgment was given by the Supreme Court against the appellant, for the amount claimed, on July 6, 1959.

The only portions of the defence which are now relevant are as follows:

> "These defendants will maintain that the said promissory notes sued on herein – being securities taken as aforesaid, are unenforceable in law, inasmuch as (i) the memorandum or writing embodying the money-lending contract entered into on the said 21st day of October, 1958 between the plaintiffs and the second defendants for the making of a loan of Shs. 19,275/60 did not comply with the provisions of s. 11 of the Money-lenders' Ordinance (Cap. 307 of the 1948 Revised Laws of Kenya)."
>
>
>
> "(*a*) The term for payment of 'disbursement' as set out in the said memorandum or writing, is illegal and contrary to s. 17 of the said Ordinance; and
>
> "(*c*) The rate of interest is not truly stated in the said memorandum, in that the plaintiffs have imposed on the borrowers the obligation of payment of the disbursements – in addition to 15 per cent per annum interest, in advance, and have in fact, recovered the same contrary to law, from the second defendants."

The matters referred to in (*a*) above can be briefly dealt with. There were only two items in question; a sum of Shs. 1/10 paid to the respondent for stamp duty on the memorandum of the contract and a sum of Shs. 10/- found by the learned judge to have been paid for telegrams, by which the respondent was requested to obtain what was referred to as "advice fate" of the promissory notes. The learned judge, following *Allingham v. London and Westminster Loan and Discount Co.* (1), [1940] 3 All E.R. 530 held that the stamp duty constituted a simple contract debt due by the borrower to the respondent and there was no need to mention it in the memorandum. He held that the stamp duty was not an expense of the kind payment of which is rendered illegal by s. 17 of the Money-lenders' Ordinance (Cap. 307 of the Laws of Kenya) and neither was the payment of the Shs. 10/-

> "so that the borrower can be informed of the fate of promissory notes given as security".

I respectfully agree that neither of these matters provided a defence to the action. Upon the authority quoted there was no need to specify the stamp duty in the memorandum and the payment of the Shs. 10/- had in law, nothing to do with the money-lending transaction. It was quite separate and was an arrangement which could have been entered into at any time before the promissory notes were presented.

The next question argued on the appeal related to the question of interest. The memorandum of the contract required by s. 11 of the Ordinance aforesaid gives (inter alia) the following particulars:

"1. Amount lent – Shs. 19,275/60.

2. Date on which loan is made – 21st October, 1958.

3. Interest payable at 15% per annum commencing from – 21st October, 1958.

4. Term of Loan – Loan will be deemed to be the pronotes given in security are paid.

5. Date or dates of repayment of loan – Shs. 7,975/- on 9.1.59; Shs. 11,300/- on 20.1.59.

6. How and when interest and disbursements payable – Payable in advance in cash."

That is an unambiguous provision that interest is to be calculated at 15 per cent per annum from the date of the loan and to be paid in advance. As the learned judge found, the sum of Shs. 688/72 was paid in cash as interest and counsel for the appellant relied in argument before this court and the court below upon the fact that the sum mentioned is a few shillings more than the amount which, accurately calculated upon the basis of a 365-day year, represents the appropriate interest over the period of the loan. The correct amount is said to be Shs. 684/80. In his judgment on this matter the learned judge said:

> "Unfortunately neither Mr. Mandavia nor Mr. Kholi, who appeared for the plaintiff, referred me to the Schedule to the Ordinance, para. 5 of which provides:
>
> > 'Where any interval between successive payments is not a number of complete weeks or complete months, the foregoing paragraphs shall have effect as though one day were one-seventh part of a week or one-thirtieth part of a month, as the case may be.'
>
> The loan being for a number of days, and having calculated the interest on the basis of a day being one-thirtieth part of a month, Mr. Maganlal Damodar Raichura has calculated the interest on the correct basis, and Mr. Mandavia, clearly, based his calculations and his cross-examination on a wrong premise. The relevant point is, however, not the calculation of the actual amount of the interest, but whether or not the memorandum shows in accordance with s. 11 (2) of the Ordinance 'the interest charged on the loan expressed in terms of the rate per cent per annum, or the rate per cent per annum represented by the interest charged as calculated in accordance with the provisions of the Schedule to this Ordinance'. The memorandum states, 'Interest payable at 15% per annum commencing from 21st October 1958'; 'Date of repayment of loan Shs. 7,975/- on 9.1.59 – Shs. 11,300/- on 20.1.59', and it is obvious that the interest is properly shown and with the assistance of the rules set out in the Schedule to the Ordinance can be calculated to an exact amount."

In so far as he placed reliance upon the Schedule to the Ordinance I think, with respect, that the learned judge was under a misapprehension. Section 11 (2) of the Ordinance, which states in mandatory form what the memorandum of a money-lending contract shall contain, is in the following terms:

> "(2) The note or memorandum aforesaid shall contain all the terms of the contract, and in particular shall show the date on which the loan is made, the amount of the principal of the loan, and either the interest charged on the loan expressed in terms of a rate per cent per annum, or the rate per cent annum represented by the interest charged as calculated in accordance with the provisions of the Schedule to this Ordinance."

There are two alternative methods of stating the interest charged and the provisions of the Schedule as to calculation apply only to the second of them. The distinction was considered and stated in the case of *Parkfield Trust Ltd. v. Curtis* (2), [1934] 1 K.B. 685. Lord Hanworth, M.R., said, at p. 690:

> "Now under s. 6, sub-s. 2, there is an alternative provided in regard to the statement of the rate of interest – namely, either to put down the interest charged on the loan expressed as a rate per cent per annum or to discover the rate of interest, if necessary, because it is not otherwise made plain, by the use of the provisions in the First Schedule to the Act. Whichever road is followed the end is the same. It is to arrive at the rate of interest being charged for the loan. It is to my mind plain that this part of s. 6, sub-s. 2, furnishes two alternative methods, and in my opinion there is no room for a resort to the mode of calculation stated in the First Schedule in a case where there is a clear statement of the rate of interest being charged to the borrower."

At p. 692 he said:

> "I would add that if the computation of the rate per cent of interest be made under the First Schedule, then I think that the note or memorandum, after stating the amount of the instalments to be paid, should explain that they included interest at whatever rate of interest per annum was ascertained from the First Schedule to the Act, and that this rate of interest has been found under that Schedule."

I will add only one further passage from the judgment of Slesser, L.J., at p. 693:

> "The sub-section therefore contemplates two methods whereby the amount to be repaid in addition to the sum actually advanced can be shown as a rate of interest. The first alternative deals with interest on loans which can be readily expressed as a rate per cent per annum, and then the sub-section goes on to deal with something which is not in terms expressed as interest, and in that case the rate per cent per annum has to be calculated in the manner provided in the First Schedule to the Act. In other words, there may be either a true rate of interest or a notional rate per cent per annum arrived at under the Schedule.
>
> "In these circumstances I do not think that the requirements of the section are fully complied with unless it is in the note or memorandum stated in terms whether the rate of interest therein mentioned is a true rate of interest or a rate per cent per annum calculated in manner provided in the Schedule."

The present case is quite clearly one in which the first alternative was adopted – the interest was stated as a rate per cent per annum. In those circumstances counsel for the appellant contends that the rate as expressed in the memorandum is not the true rate, because the sum of money actually paid as interest worked out at a slightly different rate. In his submission the method of calculating the interest adopted by the respondent (a basis of thirty days to one month) which accounted for the slight difference, must be taken to have been agreed to by the borrower, and that therefore the true agreement between the parties as to the rate of interest, was not reflected in the memorandum, in which it was stated as exactly fifteen per cent. It appears doubtful if this argument was in fact open to counsel on the pleadings but no objection has been taken.

Counsel for the respondent on the other hand, contended that the agreement was that interest was payable at 15 per cent per annum and that if there had been an erroneous calculation any excess or deficiency would be recoverable

by the party aggrieved. The memorandum therefore reflected the true agreement.

The question is one which must be resolved by reference to the evidence, it being common ground that in a money-lending transaction the court must ascertain what was the true agreement. The memorandum, though no doubt evidence of the bargain, is not conclusive. At the trial, only two witnesses were called, both by the respondent. Maganlal Damodar Raichura, a director of the respondent, said (inter alia):

> "Two of their directors, Muljibhai P. Madhavji and Pranjivan Mulji came to see me and asked for a loan of Shs. 19,275/60. I said I would grant the loan and they said they had promissory notes which they could give as security. I took out some contract forms for money-lender, typed the form obtaining the details of the promissory notes from the borrower, stamped them and obtained the signature of one of the borrowers. The contract is exhibit A. 4. A copy was made and given to one of the second defendant's directors who then endorsed over the promissory notes to me. I then gave a cheque to the second defendant for the amount stated on the contract exhibit A. 4. These are the promissory notes endorsed over to my firm, exhibits B. 1-4. This is the cheque I handed to second Defendant Co., exhibit C. I then calculated the interest and I added to that Sh. 1/- and ten cents for the stamps on the contract and second defendant paid that in cash. After that one of the directors said they wanted advice fate of the promissory notes by telegraph and one of the directors gave me Shs. 10/- to do this. The second defendant's directors then left."

In describing his method of calculation of interest he said:

> "I calculate thirty days to a month, 360 days to a year. I agree that the bank work on a 365-day year and charge on that basis on discounting bills. I agree that we should work on the basis of a 365-day year."

Counsel for the appellant relied upon a short passage at the end of the cross-examination:

> "I calculated interest on a monthly basis, counting the days 1 1/4 per cent for thirty days and second defendant understood that."

In re-examination the witness said:

> "Exhibit A. 4. The loan was made on October 21, 1958 (sic.) It was to be repaid as to Shs. 7,975 on January 9, 1959, and Shs. 11,300/- on January 20, 1959. The interest was 15 per cent per annum."

The second witness was Muljibhai Madhavji a director of Rugnath Gokaldas & Company Ltd., the borrower. His evidence does not carry the matter any further. He was described by the learned judge as advanced in years and he

> "appeared to have difficulty in directing his mind to and understanding the questions put to him".

He does not appear to have been cross-examined on the question of the rate of interest or the method of calculation, though he did say that he could not remember the amount.

The learned judge made no finding of fact relevant to this question but I am satisfied that the material in the record is sufficient to enable this court to arrive at its own finding. I am satisfied also that the true bargain between the parties was that the interest was to be chargeable at the rate of 15 per cent per annum. The sequence given in the unchallenged evidence of Maganlal Damodar Raichura makes this clear. The memorandum containing the details of the arrangement, including the rate of interest, was first prepared and signed.

Its contents must have been known to the parties and nobody (save counsel for the appellant) has suggested that it did not represent what had been agreed. Only after that had been done and after the promissory notes had been endorsed and the cheque for the principal moneys handed over, did the calculation of the interest take place. Muljibhai Madhavji may possibly have acquiesced in the calculation of interest on the basis of a thirty-day month (though this should have been put to him) either because he did not realise it was very slightly to his detriment or because he considered that the difference was negligible. The point is that he did not have to acquiesce in that method. The bargain had been made at 15 per cent per annum and he could have insisted upon accurate calculation if he had so desired. The fact that he did not do so does not alter the bargain made which was accurately reflected in the memorandum. In my opinion this ground of appeal fails and with it the whole appeal.

I do not, therefore, need to consider whether, on the basis of the acceptance of the submissions of counsel for the appellant, the fact that the respective methods of calculation gave rise to a difference of rather less than Shs. 4/-, would bring the case within the authorities on the subject of trivialities.

I would dismiss the appeal with costs, but do not think that it is a proper case in which to accede to the application of counsel for the respondent for a certificate for two counsel.

Sir Alastair Forbes VP: I agree and have nothing to add. The appeal is dismissed with costs.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:
G. R. Mandavia, Nairobi

For the respondent:
Kholi, Patel & Raichura, Kisumu
J. M. Nazareth, Q. C. and *P. V. Raichura*

Noormohamed Abdulla and Another v Ranchhodbhai Jivabhai Patel
[1960] 1 EA 900 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	8 November 1960
Case Number:	92/1959
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Miles, J.

[1] Landlord and tenant – Order of court to grant statutory tenancy – No lease executed – Whether action for rent premature – Landlord and Tenant (Shops and Hotels) Ordinance, 1954 (K.) – Landlord and Tenant (Shops) Ordinance, 1956, s. 2, s. 4 (1), s.

6 (1), s. 8 (1), s. 11 (1), s. 12 (1) and (2), s. 13 (1), s. 14, s. 15, s. 18, s. 19 (2) and s. 21 (K.) – Civil Procedure (Revised) Rules, 1948, O. XX, r. 7 (3) (K.) – Indian Transfer of Property Act, 1882, s. 107 – English Landlord and Tenant Act, 1954, s. 33 and s. 36

Editor's Summary

By an order made by a magistrate under the Landlord and Tenant (Shops and Hotels) Ordinance, 1954, the appellant obtained a tenancy at a rent of Shs. 530/- per month. This tenancy having been determined by notice to quit under s. 6 of the Landlord and Tenant (Shops) Ordinance, 1956, expiring on July 31, 1957, the appellant duly applied for a new tenancy, and the magistrate ordered that a new tenancy or lease for two years commencing August 1, 1957, under s. 12 (2) (*c*) should be granted to the appellant. By a further order made in April, 1957, the magistrate fixed the rent at Shs. 1,050/-. The appellant unsuccessfully appealed against this decision. In December, 1958, the magistrate had also made an order under s. 98 of the Civil Procedure Ordinance requiring the appellant to execute a lease within fourteen days and as the appellant did not comply a further order was made directing that a lease be executed by the executive officer of the court. Against this order the appellant had an appeal pending. In July, 1958, the respondent commenced proceedings for arrears of rent and the main defence was that as no lease had been executed by the respondent as required by s. 15 of the Landlord and Tenant (Shops) Ordinance, 1956, the action was premature. The Supreme Court entered judgment for the respondent. On appeal it was contended inter alia that the decree which the magistrate's court drew up was meaningless in that it did not specify the premises to which it related and that it did not grant or order the respondent to grant a tenancy of any premises.

Held –

(i) as between the landlord and the tenant the effect of an order for the grant of a new tenancy made under s. 12 (2) (*a*) of the Ordinance was to create a "statutory" tenancy in the sense that the tenant acquired by virtue of the Ordinance a right of occupation in respect of which rent was payable and that such rent was, by the terms of the Ordinance, immediately payable as it accrued;

(ii) s. 2 (2) (*a*) of the Ordinance was a special statutory provision which overrode the provisions of s. 107 of the Indian Transfer of Property Act and other similar legislation relating to the registration of instruments creating leases and was conclusive in favour of the respondent;

(iii) the decree could not be treated as ineffective at this stage because of the omission of certain matters which had nevertheless been taken for granted by the parties until the hearing of this appeal; the objection was purely technical and related to matters which could be corrected by the court under its inherent powers

Appeal dismissed.

Case referred to:

(1) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9.

The following judgments were read:

Judgment

Sir Alastair Forbes VP: This is an appeal from a judgment and decree of the Supreme Court of Kenya, whereby the appellant, who was the original defendant, was ordered to pay to the respondent, the original plaintiff, the sum of Shs. 10,838/73 in respect of rent, site value tax and water charges, together with costs to be taxed and certified by the taxing master. The facts of the case, which were not in dispute, are concisely stated by the learned trial judge in a written ruling dated May 12, 1959. That ruling contains the learned judge's decision on the appellant's defence that the action was premature, and it is this decision which is challenged on the appeal. The subsequent judgment of June 30, 1959, adds little or nothing to the decision contained in the ruling, and can be ignored for the purposes of this judgment. The facts are stated in the ruling as follows:

> "This is a claim by a landlord for rent and site value tax, the parties being respectively head tenant and sub-tenant of the premises on plot No. 641 L.R. No. 209, Portal Street, Nairobi.
>
> "By an order made by the resident magistrate, Nairobi, under the Landlord and Tenant (Shops and Hotels) Ordinance, 1954, the defendant obtained a tenancy in terms of the Ordinance at a rent of Shs. 530/- per month plus a proportion of the site value tax amounting to Shs. 18/42 per month.
>
> "This tenancy was determined by notice to quit under s. 6 of the Landlord and Tenant (Shops) Ordinance, 1956, expiring on July 31, 1957.
>
> "The defendant duly applied for a new tenancy under the provisions of this Ordinance and on April 1, 1958, the resident magistrate, Nairobi, ordered that a new lease or tenancy be granted to the defendant for two years commencing from August 1, 1957, under s. 12 (2) (*c*) of the Ordinance. By an order of April 28 the rent was fixed by the resident magistrate at Shs. 1,050/- per month commencing on August 1, 1957. It was also ordered that with the exception of the addition of the three further terms, the conditions of the new lease should be the same as the one contained in the previous lease of August 16, 1955.
>
> "Against this decision the defendant appealed to the Supreme Court which dismissed the appeal on December 1, 1958. Under s. 19 (2) of the Ordinance the decision of the Supreme Court is final.
>
> "The original plaint filed on May 19, 1958, contained in addition to the claim for rent a claim for possession. In the amended plaint filed on July 18, 1958, the claim for possession has been abandoned.
>
> "An application was made by the plaintiff for summary judgment under O. XXXV, r. 2, and by an order on July 10, 1958, Edmonds, J., gave leave to defend conditional upon the defendant paying to the plaintiff the sum of Shs. 3,710/- which is claimed in respect of rent from January 1 to July 31, 1957. The rent now in issue is that from August 1, 1957, that is the date of commencement of the new tenancy ordered by the resident magistrate, Nairobi.

"The main defence to the claim is that no lease has yet been executed by the plaintiff as required by s. 15 of the Landlord and Tenant (Shops) Ordinance, 1956, and that the action is accordingly premature.

"On July 29, 1958, I ordered on the application of the plaintiff that this point of law be set down for argument under O. VI, r. 27.

"In December, 1958, upon the application of the plaintiff the resident magistrate, Nairobi, made an order under s. 98 of the Civil Procedure Ordinance requiring the defendant to execute a lease within fourteen days. The defendant did not comply with this order and a further order was made directing that a lease be executed by the executive officer of the court. This order is under appeal and the appeal has not yet been heard.

"It only remains to mention, so far as the facts are concerned, that according to the agreed correspondence, the plaintiff's advocates on September 24, 1958, wrote to the defendant's advocates enclosing a draft lease for approval. As previously stated the lease was never approved by the defendant and it was in fact returned to the plaintiff's advocates on December 4, 1958."

The relevant provisions of the Landlord and Tenant (Shops) Ordinance, 1956 (No. 52 of 1956) (hereinafter referred to as "the Ordinance") are as follows:

"2. For the purposes of this Ordinance, unless the context otherwise requires:

.

" 'court' means, in respect of any matter arising under this Ordinance in relation to any premises, a subordinate court of the first class within whose local limits of jurisdiction the premises are situate;

.

" 'tenancy' means a tenancy created before the commencement of this Ordinance by a lease or under-lease, by an agreement for or assignment of a lease or under-lease, by a tenancy agreement, or by operation of law, but does not include any relationship between a mortgagor and mortgagee as such;

.

"4(1) A tenancy of a shop to which this Ordinance applies shall not come to an end unless terminated in accordance with the provisions of this Ordinance; and, subject to the provisions of s. 8 of this Ordinance, the tenant under such a tenancy may apply to the court for a new tenancy if the landlord has given notice under s. 6 of this Ordinance to terminate the tenancy."

"6(1) The landlord may terminate the tenancy of a shop to which this Ordinance applies by a notice given to the tenant in the form contained in the Second Schedule hereto specifying the date at which the tenancy is to come to an end (hereinafter referred to as the date of termination):

"Provided that this sub-section shall have effect subject to the provisions of s. 18 of this Ordinance."

The subsequent provisions of s. 6 and s. 18 limit the date when a notice under sub-s. (1) of s. 6 can take effect, and are not relevant to this appeal.

"8(1) Subject to the provisions of this Ordinance, on an application under s. 4 of this Ordinance for a new tenancy the court shall make an

order for the grant of a tenancy comprising such property, at such rent and on such other terms, as hereinafter provided."

"11(1) Subject to the next following sub-section, an order under s. 8 of this Ordinance for the grant of a new tenancy shall be an order for the grant of a new tenancy of the holding; and in the absence of agreement between the landlord and tenant as to the premises which constitutes the holding the court shall in the order designate that premises by reference to the circumstances existing at the date of the order."

"12(1) Where on an application under s. 4 of this Ordinance the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed in writing between the landlord and the tenant, or, in default of such an agreement, shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being a tenancy for a term of not less than two years and not exceeding four years.

"(2)(*a*)xcept as provided for in para. (*b*) of this sub-section, where the court makes an order for the grant of a new tenancy, the tenancy shall begin or be deemed to have begun on the day after the date of termination specified in the notice given to the tenant under s. 6 of this Ordinance and the rent determined in accordance with the provisions of this Ordinance shall be payable as from such day and notwithstanding the provisions of s. 18 of this Ordinance, the current tenancy shall terminate or be deemed to have terminated on the date of termination so specified."

"13(1) he rent payable under a tenancy granted by order of the court on an application therefor under s. 4 of this Ordinance shall be such as may be agreed in writing between the landlord and the tenant or as, in default of such agreement, may be determined by the court . . ."

"14. The terms of a tenancy granted by order of the court on an application therefor under s. 4 of this Ordinance (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed in writing between the landlord and tenant or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

"15. Where the court makes an order for the grant of a new tenancy, then, unless the landlord and the tenant agree not to act upon the order, the landlord shall be bound to execute in favour of the tenant, and the tenant shall be bound to accept, a lease for a tenancy of the holding embodying the terms agreed by the landlord and the tenant or determined by the court in accordance with the foregoing provisions of this Ordinance; and where the landlord executes such a lease the tenant shall be bound, if so required by the landlord, to execute a counterpart or duplicate thereof, and the expenses and costs thereof and incidental thereto and to the registration thereof under the appropriate registration Ordinance shall be borne by the tenant."

"21. Notwithstanding the provisions of any written law, for the purposes of this Ordinance evidence shall be receivable by the court of a tenancy whether or not it be written or registered."

It is convenient to dispose forthwith of two arguments that were raised in the course of the appeal. The first is a contention by counsel for the respondent that, by virtue of s. 21 of the Ordinance, evidence could be received in the course of this case of an unregistered tenancy which would otherwise be inadmissible in evidence. In view of the definitions of "court" and "tenancy" set out above, I am of opinion that the contention is untenable. This case was an action in

the Supreme Court relating to rent claimed in respect of a tenancy which, if it existed, came into being after the commencement of the Ordinance. I can see nothing in the context which would justify any extension of the terms of s. 21 beyond the limits of the definitions contained in s. 2.

The second matter concerns the form of the "decree" on which the action is based. This reads as follows:

"In the Resident Magistrate's Court at Nairobi

Landlord and Tenant Case No. 25 of 1957.

Noor Mohamed Abdulla t/a 'Eastern Radio Service' and 'N. Abdulla' (*applicant*) *v. Ranchhodbhai Jivabhai Patel t/a Tiny tots* (*respondent*)

Decree

Whereas this suit came for judgment before R.P. Maini, Esq., resident magistrate, Nairobi, in presence of the counsel for the applicant and counsel for the respondent, on April 1, 1958:

And whereas the court was satisfied that the applicant be given a lease or new tenancy for two years only to commence, in accordance with the provisions of s. 12 (2) (*a*) of the Landlord and Tenant (Shops) Ordinance, 1956, from August 1, 1957, in accordance with the provisions of s. 12 (2) (*a*) of the Landlord and Tenant (Shops) Ordinance, 1956, and that the court to fix the amount of such rent and other terms of the tenancy unless agreed in writing between the applicant and the respondent and that the applicant to have costs including Shs. 300/- in advocate's costs.

And whereas this suit coming for fixing rent and other terms of tenancy on April 28, 1958, before the said learned magistrate, in presence of the applicant and the counsel for the respondent,

It is Ordered:

(i) that the rent shall be Shs. 1,050/- per month payable from August 1, 1957.

(ii) that the other terms of the tenancy including the question of rates and taxes, etc. shall be the same, with necessary modifications if any, as those contained in the lease between the respondent and his landlords – exhibit A. in this suit – besides the following terms:

(*a*) the ten ant (applicant) may vacate the premises before July 31, 1959, by giving two calendar months notice to the respondent in writing by registered post, c/o P.O. Box 1617, Nairobi.

(*b*) the tenant (applicant) not to sub-let, assign or part with the possession of the suit premises in any circumstances.

(*c*) the tenant (applicant) not to engage in trade in toys or sports goods on the suit premises during the period of the new tenancy.

And whereas it is further ordered that there be no order as to costs on or for the proceedings for determining the rent, etc.

Dated this 28th day of April, 1958, at Nairobi.

Executive Officer, R.M. Civil Section."

Counsel for the appellant contended that this decree was meaningless in that it did not specify the premises to which it related, and did not grant or order the landlord to grant a tenancy of any premises.

The "decree" is certainly not an artistic document, and should, no doubt, have specified the premises to which it relates. However, there never has been any dispute as to the premises to which the "decree" relates, which, indeed can

be ascertained from the earlier lease, "exhibit A. in this suit", which is, in effect, incorporated in the "decree"; and the "decree" is clearly intended to order the grant of a tenancy of the suit premises on the terms specified. There is no question that anyone has been misled by defects in the "decree", and the point has been taken for the first time on the appeal to this court. It is to be noted that the decree of a subordinate court is drawn up by the magistrate and not by the successful party – O. XX, r. 7 (3) of the Civil Procedure (Revised) Rules, 1948. In my opinion the objection is purely technical and relates to matters which could be corrected by the court under its inherent powers – see Mulla, Code of Civil Procedure (12th Edn.) p. 484. I do not think the decree is to be treated as ineffective at this stage because of the omission of certain matters which have nevertheless been taken for granted by the parties until the hearing of this appeal.

The question which the learned trial judge had to decide and which has been argued before this court, was posed by him as follows:

> "It is contended on behalf of the defendant that until a lease is executed the tenant is not liable for rent at the new rate and that consequently the action is premature. The point which I have to decide is what is the position of the parties after a new tenancy has been granted by the court and before the acceptance of the lease under s. 15 by the tenant? This is a question of some difficulty upon which there is no authority."

The learned trial judge decided this question in favour of the respondent on two grounds: first, that the tenant was in possession of the premises by virtue of the provisions of the Ordinance, and was therefore a "statutory" tenant; and secondly, that the principle in the case of *Walsh v. Lonsdale* (1) (1882), 21 Ch. D. 9 applied, and that even if a lease must be executed under s. 15 of the Ordinance to bring the tenancy into being, yet in equity the respondent would be protected in the same way as if a lease had been granted.

Before this court counsel for the appellant argued that the order of the court did not create a tenancy; that the appellant was not a tenant until a lease had been executed in pursuance of the order and s. 15 of the Ordinance; and that until execution of a lease the appellant is a trespasser. In this he went further than counsel who appeared for the appellant in the Supreme Court was prepared to go, the learned judge remarking:

> "In the course of argument I asked Mr. Morgan to say what he contended the position of the defendant was. I do not think I am being unfair to him when I say that he was reluctant to commit himself."

The relevant provisions of the Ordinance are by no means easy to construe, and if s. 15 of the Ordinance were to be considered in isolation I think there would be force in the appellant's contention that a tenancy would not come into being until the execution of the lease; though I would hesitate to say that in the meantime the tenant would be a trespasser. After all, the object of the Ordinance as stated in the long title is, inter alia, "for the protection of tenants . . . from eviction". However, it seems to me that the matter is determined by para. (*a*) of sub-s. (2) of s. 12 of the Ordinance, which is set out above. Paragraph (*b*) of the sub-section and s. 18, which are referred to in para. (*a*), are not relevant to the matter under consideration. Paragraph (*a*) provides in express terms that

> "where the court makes an order for the grant of a new tenancy, the tenancy shall begin or be deemed to have begun on the day after the date of termination specified in the notice given to the tenant under s. 6 of this Ordinance and the rent determined in accordance with the provisions of this Ordinance shall be payable as from such day . . .".

I cannot see that this express statutory provision is in any way qualified by the provisions of s. 15. No doubt the execution of a lease which can be registered under the appropriate registration Ordinance is a valuable step for the protection of the tenant against third parties; but as between the landlord and the tenant it appears to me that under para. (*a*) of sub-s. (2) of s. 12 the effect of an order for the grant of a new tenancy is to create a "statutory" tenancy in the sense that the tenant acquires by virtue of the Ordinance a right of occupation in respect of which rent is payable, and that such rent is, by the terms of the Ordinance, immediately payable as it accrues. This is a special statutory provision which, in my opinion, overrides the provisions of s. 107 of the Indian Transfer of Property Act and other similar legislation relating to the registration of instruments creating leases, and is, I think, conclusive in favour of the respondent.

It may be noted that s. 33 of the English Landlord and Tenant Act, 1954, which is in similar terms to sub-s. (1) of s. 12 of the Ordinance, does not contain any provision corresponding to sub-s. (2) of s. 12.

In view of my conclusion on the effect of s. 12 (2) of the Ordinance, I do not propose to consider the question whether the principle in *Walsh v. Lonsdale* (1), could be applied in this case. It is sufficient to remark that the learned trial judge did not consider the effect of s. 107 of the Indian Transfer of Property Act, which was not brought to his attention; and that counsel for the respondent conceded that, apart from that section, it is arguable whether an order of the court under the Ordinance would be enforceable by a decree for specific performance notwithstanding the suggestion to that effect in relation to s. 36 of the English Landlord and Tenant Act, 1954, which appears at p. 29 of the permanent supplement to the 25th Edition of Woodfall on Landlord and Tenant. These, however, are questions which I do not think it necessary to decide.

I would dismiss the appeal with costs.

Gould JA: I agree and have nothing to add.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:
E. P. Nowrojee, Nairobi

For the respondent:
D. N. & R .N. Khanna, Nairobi
D. N. Khanna

Omer Saleh Audalih and another v A Besse & Co (Aden) Ltd
[1960] 1 EA 907 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	15 November 1960
Case Number:	64/1960

Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court of Aden – Campbell, C.J.

[1] Sale of Goods – Agreement for sale of vehicle – Payment by instalments – Failure to pay instalments – Repossession by vendor – Obligation upon vendor to sell when possession resumed – Whether vendor can repossess and also sue for purchase price – Sale of Goods Ordinance (*Cap.* 137), *s.* 16 (*A.*) – *Sale of Goods Act*, 1893, *s.* 14.

Editor's Summary

The first appellant had entered into an agreement with the respondents which was meant to be a hire-purchase agreement in respect of a motor lorry the payment for which the second appellant guaranteed. When the instalments were not paid the respondents took possession and kept the vehicle in the open for some time where it deteriorated. It was ultimately sold for Shs. 2,500/-. The respondent then took proceedings against both the appellants who were ordered to pay the sum of Shs. 14,050/- which was found to be due under the agreement. The vehicle had been bought in Aden, but the respondents knew that it might be used up-country. On appeal, it was submitted, inter alia, that the vehicle was not fit for the purpose for which it was required, that when possession was resumed the vehicle was worth Shs. 17,000/- and under the agreement, the vendor could only repossess it for the purpose of sale and payment pro tanto of the amount due out of the proceeds of the sale. Clause 9 of the agreement provided, inter alia, that the respondents would be entitled "to resume possession of the truck for selling the same to repay themselves out of the moneys realised therefrom . . .", while cl. 10 stated, inter alia, that no warranty was implied on the part of the owner as to the quality or state of the truck or its fitness for any purpose whatsoever.

Held –

(i) although the agreement for sale was intended to be a hire-purchase agreement, it was badly drawn and was in fact an agreement for the sale of the vehicle by instalments;

(ii) the framers of cl. 10 clearly had in mind amongst other things, warranties implied by the Sale of Goods Ordinance and construing the clause strictly contra proferentem, it could not be said to exonerate the respondents from liability for breach of an implied condition if such condition properly arose under s. 16 of the Sale of Goods Ordinance;

(iii) the court was not prepared to find that the Austin lorry which was of the description specified in the agreement was not saleable under that description in Aden or was not of merchantable quality in Aden merely because it was not fitted for up-country conditions, and s. 16 (2) ibid. did not avail the appellants;

(iv) the respondent could not re-take the vehicle and also sue for the price of it, except under the special power conferred by cl. 9 of the agreement;

(v) the balance of probability was that the respondents resumed possession under cl. 9 and they should, therefore, have sold the truck, assuming it was possible to sell it, when possession was resumed.

Appeal allowed in part. Order accordingly.

Cases referred to in judgment:

(1) *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394.

(2) *Karsales* (*Harrow*) *Ltd. v. Wallis*, [1956] 1 W.L.R. 936; [1956] 2 All E.R. 866.

(3) *Smeaton Hanscombe & Co. Ltd. v. Sassoon I. Setty Son & Co*. No. 1, [1953] 1 W.L.R. 1468; [1953] 2 All E.R. 1471.

(4) *Lowe v. Lombank Ltd*., [1960] 2 W.L.R. 196; [1960] 2 All E.R. 611.

(5) *Wallis Son & Wells v. Pratt & Haynes*, [1911] A.C. 394.

(6) *Bristol Tramways & Carriage Co. Ltd. v. Fiat Motors Ltd.*, [1910] 2 K.B. 831.

(7) *Grenfell v. Meyrowitz Ltd*., [1936] 2 All E.R. 1313.

(8) *Wieler v. Schilizzi*, 139 E.R. 1219.

(9) *Gillespie v. Cheney*, [1896] 2 Q.B. 59.

(10) *Attorney-General v. Pritchard* (1928), 97 L.J. K.B. 561.

The following judgments were read:

Judgment

Sir Kenneth O'Connor P: This is an appeal from a judgment and decree of the Supreme Court of Aden, whereby the appellants were ordered to pay to the respondent the sum of Shs. 14,050/- interest and costs, being the amount found due under an agreement dated April 6, 1956, and made between the first appellant (herein called "the hirer"), the second appellant (herein called "the guarantor") and the respondent (herein called "the owners"). The respondent company deals in motor cars and holds the Austin agency in Aden. The second appellant is the respondent's transport contractor. The first appellant is an employee working for the respondent company as a workman. He decided to go into the transport business as a side line and signed the above-mentioned agreement, with the second appellant as his guarantor. The agreement was intended to be a hire-purchase agreement of a vehicle described as "one Austin 5-ton Ch-Scuttle with Eaton Axle (truck)"; but the agreement was badly drawn, and was found by the learned Chief Justice in the court below to be in law an agreement for sale of the truck by instalments. The agreement inter alia acknowledged the payment to the respondent by the first appellant of a deposit of Shs. 8,000/-. The first appellant agreed to pay the balance of Shs. 14,950/- by monthly instalments as set out in the agreement, whereof Shs. 900/- was paid on October 29, 1956, the last instalment being due on November 30, 1957. No further payment was made. Liability to pay was disputed by the first appellant on the ground that, after taking delivery of the truck, it was found not to be of good merchantable quality, and because he alleged that an arrangement had been made in September, 1956, for one Hadad to take over the liability for the truck and to pay the arrears of instalments. The first appellant pleaded that the respondent and the second appellant had conspired to take possession of the truck fraudulently and had taken possession of it in 1957, and that at that time the truck was worth Shs. 17,000/- to Shs. 18,000/- or more.

Ramniklal Ambani, the manager of the respondent's automotive department testified that the second

appellant brought the truck to the respondent in December, 1957 and the respondent had detained it; the respondent had asked the second appellant to bring it in; the respondent detained it as a security; the tyres were then very worn; the second appellant had asked the respondent to sell the truck; an offer of Shs. 2,500/- had been received about two months later; the second appellant kept asking the witness not to sell the truck at Shs. 2,500/- or Shs. 2,000/-; trucks were kept in the open and they deteriorated. Most of this evidence was denied by the second appellant who said that the

truck had been returned by Hadad. The learned Chief Justice, however, believed Ramniklal and found that the truck had been returned by the second appellant.

The agreement contained, among other clauses, the following:

> "Clause 2. Until the said sum of Shs. 14,950/00 shall have been paid the said truck shall remain the sole and absolute property of the owners.
>
>
>
> "Clause 9. The hirer further agrees that in case of default in the punctual payment of any one instalment as above mentioned whether legally demanded or not or in the case of any breach by the hirer of this agreement or any term thereof or in case the hirer becomes bankrupt or compounds with his creditors or suffers attachment levied against any of his property or is arrested under process of law or convicted all the hirer's rights under this agreement shall forthwith be determined ipso facto without any notice from the owners and the whole of the balance remaining due at the time of such default or breach shall become immediately due and payable and the owners shall be entitled to recover the same from hirer with interest at 9 per cent per annum from the date of such default or breach, and shall also be entitled (without prejudice to their other rights) to resume possession of the truck for selling the same to repay themselves out of the moneys realised therefrom the amount due to them holding the hirer responsible for the deficiency as well as for damage for breach of agreement and for all the costs of retaking the car and all costs occasioned by the hirer's default.
>
> "Clause 10. The hirer has examined or caused to be examined the truck and satisfied himself as to its condition and running and no warranty is implied on the part of the owners as to the quality or state of the truck or its fitness for any purpose whatsoever."

The learned judge did not, in his judgment, answer several of the issues of fact which arose on the pleadings, but he did find:

(1) that cl. 10 was valid and effectual to guard the respondent against any complaints about the vehicle;

(2) in case he should be found to be wrong in this, that the vehicle was not reasonably fit for the purpose for which it was required;

(3) that the respondent did not seize the vehicle for non-payment of instalments and make it its own: the respondent merely detained the vehicle when it was brought to it by the second appellant: the respondent made an inquiry about selling the vehicle, as the second appellant had asked the respondent to sell it, but nothing came of that: the respondent did no more than keep the vehicle in its custody as a security.

Accordingly, the learned Chief Justice gave judgment for the respondent on its claim with interest and costs.

Mr. Sanghani, for the appellant, argued, in the first place, that the first appellant was illiterate and that he could not read the agreement and that, as it was not read over to him in Arabic or fully explained to him, he was not bound by it. His co-defendant and guarantor was, however, literate in English: the guarantor was present at the negotiations and confirmed in his evidence the testimony of the respondent's automotive manager that the nature of the agreement was explained. There is no suggestion that the first appellant did not know the nature of agreement which he was signing, i.e. that he was signing an agreement for the hire-purchase or purchase by instalments of a truck. There is no suggestion of fraud at this stage and although this appellant pleaded

that he was illiterate and was not informed that under the agreement the property in the vehicle would remain with the respondent or that he could not sell it or that he would remain liable for its price after possession of it had been taken by the respondent, and pleaded that his attention was not drawn to cl. 10, he gave no evidence in support of these averments. The learned Chief Justice made no finding on this pleading, but treated the agreement as binding. As already stated, the appellant knew the general nature of the agreement which he was signing and there was no evidence of fraud or misrepresentation.

> "When a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he read the document or not":

L'Estrange v. F. Graucob Ltd. (1), [1934] 2 K.B. 394 per Scrutton, L.J., at p. 403. I am of opinion that this argument fails.

The first two written grounds of appeal are as follows:

> "1. The learned Chief Justice erred in construing cl. 10 of the suit agreement.
>
> "2. The learned Chief Justice erred in law in failing to consider and/or to enforce the statutory obligation on the part of seller/respondent to supply goods of 'merchantable' quality and should have held that failure to discharge that obligation extinguished the respondent's claim for balance price."

Mr. Sanghani argued that cl. 10 of the agreement did not exclude all warranties as to the state and condition of the truck, but only warranties relating to defects which would be apparent on visual examination. He sought to infer this from the fact that cl. 10 was drawn in one sentence and not two; and he said that if the intention had been to make the clause absolute, the second part of the clause would not have been joined with the first. As a matter of construction I disagree, and I concur with the learned Chief Justice in rejecting that argument. I do not consider that either the case of *Karsales* (*Harrow*) *Ltd. v. Wallis* (2), [1956] 1 W.L.R. 936 or the case of *Smeaton Hanscombe & Co. Ltd. v. Sassoon I. Setty Son & Co.* (3), [1953] 1 W.L.R. 1468, both relied on by Mr. Sanghani, applies to this case. There was here no breach of a fundamental term of the contract. *Lowe v. Lombank Ltd.* (4), [1960] 2 W.L.R. 196, also relied on for the appellants, was a case on a special statute and very different facts and seems to me to have no application to the present case. It should, however, be noted that an exclusion clause which mentions only "warranties" does not necessarily exclude "conditions": *Wallis Son & Wells v. Pratt & Haynes* (5), [1911] C.A. 394. The facts of *Wallis Son & Wells v. Pratt & Haynes* (5), were very different from those of the present case; but clauses, such as cl. 10, excluding liability should be construed strictly. I am not prepared to hold that a clause which excludes liability for warranties necessarily excludes liability for implied conditions. The framers of cl. 10 clearly had in mind (amongst other things) warranties implied by the Sale of Goods Ordinance; but that Ordinance distinguishes very clearly between warranties and conditions, and conditions are not expressly covered by cl. 10. Construing cl. 10 strictly contra proferentem I would hold that it would not exonerate the respondent from liability for breach of an implied condition if such condition properly arose under s. 16 of the Sale of Goods Ordinance.

Mr. Sanghani addressed to us an argument based on s. 16 of the Sale of Goods Ordinance (Cap. 137 of the Laws of Aden). That section, so far as material, reads:

> "16. Subject to the provisions of this Ordinance and of any other law for the time being in force, there is no implied warranty or condition as

to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:

> (1) Where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose:
>
> "Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.
>
> "(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality:
>
> "Provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed."

Mr. Sanghani referred first to sub-s. (2) of s. 16 and argued that the vehicle came within the phrase "goods . . . bought by description" and he submitted that the law implied a condition that the goods should be of merchantable quality except as regards defects which an examination ought to have revealed. It was alleged that the defects from which Austin trucks of the kind purchased by the appellants suffered were a weakness in the chassis, defects in the gear-box, etc. which a buyer's visual examination would not reveal.

In the first place, I have some doubt whether this vehicle falls within the category of "goods . . . brought by description" in s. 16 (2). In Benjamin on Sale, (8th Edn.), at p. 615 the learned authors say:

> "Sales by description may, it seems, be divided into sales:
>
> "1. Of unascertained or future goods, as being of a certain kind of class, or to which otherwise a 'description' in the contract is applied.
>
> "2. Of specific goods, bought by the buyer in reliance, at least in part, upon the description given, or to be tacitly inferred from the circumstances, and which identifies the goods."

Clearly para. 1 does not apply. I doubt whether the buyer in this case bought in reliance upon the description given as identifying the goods. He bought relying upon getting a particular truck which he identified by visual inspection and examination. However, no doubt, he did rely upon its being a particular kind of Austin truck and I will assume in the appellants' favour that this was a sale by description. Was the truck of "merchantable quality"? Both appellants pleaded that it was not. This was denied in the rejoinder and an issue whether the truck was or was not of merchantable quality clearly arose on the pleadings. But the learned Chief Justice made no finding upon this important point. He found that the vehicle was not reasonably fit for the purpose for which it was required, which is not at all the same thing. As was pointed out by Kennedy, L.J., in *Bristol Tramways & Carriage Co. Ltd v. Fiat Motors Ltd*. (6), [1910] 2 K.B. 831 (C.A.) at p. 843:

> "An article may be of merchantable quality and yet not fulfil the special condition of fitness for the particular purpose for which the article was bought . . ."

Farwell, L.J., at p. 840 and p. 841 of the report of that case discussed the meaning of "merchantable quality" in s. 14 (2) of the Sale of Goods Act, 1893 corresponding to s. 16 (2) of the Aden Ordinance, and said:

> "In *Gardiner v. Gray* (1815), 4 Camp. 144, Lord Ellenborough says:
>
> 'The intention of both parties must be taken to be that it shall be saleable in the market under the denomination mentioned in the contract between them; the purchaser cannot be supposed to buy goods to lay them on the dunghill'. The phrase in s. 14, sub-s. 2, is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article whether he buys for his own use or to sell again."

In that case also the trial judge had made a finding that the omnibuses delivered were not fit to perform the duty required of them, but had not found that they were not of merchantable quality. Two of the learned Lord Justices held, on the strength of a report by a Mr. Preen (presumably an expert witness in the court below), that the omnibuses were not of merchantable quality. Kennedy, L.J., however (at p. 843) was not prepared so to find. He felt some doubt as to the propriety of so finding as, though the machinery of the omnibuses was not adapted for the heavy work of the Bristol traffic, "for light work they might have been sufficient". As I have said, it is necessary to distinguish between "merchantable quality" in sub-s. (2) of s. 16, and fitness for a particular purpose (which will be dealt with when sub-s. (1) is discussed below). Under sub-s. (2)

> "the buyer has a right to expect, not a perfect article, but an article which would be saleable in the market (under the description)."

(*Grenfell v. Meyrowitz Ltd*. (7), [1936] 2 All E.R. 1313, 1318 (C.A.); *Wieler v. Schilizzi* (8), 139 E.R. 1219). It is notorious that the conditions which motor vehicles have to encounter once they get off the main roads of Aden and the Protectorate are apalling. The respondent's automotive manager said that all makes of trucks sold in Aden were almost invariably reinforced by their owners and drivers who were going to use them in the Yemen: many axles of all makes of trucks broke on local roads. This vehicle was sold reinforced; but the reinforcement was not sufficient for the conditions which it encountered on up-country roads. There is no finding by the learned Chief Justice, and I am certainly not prepared to find, that an Austin truck of the description specified in the agreement was not saleable under that description in Aden or was not of merchantable quality in Aden merely because it was not fitted for up-country conditions. In my opinion, sub-s. (2) of s. 16 of the Sale of Goods Ordinance does not avail the appellants.

It will be convenient now to consider sub-s. (1) of s. 16.

The first appellant did not plead that he had made known to the respondent either expressly or by implication the particular purpose for which the truck was required, i.e. transport in the Aden Protectorate and the Yemen. He did, however, state in his evidence

> "I told Ramniklal I wanted to transport the goods to the Yemen and to the Protectorate".

The second appellant pleaded:

> "The first defendant impliedly made known to the plaintiffs the said purpose so as to show that he relied, as was the fact, upon the plaintiff's skill and judgment".

On a request for further and better particulars of this averment the second appellant stated

> "The first defendant impliedly made known to the plaintiff the purpose for which the said scuttle was required in that: He had no transport business in Aden; he was a Protectorate man; the body of the scuttle was specially designed or constructed for the purpose of up-country transport".

The second appellant testified that the first appellant told Ramniklal that the truck was wanted to be used up-country. This Ramniklal denied, saying that he did not know for what special purpose the defendant wanted the truck. However, Mr. Nunn, for the respondent, said in the lower court "I will admit that we knew the vehicle could be used up-country".

The learned Chief Justice made no finding whether the first appellant was in fact relying on the seller's skill or judgment to select a suitable truck for his purpose or whether he bought the respondent's truck because he was their workman and because he could get a contractor of the respondent to guarantee him. I will assume in favour of the appellants that the buyer (the first appellant) did make his purpose known and did rely on the respondent's skill or judgment. As already stated, the learned Chief Justice found that the vehicle was not reasonably fit for the purpose for which it was required and there was evidence upon which he could so find. But that does not conclude the matter; because, in my opinion, the proviso to sub-s. (1) applies to this case and prevents the implication of a condition as to fitness for the particular purpose indicated. The agreement into which the parties entered recites that the first appellant "is desirous of hiring one Austin 5-ton Ch-Scuttle with Eaton Axle (truck)". As already stated, the agreement is in law an agreement for sale and, it is clearly, it is clearly, to my mind, a "contract for the sale of a specified article under its . . . trade name" within the proviso to sub-s. (1) of s. 16. In *Gillespie v. Cheney* (9), [1896] 2 Q.B. 59 at p. 64, Lord Russell, C.J., stated the scope of the proviso to s. 14 (1) of the Sale of Goods Act, 1893 (corresponding to the proviso to s. 16 (1) of the Ordinance) as follows:

> "It is intended to meet the case, not of the supply of what I may call for this purpose raw commodities or materials, but for the supply of manufactured articles – steam ploughs or any form of invention which has a known name, and is bought and sold under its known name, patented or otherwise."

Clearly, the Austin truck contracted for would fall within that interpretation.

So also in *Bristol Tramways v. Fiat Motors Ltd* (6), Farwell, L.J., said, at p. 839:

> "It is one thing to order an article known as a Fiat omnibus, an order which is intelligible only if there be such an article known to the public or the trade; it is quite another thing to order an omnibus to be made by the Fiat company . . . A trade name has to be acquired by user, and whether it has or has not been so aquired is a question of fact in each case."

It is notorious that there is such a thing known to the public and the trade as an Austin truck and that "Austin" is a trade name for motor vehicles. It has not been alleged that the description of the vehicle considered sufficient by the parties in their agreement was not its name known to the trade. In my opinion, the proviso to s. 16 (1) of the Sale of Goods Ordinance applies and negatives the implication of a condition under that sub-section. I think that ground 2 of the memorandum of appeal fails.

Grounds 3 and 4 of the memorandum of appeal read:

> "3. The respondent's claim for the full price of the vehicle was bad in

law and equity. The respondent/plaintiff was bound to mitigate damages but failed so to do and, moreover, gravely prejudiced the appellants' interests by unreasonable and unexplained delay in selling the vehicle promptly after its seizure.

"4. The learned Chief Justice erred in holding that the vehicle was kept by the respondents in its custody as a security. The said finding is bad in law and in fact. It was not so pleaded; there was no evidence to that effect; and the suit contract did not so provide."

It will be convenient to deal first with ground 4. It is correct that the respondent did not plead that it took possession of the vehicle or kept it in its custody as a security. The plaint did not mention that the respondent took possession of the vehicle at all, but did set out cl. 9 of the agreement in full. It is not, however, correct that there was no evidence on this point. Ramniklal said:

> "The defendant put the truck in our garage in December, 1957. We had seized it in order to help us to get the money which was owed . . . When I say 'seized' the truck I mean Nasser Ali, defendant 2, brought it in and we detained it. We had asked Nasser Ali to bring it . . . We keep trucks in the open. I agree they deteriorate. Nobody ever asked us to give the truck back. We kept it as our security".

Nasser Ali said that the respondent had not asked him and that it was Hadad who brought the truck back. The learned Chief Justice seems to have believed Ramniklal, for he found that the

> "plaintiffs did no more than detain the vehicle when it was brought to them by the second defendant . . . If the first defendant had asked for it back the plaintiffs would have had no right to detain it".

I do not challenge the learned Chief Justice's findings of fact; but, with respect, I cannot entirely agree with the inference which he drew from them. It seems to me that for the respondent to ask its transport contractor, Nasser Ali, the guarantor, to bring in the truck and, when he did so, to detain it and deprive the first appellant of its possession and use was equivalent to re-possessing the truck, and the fact that the respondent may have intended to hand it back if the instalments then due were paid (which is what I take Ramniklal to mean by "We had seized it in order to help us to get money which was owed" and "we kept it as our security") does not affect that position. Also, I must respectfully disagree with the learned Chief Justice that if the first defendant had asked for the truck back, the respondent would have had no right to detain it. The truck belonged to the respondent, the property in it had not passed and the respondent was within its rights in resuming and retaining possession of it, subject to the legal consequences of so doing.

On ground 3 of the memorandum of appeal Mr. Sanghani argued that there was no absolute right to take possession of the vehicle: the right of re-possession conferred by cl. 9 was a right

> "to resume possession of the truck for selling the same to repay themselves out of the moneys realised therefrom".

Mr. Sanghani argued that, after taking possession of the truck under cl. 9, the respondent was bound to mitigate damage by selling it and repaying itself pro tanto out of the proceeds. He also argued that, having resumed possession of the vehicle, the respondent had disentitled itself from suing for the price of it: the respondent could only sue for damages for breach of the agreement to purchase, and that it had not done. He relied on *Attorney-General v. Pritchard* (10) (1928), 97 L.J. K.B. 561. In that case premises were let by the Crown to

a lessee and the lease contained an agreement for the sale of furniture by instalments, the property in the goods to pass to the lessee on completion of payment of the instalments. No instalments were paid. The lease was surrended and the Crown resumed possession of the premises and of the furniture and dealt with the furniture in a manner inconsistent with any proprietary rights of the lessee in it. It was held that the vendor, having resumed possession of the furniture and dealt with it in such a way as put it out of his power to return it to the purchaser, was disentitled from claiming part of the purchase price. The proper remedy was to sue for damages for breach of the contract. Swift, J., said at p. 565:

> "This was not a hiring agreement – it was an agreement of sale, the property not to pass until the whole of the purchase price had been paid . . . That being so, it seems to me that by resuming possession of the furniture when it was abandoned by the defendants, the Crown has disentitled itself to sue for a part of the purchase price. The proper course of action, I think, was to sue for damages for breach of agreement to purchase, and in that form compensation would have been recoverable for the usage of and depreciation in the value of the furniture during the three or four years which it was in the possession of the defendants and their testator.
>
> "This is not a case, in my opinion, like *Brooks v. Beirnstein*, in which it was held that an owner who had let goods out on hire did not, by re-taking possession, abandon his right to recover hire instalments which had accrued due before he re-took the goods. In that case a clear distinction is drawn between an agreement for the hiring of goods and an agreement for the sale of goods, and the reasoning in that case makes it quite clear, to my mind, that if it is an agreement for the sale of goods, the owner cannot re-take them, and at the same time sue for the price. This, I think, is clearly laid down in the case of *Hewison v. Ricketts*."

Applying this principle to the present case (in which the agreement is also an agreement for the sale of goods) I think that the respondent could not re-take the vehicle and also sue for the price of it, unless it acted under the special power conferred by cl. 9 of the agreement. Mr. Westby Nunn for the respondent distinguished *Attorney-General v. Pritchard* (10), on the ground that in that case the vendor had exercised dominion over the goods and dealt with them in such a way as to put it out of his power to return them to the purchaser and he said that that did not apply in the present case. It must be remembered, however, that the respondent detained the truck for many months in the open in Aden and it might be argued that it thereby put it out of its power to return the truck to the appellants in the condition in which it was when possession of it was resumed. It may indeed have deteriorated so much as virtually to cease to be a motor vehicle capable of transporting goods at all. But I think that this is academic, because I feel convinced that the respondent did not act under any general power which it might have had to seize the truck, but acted under the specific power to resume possession conferred by cl. 9 of the agreement. The initiative came from Ramniklal: he asked Nasser Ali to bring the truck in and detained it. He described this (rightly in my opinion) as "seizing" the truck. He would know that the respondent company had a power of seizure under cl. 9 of the agreement. He might or might not know that there was power to seize otherwise. There is no finding on the point; but the strong probability is that he seized under cl. 9. What was overlooked was that cl. 9 did not confer an unqualified power to resume possession, but only a power to resume possession for the purpose of sale and payment pro tanto of the amount due out of the proceeds of sale. Ramniklal said:

> "We were under no obligation to sell and were not concerned whether the truck was sold or not".

In that I think he was wrong. The respondent company is I think in this dilemma. If it resumed possession under cl. 9 of the agreement, it was under an obligation to sell: if it did not act under cl. 9, it could not resume possession and also sue for the balance of the purchase price. As I have said, the balance of probability is that the respondent resumed possession under cl. 9. It should, therefore, have sold the truck, assuming that it was possible to sell it. Ramniklal said that Nasser Ali, the guarantor, asked him to sell the truck; but not for Shs. 2,500/- which was all that was offered. Nasser Ali denied this. There is no finding whether the truck was saleable or not when it was brought back to the respondent and detained; and there is no finding whether, if it was saleable, how much it would have fetched. If Ramniklal is telling the truth, it was probably saleable at least for Shs. 2,500/-. I cannot make a finding on a matter depending to a large extent on the credibility of conflicting witnesses. The respondent, having seized the vehicle under cl. 9, should have sold it for the best price obtainable, irrespective of Nasser Ali's wishes.

Ground 5 of the memorandum of appeal reads:

> "5. The learned Chief Justice ought to have given relief to the appellants against interest and for the price of vehicle at the time when it was seized against the respondent's claim."

In my opinion, interest should not be charged on any amount which should have been realised from a sale of the vehicle, as from the date when such amount should have been realised.

The case should be remitted to the registrar of the Supreme Court at Aden to inquire and certify:

(*a*) whether the truck, at or within a reasonable time after the date of its return to the custody of the respondent, was saleable; and if so

(*b*) for what amount, having regard to its age, its condition, and to any actual offer received?

(*c*) At what date could the vehicle have been sold for amount (*b*)?

The value so arrived at should be deducted from the decretal amount of Shs. 14,050/- and there should be judgment for the remainder with interest as hereinafter mentioned. I would point out that the sum of Shs. 4,893/75 for interest which appears in the decree (rather strangely under the heading "Schedule of costs") has been calculated from the wrong date. It should have run from the respective due dates of the instalments unpaid. An adjustment will now have to be made, in that interest at 9 per cent from the due dates of the various instalments will run until the date arrived at under (*c*). From that date it will run at 9 per cent on the balance remaining after deducting the amount arrived at under (*b*) from the principal amount, Shs. 14,050/-, until February 26, 1960. The decree will be amended accordingly. The truck should remain, as it always has been, the property of the respondent company.

I would therefore allow the appeal only to the extent indicated and would order that each party should bear his own costs of the appeal, but that the respondent should have three-quarters of his costs in the Supreme Court.

Gould, JA: I agree and have nothing to add.

Crawshaw, JA: I also agree.

Appeal allowed in part. Order accordingly.

For the first appellant:
P. K. Sanghani, Aden

For the second appellant:

Horrocks, Williams & Beecheno, Aden

For the respondent:
Westby Nunn & Kazi, Aden
E. Westby Nunn

Iddi Faraj v Sheikh Amin Bin Musellem

[1960] 1 EA 917 (SCK)

Division:	HM Supreme Court of Kenya at Mombasa
Date of judgment:	3 October 1960
Case Number:	334/1959
Before:	Edmonds J
Sourced by:	LawAfrica

[1] Rent restriction – Possession – Conditional order – Tenant to be re-admitted when alterations completed – Subsequent application by landlord to vary condition – Claim that reconstructed are exempt as new building – Increase of Rent (*Restriction*) *Ordinance,* 1949, *s.* 1 (2) (*d*), *s.* 5 (1) (*p*) *and s.* 16 (1) (*e*) (*i*) (*K.*).

Editor's Summary

The appellant, a landlord, applied to the Coast Rent Control Board in August, 1958, for vacant possession of certain premises of which the respondent was the tenant, on the grounds that vacant possession was necessary in order that certain major repairs required by the Medical Officer of Health could be carried out. The board made an order for vacant possession by August 31, 1958, that the repairs and reconstruction work should be completed in two months and that the respondent should be re-admitted on completion of the work. In March, 1959, the appellant applied to the board under s. 5 (1) (*p*) of the Increase of Rent (Restriction) Ordinance, 1949, to vary the order by cancelling the requirement that a new tenancy to be given to the respondent. The appellant claimed that he required the premises as a residence for himself and his family and that the respondent had alternative accommodation. At the hearing the appellant also submitted that owing to the collapse of the building during repairs a new building had in effect been constructed which was exempt from the operation of the Ordinance under s. 1 (2) (*d*) as read with Government Notice 555 of 1954. The board by a majority held that the building was not a new construction and refused to vary the original order but made no reference to the other grounds. On appeal it was submitted that the majority decision could not be supported by the evidence and that it did not refer to the other two grounds upon which the application for review had been based. The respondent contended that the board had power under s. 5 (1) (*p*) to vary its decision only for "good cause shown".

Held –

(i) there was evidence to support the decision of the majority of the board.

(ii) the purpose and intent of the provisions of s. 5 (1) (*p*) are that proceedings may be reopened and an order of the board varied only when facts and circumstances emerge which are shown to have existed at the time the order was made, but which through inadvertence had not been brought to the notice of the board and the existence of which made the earlier order unjust or wrong; the sub-section was not intended to allow a review of an order as a consequence of facts or circumstances arising subsequent to the order. *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao* (1900), 27 I.A. 197 applied.

(iii) the appellant's remedy was to make a fresh application for possession of his premises and not to ask for a review of an order which, at the time it was made, was right.

(iv) the appellant could not approbate and reprobate: he had taken the full benefit of the board's order of August 16, 1958, and later sought to set aside that part of the order which he found irksome.

(v) the two grounds upon which the appellant sought to obtain his review were not valid and the board was not obliged to consider them.

Appeal dismissed.

Cases referred to in judgment:

(1) *Solle v. Butcher*, [1950] 1 K.B. 671; [1949] 2 All E.R. 1107.

(2) *R. v. Meischke's* (*Pty.*) *Ltd*., 1948 (3) S.A. 704 (A.D.).

(3) *Gore-Geimes v. Foley* (1930), 64 Ir. L.T.R. 52.

(4) *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao* (1900), 27 I.A. 197.

(5) *Alla Ditta Qureshi v. Ngara Provision Store and Others* (1956), 23 E.A.C.A. 1.

Judgment

Edmonds J: On August 16, 1958, the appellant (the landlord) made application to the Coast Rent Control Board for vacant possession of his premises situate on plot 291, s. III, Mombasa, of which the respondent was the tenant, on the grounds that vacant possession was necessary in order that certain major repairs required by the Medical Officer of Health could be carried out. After hearing evidence, the board made the order sought in the following terms:

> "Ordered that tenant shall give landlord vacant possession on or before August 31, 1958. Repairs and reconstruction to commence forthwith on vacant possession being given and completed in two months. Tenant to be re-admitted on completion."

On March 22, 1959, the appellant applied under s. 5 (1) (*p*) of the Increase of Rent (Restriction) Ordinance, 1949, for a variation by the board of its order of August 16, 1958, by the cancellation of the requirement thereunder of a new tenancy being given to the respondent upon the completion of the repairs to the building on the grounds (*a*) that the appellant required the premises as a residence for himself and his family, and (*b*) that the respondent had alternative accommodation. At the hearing of the application, a further and, indeed, the principal ground upon which the application was prosecuted was put forward on behalf of the appellant, namely, that as a consequence of the collapse of the building during the work of repair, a new building had in effect been constructed and was accordingly exempt from the operation of the Ordinance under the provisions of s. 1 (2) (*d*) as read with Government Notice 555/1954. The notice is in the following terms:

> "In exercise of the powers conferred by para. (*d*) of sub-s. (2) of s. 1 of the Increase of Rent (Restriction) Ordinance, 1949, the Governor in Council has been pleased to exempt from all the provisions of the said Ordinance all dwelling houses whereof the erection is commenced after the 28th day of February, 1954."

The application of March 22, 1959, was contested almost entirely upon the question whether or not the building as finally completed was a new building or erection. The evidence as to the appellant's requirement of the building as a residence for himself and his family, and the provision of reasonably equivalent alternative accommodation for the respondent was very brief, while the appellant's advocate, in his closing address, made no reference whatever to these matters. The deputy-chairman of the board came to the conclusion that in the result the building after reconstruction was a new building, erected subsequent to March 1, 1954, and therefore no longer subject to control under the Ordinance. He then made a brief reference to the question of alternative accommodation for the respondent, and finally gave it as his view that the board's order of August 16, 1958, should be varied by the cancellation of the direction for the re-admission of the respondent to the premises. The deputy-chairman

was, however, alone in this view. The other two members of the board came to the conclusion that the building did not amount to a new construction and decided that there should be no variation of the original order, but no reference was made by them to the other two grounds upon which the appellant based his application. An order was accordingly made in terms of their majority decision.

It is against this majority decision, which of course became the decision of the board, that this appeal is now made. It is contended for the appellant that the decision of the majority members is wrong on the grounds (*a*) that it cannot be supported by the evidence, and (*b*) that the members in coming to their decision considered only the question of whether the building fell within the exemption provided by Government Notice 555/1954, and failed to consider the other two grounds upon which the appellant based his application. It is contended that the decision of the board should be reversed and an order made in accordance with the order proposed by the deputy-chairman. The order proposed by the deputy-chairman was based partly upon his finding that the reconstructed building amounted to a new building, and partly upon his opinion that it would be unreasonable to put the respondent back into the premises. The following passage appears from his written decision:

> "Whatever – if anything – can follow what the landlord has done, in my opinion he has erected a house and commenced this erection after March 1, 1954 – the notice of the Municipality is dated 1958. He has had an occupation certificate for the house as it now stands. I have no hesitation in finding that he had constructed this house, commencing after March 1, 1954, and it is beyond control. The question now arises as to whether the former tenant can be re-admitted to it."

I pause at this stage of the quotation to remark that once a building is found to be new and beyond control, there can be no "question" of whether a former tenant may be re-admitted to it. Such a question would be beyond the jurisdiction of a board to decide as the building would be no longer subject to the provisions of the Ordinance. The new building would be within the entire and unfettered control of the landlord and any order made in respect thereof by a board would be ultra vires. However, to continue the quotation from the deputy-chairman's decision:

> "The order was for the repairs to be done, completed in two months, and for the tenant to be re-admitted. But much more was done than 'repairs'. A new house was constructed. The whole circumstances have changed since the original order was passed. The former order referred to an old house, which was to be repaired.
>
> "In my opinion, it would not be just or reasonable to insist on the tenant being put back. He has other accommodation and there is evidence that he could get Government quarters, if he wanted them but for personal and domestic reasons, he does not want them. I would vary the order for his re-admission and cancel it."

In dissenting from this opinion the other two members of the board gave their reasons as follows:

> "We have patiently heard and gone through very carefully the evidence of the witnesses of both sides and have to conclude that the house is not entirely newly constructed but the repairs and renovations were so carried out to the old house that it looks like a new one – this does not mean the whole building is of a new construction. The former order therefore, stands for the tenant's re-admission provided the tenant agrees to pay the revised rent to be assessed by the board."

This majority decision became, as I have said, the decision of the board. Before this court can interfere with the decision of the majority members that the repairs and reconstruction did not have the effect of bringing into being a new building, it would have to be satisfied that there was no evidence upon which the board could have reached its conclusion. The evidence for the appellant is that in the course of carrying out repairs to the building, the walls collapsed, necessitating replacement by new walls. The original walls were of mud and wattle and the new walls were of coral blocks with mud. There is evidence that new doors and window frames were put in and a roof of corrugated iron sheets replaced the former roof of flattened 4-gallon tins. There is evidence also of a new cement floor being laid. There is no evidence or suggestion that the design or dimensions of the reconstructed house were in any way different from the original. The evidence of two witnesses for the respondents is to the effect that the reconstruction was not to the extent claimed by the appellant. Both say that they did not see any collapsed walls. It was the opinion of a municipal building inspector that the building as repaired and reconstructed could not be regarded as a newly erected house.

The question before the board was whether this was the same building after repairs and reconstruction. The following statement in Megarry on The Rent Acts, (8th Edn.), at p. 103, was quoted with approval by Bucknili, L.J., in *Solle v. Butcher* (1), [1950] 1 K.B. 671 at p. 680: [1949] 2 All E.R. 1107 at 1112 as correctly summing up the various decisions on the point:

> ". . . if a house within the Acts is subjected to such 'substantial structural alteration' that it becomes 'a new and separate dwelling house in fact' by reason of change of identity, the new premises shed all the attributes of the old."

In *R. v. Meischke's* (*Pty*.) *Ltd*. (2), 1948 (3) S.A. 704 (A.D.), Tindall, A.C.J., at p. 708 said:

> "It is impossible to give an accurate and comprehensive definition of the factors which will determine whether alterations to premises have brought about a change in their identity. The question is one of degree depending on the facts of the particular case."

It has been held that if several walls of a defective building are rebuilt, that will not be enough to result in a change of identity. (*Gore-Grimes v. Foley* (3) (1930), 64 Ir. L.T.R. 52). It is, of course, a matter of law whether evidence exists to support the particular inference of fact drawn (per Bucknill, L.J., in *Solle v. Butcher* (1)). It might be contended that the facts in this case were such that an inference might be drawn either way, namely, that there had been a change of identity, or that there had been no such change. If, indeed, the facts can be said to support either view, that would not be sufficient to justify interference by this court with the decision of the majority members (per Bucknill, L.J., in *Solle v. Butcher* (1)). I would strongly incline to the view that the facts, even when considered in the light most favourable to the appellant, cannot support the inference that there was a change of identity. However, I am not concerned with that. My only concern is whether there was evidence which could support the decision of the majority members of the board, and I am fully satisfied that there was.

It is then contended for the appellant that the order of the board cannot stand as the majority members failed to consider the other grounds of the appellant's application, namely, that he required the premises as a residence for himself and his family, and that the respondent had alternative accommodation. It was contended for the respondent that in terms of the provisions of s. 5 (1) (*p*) the board has power upon the application of a landlord to vary its decision only "for good cause shown", and that the principles which should guide a board in deciding whether or not good cause is shown must be the same

as those enunciated by the Privy Council in *Rajah Kotagiri Venkata Subbamma Rao v. Rajah Vellanki Venkatrama Rao* (4) (1900), 27 I.A. 197. In that case the judicial committee was considering the effect of the words "any other sufficient reason" which appeared in s. 623 of the Indian Code of Civil Procedure of 1882. That section enabled a party to apply for a review of a decree on the discovery of new and important matter and evidence, which was not within his knowledge, or could not be produced by him at the time the decree was passed, or on account of some mistake or error apparent on the face of the record, or "for any other sufficient reason". In delivering the judgment of the judicial committee, Lord Davey said at p. 205:

> "In the opinion of their lordships, the ground of amendment must at any rate be something which existed at the date of the decree, and the section does not authorise the review of a decree which was right when it was made on the ground of the happening of some subsequent event."

It is my view that the same principle must necessarily apply when a Rent Control Board is considering the question whether good cause is shown to justify a variation of an order made by it. If the same principle did not apply, there would be no end to applications for review on grounds arising subsequently to and entirely new and different from those existing and supporting an earlier application on which an order had been made. I think the purpose and intent of the provisions of s. 1 (5) (*p*) are that proceedings may be reopened and an order of the board varied only when facts and circumstances emerge which are shown to have existed at the time the order was made, but which through inadvertence had not been brought to the notice of the board and the existence of which make the earlier order unjust or wrong. I feel confident that the sub-section is not and was not intended to allow a review of an order as a consequence of facts or circumstances which have arisen subsequent to the order. If such facts or circumstances do arise, the remedy open to a landlord or tenant is to make a fresh application under the appropriate provision of the Ordinance. In this case, the appellant's application for review is based upon the provisions of s. 16 (1) (*e*) (i) and is supported by factors and circumstances which arose subsequent to the board's order of August 16, 1958. His remedy was to make a fresh application for possession of his premises, not to ask for a review of an order which, at the time it was made, was right. Furthermore, as Sir Barclay Nihill, P., said in *Alla Ditta Qureshi v. Ngara Provision Store and Others* (5) (1956), 23 E.A.C.A. 1 at p. 3:

> "It is well established that the courts will not usually allow a party to both approbate and reprobate; one application of this rule is that a party who has taken the benefit of an order or award cannot subsequently be heard to complain of it."

In this case the appellant has had the full benefit of the order of the board of August 16, 1958, and now seeks to suit his own convenience to set aside that part of the order which he finds irksome, namely the re-admission of the respondent to the premises. He must comply fully with the order made in the circumstances existing at the time it was made, but, as I have already stated, if circumstances have altered, his remedy is to apply afresh.

It follows from the foregoing that it is my view that the other two grounds upon which the appellant sought to obtain his review were not valid and that the board was not obliged to consider them. In the result, therefore, I can find no justification for interfering with the board's decision and the appeal is accordingly dismissed with costs.

Appeal dismissed.

For the appellant:

K. M. Pandya, Mombasa

For the respondent:
R. K. Mitra, Mombasa

Shah Jivraj Hira & Sons v M K Gohil
[1960] 1 EA 922 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	15 November 1960
Case Number:	1142/1959
Before:	MacDuff J
Sourced by:	LawAfrica

[1] Execution – Priority – Attachment – Salary of employee – Income tax – Appointment of employer as agent to collect tax for Commissioner – Whether prior appointment by Commissioner of Income Tax has priority over subsequent court order for attachment of salary – East African Income Tax (*Management*) *Act*, 1958, *s.* 121 – *Civil Procedure Ordinance* (*Cap.* 5), *s.* 44 (1) (*K.*).

[2] Income tax – Collection – Appointment of employer as agent of Commissioner – Whether appointment has priority over subsequent court order for attachment of salary – East African Income Tax (*Management*) *Act*, 1958, *s.* 121 – *Civil Procedure Ordinance* (*Cap.* 5), *s.* 44 (1) (*K.*).

Editor's Summary

The point for consideration was whether a notice appointing an employer as agent to collect tax due from an employee to the Commissioner of Income Tax takes priority over a subsequent court order for attachment of the salary of the employee.

Held –

(i) the notice of the Commissioner of Income Tax when served on the employer takes effect in the nature of a statutory assignment and in respect of that portion of the employee's salary which is specified in the notice the employer becomes a trustee for the Commissioner.

(ii) the notice has the effect of curtailing the amount payable to the employee at its source and accordingly the notice by the Commissioner has priority over a subsequent court order for attachment of salary.

Order accordingly.

Judgment

Macduff J: The point for consideration is whether a notice of appointment of an agent by the Commissioner under s. 121 of the East African Income Tax (Management) Act (No. 10 of 1958),

provided it has priority in time, has priority in law over an attachment under a court decree.

The procedure to be followed and the effect of such orders are set out as follows:

"121 (1) The Commissioner may in his discretion by notice in writing to any person declare him to be the agent of any other person for the purposes of the collection and recovery of tax due by such other person; and the person so declared agent shall pay any tax so due and specified in such notice from any moneys, including pensions, salary, wages or any other remuneration, which may, at any time within twelve months from the date of such notice, be held by him for, or due by him to, such other person.

"(2) For the purpose of this section the Commissioner may, by notice in writing, at any time require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of such notice, with a return showing any moneys which may be held by him for, or due by him to, any other person from whom tax is due.

> "(3) Where any person declared an agent under sub-s. (1) fails to pay to the Commissioner within thirty days of the date of service of the notice referred to in such sub-section or of the date on which any moneys referred to in such sub-section are held by him for, or due by him to, the person of whom he is so declared to be agent, whichever is the later, any amount which he is required to pay under such sub-section, then the provisions of this Act relating to the collection and recovery of tax shall apply to the collection and recovery of such amount as if it were tax the due date for the payment of which was the date upon which such person should have paid such amount to the Commissioner under this sub-section."

The effect of the Act itself is set out in the East Africa (High Commission) Order-in-Council, 1947, as follows:

> "28.(1) Subject to the provisions of this Order, it shall be lawful for the High Commission:
>
> (*a*) with the advice and consent of the Assembly, to make laws for the peace, order and good government of the territories, in respect of the matters specified in the Third Schedule to this Order;
>
> (*b*) with the advice and consent of the Legislative Councils of the territories, to make laws for the peace, order and good government of the territories.
>
> "(2) Any law made in accordance with the provisions of para. (*a*) of sub-s. (1) of this section may repeal, amend or suspend any law of the territories relating to the matters specified in the Third Schedule to this Order.". . .

and included in the Third Schedule to the Order is

> "5. Income tax – administrative and general provisions (but not including rates of tax and allowances)."

Section 44 (1) of the Civil Procedure Ordinance (Cap. 5) enables the attachment in execution of a decree of salary accrued or to become due and O. XXI, r. 7, r. 18, r. 19 and r. 43 of the Civil Procedure (Revised) Rules, 1948, provide the machinery for such attachment.

In my opinion the position is clear. As at the time of service of the Commissioner's order on the debtor's employer the order binds the amounts specified in the order in the hands of the employer. It takes effect in the nature of a statutory assignment and in respect of that portion of the debtor's salary the employer becomes a trustee for the Commissioner. I would accept the contention that such order has the effect of curtailing the amount payable to the debtor by way of salary at its source and before it comes into his hands. In that event such portion of his salary as is bound by the order is not available for subsequent attachment by order of the court. In other words the order by the Commissioner has priority over a subsequent attachment.

I can appreciate that an attachment order can be made in ignorance of a prior order by the Commissioner. This fact should, of course, be brought to the notice of the court in the first instance by the debtor appearing on the notice to show cause when the provisions of O. XXI, r. 20 (1) would be utilised. In default of appearance by the debtor the fact of the previous order could be brought to the court's notice by the employer.

Order accordingly.

For the plaintiff:
K. A. Shah, Nairobi
K. S. Shah

For the defendant:
Maini & Patel, Nairobi
P. L. Maini

Mwajuma Binti Koja v R
[1960] 1 EA 924 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	15 November 1960
Case Number:	86/1960
Before:	Mahon CJ
Sourced by:	LawAfrica

[1] Criminal law – Breach of peace – Offensive language at public meeting – No evidence that accused likely to misbehave in future – Accused ordered to execute bond to keep peace – Misdirection – Penal Decree (*Cap.* 9), *s.* 87A (1) (*b*) (*Z.*) – *Criminal Procedure Decree* (*Cap.* 8), *s.* 35 (1) (*Z.*).

Editor's Summary

The appellant when speaking at a public meeting made certain remarks concerning members of a political party which in the opinion of a magistrate were so abusive and insulting as to warrant her prosecution under s. 87A (1) (*b*) of the Penal Decree. He accordingly held that the remarks justified him in ordering the appellant to execute a bond in the sum of Shs. 100/- to keep peace for a period of six months. On appeal it was submitted that the magistrate had misdirected himself in law.

Held –

(i) it is not competent for a magistrate to order a person to execute a bond unless it is established by evidence that there is a likelihood of a breach of the peace.

(ii) that the appellant's remarks were, in the opinion of the magistrate, such as to warrant her prosecution under s. 87A (1) (*b*) of the Penal Decree was not a proper ground on which to order her to execute a bond.

(iii) there was no evidence on which the magistrate could properly suspect the appellant of future misbehaviour; accordingly he was not entitled to order the appellant to execute the bond.

Appeal allowed. Magistrate's order set aside.

Case referred to in judgment:

(1) *R. v. Sandbach*, [1935] 2 K.B. 192.

Judgment

Mahon CJ: This is an appeal from a decision of the resident magistrate, Zanzibar, in which he ordered the appellant to execute a bond in the sum of Shs. 100/- for a period of six months to keep the peace.

The facts, which have not been disputed, are briefly, that on June 28, 1960, a meeting of the Afro-Shirazi party was held near Mwembeladu. At this meeting the appellant spoke and some of her remarks were regarded as referring to members of the Nationalist Party. These remarks were to quote the magistrate

> "abusive or insulting so much so that they could afford the basis for establishing a prima facie case against the respondent on a charge under para. (*b*) of sub-s. (1) of s. 87A of the Penal Decree, Cap. 9 . . ."

He, therefore, held that the words complained of justified his ordering the appellant to execute a bond.

The first ground of appeal is the only ground which I find it necessary to deal with for the purpose of disposing of this appeal. This is that in so holding the magistrate misdirected himself in law.

Section 35 (1) Criminal Procedure Decree as amended by Decree No. 26/52 is in these terms:

> "35(1) A magistrate empowered to hold a subordinate court of the first class, upon complaint of any person may, in the manner hereinafter provided, require any person to show cause why he should not be ordered to execute a bond, with or without sureties, to keep the peace or be of good behaviour for such period, not exceeding one year, as the magistrate thinks fit."

On the face of it this section appears to give a magistrate somewhat wider powers than he had under the repealed section. The discretion given by both sections is, however, one which must be exercised judicially. It is well settled that binding over is not to be regarded as a punishment but as a means of preventing the likelihood of a breach of the peace. That being so, it follows that unless such a likelihood is apprehenced and this must, of course be established by evidence, it is not competent for a magistrate to order a person to execute a bond.

In *R. v. Sandbach* (1), [1935] 2 K.B. 192, to which I have been referred, it was submitted on behalf of the appellant that the power to require recognizances to be entered into, whether to keep the peace or be of good behaviour, was limited to cases which involve or tend to a breach of the peace in the sense of something calculated to lead to violence. This argument was rejected.

The following passage appears in the judgment of Avory, J.:

> ". . . I must say that I am not prepared to assent to his proposition that there can be no binding over of a person to be of good behaviour unless he has done something which tends to a breach of the peace in the sense of something which is calculated to lead to violence. In my view, the phrase 'calculated to lead to a breach of the peace' is far more extensive in its meaning that Mr. Comyns Carr has suggested. If further authority is wanted, I think the passage from Blackstone, Vol. IV, p. 251, shows that the scope of this remedy is what is called preventive justice. The passage reads: 'This preventive justice consists in obliging those persons, whom there is probable grounds to suspect of future misbehaviour, to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen by finding pledges or securities for keeping the peace, or for their good behaviour."

The fact that the appellant's remarks in the present case were, in the opinion of the magistrate, such as to warrant her prosecution under s. 87A (1) (*b*) Penal Decree was no proper ground, in my view, on which to order her to execute this bond. The remarks were made on June 28 but no complaint was made until July 23 which would seem to negative any apprehension by the authorities that a breach of the peace was likely. In the proceedings before the magistrate there was no mention of who the appellant was, how she came to address this particular meeting, that she had ever addressed any other meeting or that there was any likelihood of her addressing subsequent meetings. In short, there was no evidence on which the magistrate could properly suspect her of future misbehaviour and in the absence of any such evidence the magistrate was not, in my opinion, authorised to order her to execute a bond. The evidence showed no more than that some two months previously the appellant had at this meeting made some offensive remark: it was not suggested that she was in the habit of making such remarks or that she was likely to do so on subsequent occasions or that such remarks were likely to cause a breach of the peace. If that had been established the result of this appeal might have been different.

I have no doubt that if the magistrate had directed himself properly he would not have come to the conclusion which he did. I am, therefore, satisfied that this appeal should be allowed if an appeal lies. This is a question which has

not been taken or argued by learned counsel and I do not, consequently, intend to decide it now. It appears, however, that prior to the Criminal Procedure Code of 1898 in India a distinction was made between an order for security to keep the peace and an order for security to be of good behaviour but that since 1898 both orders are appealable. Sub-section (2) of s. 47, Criminal Procedure Decree, says that any person ordered to give security for good behaviour under the section may appeal but no mention is made of a person ordered to execute a bond to keep the peace. It could, therefore, certainly be argued that no appeal lies from the order of the magistrate in this case. That being so I propose to dispose of the matter under the revisionary powers possessed by this court and set the order aside.

Order accordingly.

Appeal allowed. Magistrate's order set aside.

For the appellant:
Wiggins & Stephens, Zanzibar
K. S. Talati

For the respondent:
The Attorney-General, Zanzibar
B. A. G. Target (Crown Counsel, Zanzibar)

Souza Figueiredo & Co Ltd v Moorings Hotel Co Ltd
[1960] 1 EA 926 (CAK)

Division:	Court of Appeal at Kampala
Date of judgment:	6 December 1960
Case Number:	42/1960
Before:	Sir Kenneth O'Connor P, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Uganda – Lewis, J.

[1] Land registration – Agreement creating sub-sub-lease – Agreement defective in form – Registration refused – Whether refusal justified – Registration of Titles Ordinance (*Cap.* 123), *s.* 3, *s.* 9 (3), *s.* 51 (*U.*) *– Uganda Order-in-Council*, 1902, *s.* 15 *– State of Victoria* (*Australia*) *Transfer of Land Act*, 1954, *s.* 40 (1) *– New South Wales* (*Australia*) *Real Property Act*, 1900, *s.* 41 *– Liquor Ordinance*, 1955 (*U.*) *– Liquor Rules*, 1955, *r.* 14 (2) (*U.*).

Editor's Summary

The respondent was the transferee of a sub-lease of certain club premises for which it held a liquor

licence. By an agreement the respondent let the premises to the appellant for the residue of the term under the sub-lease less the last three days thereof. This term exceeded three years. Registration of the agreement was refused by the Registrar of Titles who in evidence said that he refused to register the sub-sub-lease and that the document was not in a form which could be registered. The appellant took possession of the premises with the furniture and fittings and carried on the club there but he was never registered as propriletor under the Registration of Business Names Registration Ordinance. The iquor licence and the business both remained in the name of the respondent. The appellant remained in possession from April 1, 1956, until September 16, 1958, when the keys of the premises were handed to the respondent's accountant. There was then Shs. 50,199/96 owing for arrears of rent, and proceedings were instituted for this amount. The principal defence was that the agreement operated by way of present demise of land for a term exceeding three years and since the agreement was not registered it was ineffectual to create any estate or interest in land and the covenant to pay the rent was

unenforceable. It was also objected that the agreement was tainted with illegality as the parties to it contemplated, and had been permitting, sales of liquor for the appellant's gain under a licence held by and in the name of the respondent contrary to the Liquor Ordinance, 1955, and Liquor Rules, 1955. The judge rejected these arguments and found for the respondent. On appeal

Held –

(i) section 51 of the Registration of Titles Ordinance provides that no estate or interest in land can be created or transferred by an unregistered instrument and that no land can be made liable to the covenants in an unregistered instrument, but it does not state that an unregistered instrument cannot operate as a contract inter partes; the instrument was not avoided by the Ordinance and should be construed "ut magis valeat quam pereat".

(ii) an unregistered document operates as a contract inter partes and can confer on the party in the position of intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registrable lease.

(iii) whether the covenant to pay rent contained in the agreement was looked at as a contractual stipulation in a document of which specific performance could be obtained in equity, or as a term of common law tenancy at will, it was enforceable.

(iv) a sub-sub-lease is a sub-lease and is registrable under the Ordinance if in proper form.

(v) there was no evidence that, when the agreement was made, the parties intended to act illegally and the failure of the appellant to apply for a liquor licence did not taint a legal agreement with illegality or render it incapable of enforcement.

Appeal dismissed.

Cases referred to in judgment:

(1) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9.

(2) *Ariff v. Jadunath Majumdar* (1930), 58 Cal. 1235.

(3) *Maddison v. Alderson* (1882), 8 App. Cas. 467.

(4) *Ramsden v. Dyson* (1886), L.R. 1 H.L. 129.

(5) *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co*. (1879), 4 App. Cas. 391.

(6) *Davis v. McConochie* (1915), 15 S.R. 510.

(7) *Pitman v. Woodbury* (1848), 3 Ex. 4.

(8) *Toler v. Slater* (1867), L.R. 3 Q.B. 45.

(9) *Purchase v. Lichfield Brewery Co*., [1915] 1 K.B. 184.

(10) *Hallen v. Spaeth*, [1923] A.C. 684.

(11) *Unsworth v. Elder Dempster Lines Ltd*., [1940] 1 K.B. 658; [1940] 1 All E.R. 362.

The following judgments were read by direction of the court:

Judgment

Sir Kenneth O'Connor P: This is an appeal from the High Court of Uganda. The appellant and the respondent are both limited companies carrying on business at Kampala.

Globe Cinema Ltd. is the proprietor of a lease for eighty-six years and six months of a plot of land in Kampala, known as plot 28 Kampala Road, on which now stand premises known as the Black Cat Club. One George Burloyanis is the registered proprietor of a sub-lease of this plot from Globe Cinema Ltd. which was registered on March 10, 1953. The term of this sub-lease (hereinafter called "the sub-lease") was ten years from March 15, 1952.

The respondent was at the date that the suit commenced the registered transferee of the sub-lease. The transfer of the sub-lease, though dated May 17, 1955, was not registered until September 15, 1958. The plaint was filed on November 18, 1958.

By a badly-drawn document called an agreement dated April 16, 1956, made between the respondent of the one part and the appellant of the other part (hereinafter called "the agreement") it was recited that the respondent was registered as the proprietor of the sub-lease (this was, at that date, incorrect) for a period of ten years from March 15, 1952, at an annual rent of Shs. 20,400/- payable quarterly in advance on the fifteenth days of March, June, September and December in each year and it was recited that the respondent was conducting a club on the premises known as the Black Cat Club and held a liquor licence. The following paragraphs, though placed as part of the recitals, must have been intended as operative provisions. Paragraph (3) reads:

> "(3) The company [i.e. the respondent] agrees to sub-let and the sub-lessee [i.e. the appellant] agrees to take the premises together with the hard furniture and fittings at present situate on and used in connection therewith particulars whereof are set out in the schedule hereto (all of which are hereinafter called the demised premises) to hold to the sub-lessee from the first day of April one thousand, nine hundred and fifty-six for the residue of the term of the said sub-lease less the last three days thereof) yielding and paying therefor the sum of shillings sixty thousand four hundred (Shs. 60,400/-) per annum payable as to the said sum of shillings twenty thousand four hundred by equal quarterly payments in advance on the same days and in the same manner as provided in that behalf in the said sub-lease [i.e. the sub-lease] and as to the said sum of shillings forty thousand by equal monthly payments the first of which will be payable on the last day of April one thousand nine hundred and fifty-six and thereafter on the last day of every succeeding month."

Paragraph (4) reads:

> "(4) The sub-lessee to the intent that the obligation may continue throughout the term hereby created hereby covenants with the company as follows:
>
> (*a*) To pay the rent hereinbefore reserved on the days and in the manner aforesaid.
>
>
>
> (*e*) To apply or cause application to be made at all proper times to the licensing authority for the time being and to use its best endeavours to obtain a grant or renewal of the club liquor licence necessary for using and keeping open the demised property as a properly licensed club and to pay all fees and duties in respect thereof."

There followed other covenants whcih it is not necessary to set out.

The agreement, although the operative words are "the company agrees to sub-let and the sub-lessee agrees to take" refers to "the term hereby created", "the tenancy hereby created", and "the demised premises" and was expressed to take effect from April 1, 1956, that is a date anterior to the date of the agreement. It seems that it was intended to be a document of past or present, and not future, demise. It was for a term exceeding three years.

The agreement was never registered. The Registrar of Titles was called as a witness in the court below. He said that he was asked to register the agreement, but refused: he refuses to register sub-sub-leases. He also said that the document was not in a form which could be registered.

The appellant took possession, under the agreement, of the premises with the furniture and fittings and carried on the Black Cat Club there, though the appellant was never registered as proprietor of the club under the Business Names Registration Ordinance. The first registration certificate was in the name of George Burloyanis. The name was changed to that of the respondent on February 21, 1958, and so remained. The appellant was in occupation from April 1, 1956, until September 16, 1958, on which date it handed over the keys of the premises to Mr. Jones, of Kerr Jones & Co., accountants of the respondent, who accepted them without prejudice to the position of the respondent. The liquor licence throughout remained in the name of the respondent and was never transferred to the appellant.

The appellant made heavy losses in its operation of the club and, according to the evidence of Mr. Jones, as at September 15, 1958, owed the respondent Shs. 50,199/96 for rent under the agreement. Mr. Khanna for the appellant, asserted before us that the keys were surrendered on September 15 and not September 16. But as there is an admission that the date was September 16, and two agreed issues were framed on that basis, I think that I must take that as the correct date. The learned judge (at p. 65) says that the defendants occupied the premises

> "until September 15 when they handed over the keys of the club to the plaintiff's accountants."

But, at p. 70 he refers without demur to an argument that the keys were handed over on September 16. As I have already stated, there is an admission (at p. 62) that September 16 was the date that the keys were handed to Mr. Jones.

On November 18, 1958, the respondent filed a plaint claiming Shs. 50,199/96 arrears of rent, interest and costs. There was no defence on the merits except as to the quarter's rent due for payment on September 15, 1958. The defence was that the agreement operated by way of present demise and, being a lease for more than three years, required registration under the Registration of Titles Ordinance; and, not having been registered, was ineffectual to create any estate or interest in the land. The appellant averred that, as the consideration for the agreement, namely the appellant's expectation of the grant of a valid term, had (for lack of registration of the agreement) wholly failed, the covenant to pay rent, which was inseparable from the lease, was unenforceable. The appellant denied being indebted to the respondent in the sum of Shs. 50,199/96 or at all. The appellant averred, as a second line of defence, that the agreement was tainted with illegality, as the parties to it contemplated, and had been permitting, sales of liquor for the appellant's gain under a licence held by and in the name of the respondent without changing the proprietorship of the club. The appellant further averred that the respondent had no registered title to the premises at the date of the agreement and that, by reason of the respondent's delay in getting a registered title and transferring the liquor licence to the appellant, it (the appellant) had rightfully terminated the arrangement by moving out of the premises and handing back the keys to the respondent's duly authorised agent. The appellant said that the keys were not, and could not be in the circumstances, accepted "without prejudice". The appellant further averred that it had suffered damage by reason of the respondent's failure to give the appellant a registered title and to transfer the proprietorship of the club and the benefit of the liquor licences to the appellant for which the appellant reserved a right to sue; and the appellant said that, in any event, there could be no liability for rent after September 1, 1958.

The following agreed issues were framed:

> "Issues:
>
> 1. What is the effect of the unregistered agreement of April 16, 1956?

2. Is there an action maintainable in law or equity on the said agreement of April 16?
3. Is the said agreement of April 16 tainted with illegality? If so, is it void?
4. Was the business of the Black Cat Club being run contrary to the Liquor Ordinance? If so, does it invalidate the said agreement?
5. Was possession given on September 16, 1958, and was there an acceptance thereof by the plaintiffs?
6. What is the legal effect of qualifications 'without prejudice' or 'under protest' if used in relation to the acceptance of possession?
7. Was there such delay and failure to make out a title or to grant a registered lease as entitles the defendants to repudiate?
8. Can the plaintiffs recover rent for the period September 15 – December 15, 1958, in view of the acceptance of possession on September 16?"

The learned judge decided these issues in favour of the respondent and gave judgment for the respondent for Shs. 50,199/96, interest at 6 per cent. per annum, and costs.

The appellant appealed. Before us Mr. Khanna argued the propositions of law which had been pleaded in the defence, with certain other propositions which will be noticed later. By far the most important of these was the contention that a covenant to pay rent contained in an agreement which operates as a present demise of land for upwards of three years is unenforceable if unregistered. Mr. Khanna summarised his argument on this question in this way: Section 3, s. 9 (3) and s. 51 of the Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda) prevent legal or equitable estates in land from arising out of unregistered instruments. The covenant in the agreement to pay rent is so bound up with the land that it cannot have effect unless it is part of a registered lease. Section 9 of the Registration of Titles Ordinance strikes even at estates arising by estoppel, but not at pure contracts. There is a distinction in this respect between e.g. the personal covenant to repay contained in a mortgage and a covenant in a lease to pay rent, because rent issues out of the land and is bound up with the estate in land which the lease creates. The consideration for the sub-sub-lease sought to be created by the agreement was the grant of a valid term and, that having failed by reason of non-registration, the consideration for the agreement wholly failed and the covenant to pay rent was unenforceable.

Section 3 of the Registration of Titles Ordinance (Cap. 123 of the Laws of Uganda) so far as material, reads:

> "3. Except so far as is expressly enacted to the contrary, no Ordinance or rule so far as inconsistent with this Ordinance shall apply or be deemed to apply to land whether freehold or leasehold which is under the operation of this Ordinance."

Mr. Khanna contends that "rule" in this sub-section includes a rule of equity, a point on which I feel considerable doubt, but which I find it unnecessary to decide.

Section 9 (3) of the Registration of Titles Ordinance occurs in Part III of the Ordinance of which the heading is "Bringing Land Under the Ordinance". It reads:

> "(3) No dealing with any land however held prior to this Ordinance shall, after the commencement of this Ordinance, operate to pass any estate or interest whatever, until such dealing is registered in manner herein provided."

It will be observed that this sub-section relates only to dealing with land and to passing estates or interests in land.

Section 51 of the Ordinance, so far as material, reads:

> "51. No instrument until registered in manner herein provided shall be effectual to pass any estate or interest in any land under the operation of this Ordinance or to render such land liable to any mortgage; but upon such registration the estate or interest comprised in the instrument shall pass or (as the case may be) the land shall become liable in manner and subject to the covenants and conditions set forth and specified in the instrument or by this Ordinance declared to be implied in instruments of a like nature."

It will be observed that what s. 51 says is that no instrument until registered shall be effectual to pass any estate or interest in land . . .; but upon registration the estate or interest in the land shall pass or the land shall become liable in manner and subject to the covenants and conditions set forth . . . in the instrument. That is to say that no estate or interest in land can be created or transferred by an unregistered instrument, and land cannot be made liable to the covenants in an unregistered instrument; but s. 51 does not say that an unregistered instrument cannot operate as a contract inter partes. Similarly s. 9 (3) (assuming without deciding that that section applies generally and not only to land which has been brought under the Ordinance for the first time) says that an unregistered dealing in land shall not operate to pass any estate or interest; but does not say that an instrument purporting (ineffectually) to create an interest in the land and containing contractual terms cannot operate as a contract between the parties to it.

Mr. Khanna pressed upon us that by s. 15 of the Uganda Order-in-Council, 1902, the doctrines of equity are only applied to Uganda in so far as they are not modified, amended or replaced by the provisions of any Ordinance of the Uganda legislature, and that no equity can override the terms of the Registration of Titles Ordinance. No doubt that is right, but there is no question here of an equity overriding the terms of the Ordinance. As already stated, that Ordinance avoids the creation of an estate or interest in land by unregistered instruments, but there is nothing in the Ordinance which renders such instruments ineffectual as contracts between the parties to them: there is nothing in the Ordinance to say that an unregistered document purporting to be a lease of, or an agreement to lease, land which is subject to the operation of the Ordinance for more than three years is void. In my view it can operate as a contract inter parties and can confer on the party in the position of intending lessee a right to enforce the contract specifically and to obtain from the intending lessor a registrable lease. That is not to override the provisions of the Ordinance, but to act in conformity with them. The same principles apply to sub-leases. In England, since equity treats as done that which ought to be done, the intending lessee would be a lessee in equity and would have an equitable estate in the land: *Walsh v. Lonsdale* (1) (1882), 21 Ch. D. 9. In Uganda he cannot derive any estate (whether legal or equitable) in the land from an unregistered instrument, because s. 51 so says. Accordingly, as the intending lessee has no estate in the land, he would not have anything to assign or sub-let until his lease was registered, and he would be postponed to any subsequent lessee from the landlord who took without notice of the unregistered document and registered his lease; but, as already stated, there is nothing in the Ordinance which prevents the document operating as a contract between the parties to it: the document, as I have said, is not avoided by the Ordinance and must be construed ut magis valeat quam pereat.

The case of *Ariff v. Jadunath Majumdar* (2) (1930), 58 Cal. 1235, though decided on a different statute, is in point. In that case, the appellant, having

in 1913 orally agreed with the respondent to grant him a permanent lease of a plot of land at Rs. 80 per month, let him into possession. Shortly afterwards, the respondent, with the knowledge and approval of the appellant, erected structures on the land at a cost of over Rs. 10,000. In December, 1918, the appellant definitely refused to grant the respondent the agreed lease, and, in 1923, sued to eject him after a month's notice to quite. Under the Indian Limitation Act, 1908, Schedule 1, art. 113, the respondent's right to sue for a specific performance of the oral agreement was barred in December, 1921. It was held that there being no lease made by a registered document, as required by s. 107 of the Transfer of Property Act, 1882, the appellant was entitled to eject the respondent with liberty to him to apply to remove the structures; had the respondent's right to sue for specific performance not been barred, he could have claimed the execution of an instrument, which he would have registered, the appellant's suit being stayed in the mean time. Even (their lordships said) if an English equitable doctrine should be applied in any case so as to modify the effect of an Indian Act, which might well be doubted, the English equitable doctrine of part performance, referred to in *Maddison v. Alderson* (3) (1882), 8 App. Cas. 467, affecting the provisions of an English statute as to the right to sue upon a contract, could not be applied, so as to create, without writing, an interest, which s. 107 of the Transfer of Property Act enacts can be created only by a registered instrument: the principle laid down in *Ramsden v. Dyson* (4) (1886), L.R. 1 H.L. 129 appeared to be based solely upon the doctrine of part performance; but, even if it was intended to cover anything beyond that, it did not apply to *Ariff's* (2) suit, as the only contract to which the erection of the structures could be referred had since ceased to be enforceable and as there was no representation of fact giving rise to an estoppel by s. 115 of the Indian Evidence Act, 1872. Their lordships held further that *Walsh v. Lonsdale* (1) did not apply, as the respondent's right to sue for specific performance was barred.

At p. 1241 Lord Russel of Killowen, delivering the judgment of the judicial committee, said:

> "Now it is clear that the verbal agreement alone could confer upon the respondent no such right. By s. 107 of the Transfer of Property Act, 1882, it is expressly enacted that 'a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent, can be made only by registered instrument. All other leases of immovable property may be made either by a registered instrument or by oral agreement.' This amounts to a statutory prohibition of the creation of such a right as is claimed here by the respondent, otherwise than by a registered instrument. No registered instrument exists: therefore, the respondent can have no such right as he claims, unless he can establish it by some means operating independently and in violation of the statute."

At p. 1245 Lord Russell says that the English equitable doctrine of part performance is inapplicable to modify an Indian statute and continues:

> "Their lordships find themselves in agreement with the High Court in the view that *Walsh v. Lonsdale* (1882), 21 Ch. D. 9 has no application to this case, owing to the fact that the respondent's right to enforce the verbal contract had been barred long before the commencement of the present suit. The respondent was not in a position to obtain specific performance of the agreement for a lease from the same court and at the same time as the relief claimed in this action. Had he been so entitled, the position would be very different, for then the respondent could claim to have executed in his favour by the appellant an instrument in writing which he could duly

> have registered, the appellant's ejectment action being stayed in the mean-time. In these circumstances, the respondent would obtain complete protection, but consistently with and not in violation of the provisions of the Indian statute."

Ariff's case (2), makes it quite clear that notwithstanding that under the Indian statute an oral agreement to lease land for more than one year or an unregistered document could not operate as a lease, it could (but for the question of limitation) have operated as a contract capable of specific performance and entitling the intending lessee to call for a registrable instrument. Notwithstanding that the statutes are differently worded, that is precisely the position in the present case.

A similar though not identical position obtains in various jurisdictions where a Torrens system of registration of title is in force. For instance, s. 40 of the Transfer of Land Act, 1954, of the State of Victoria, Australia, provides:

> "40(1) Subject to this Act no instrument until registered as in this Act provided shall be effectual to create or extinguish or pass any estate or interest or encumbrance in or over any land under the operation of this Act, but upon registration the estate or interest or encumbrance shall be created or extinguished or pass in the manner and subject to the covenants and conditions specified in the instrument or by this Act prescribed or declared to be implied in instruments of a like nature."

This, though the wording is slightly different, does not differ in substance from s. 51 of the Registration of Titles Ordinance. It has, however, been held under it that an unregistered agreement for sale though inoperative at law until registered, may create equities between the parties to it: *National Bank of Australasia v. United Hand-in-Hand and Band of Hope Co*. (5) (1879), 4 App. Cas. 391, 407 (P.C.). Fox in his treatise on the Transfer of Land Act, 1954, at p. 34, writes:

> "Equitable claims and interests in land are recognised by the Act and unregistered instruments may confer such equitable claims or interests . . . An instrument which is unregistered will be regarded as an agreement binding on the parties to it: *National Bank v. United Hand-in-Hand etc., Co. Ltd*. (1879), 4 A.C. 391; *Mathieson v. Mercantile Finance, etc., Co. Ltd*. (1890) 17 V.L.R. 271."

At p. 69 Fox writes:

> "Unregistered Leases, Effect
>
> "No instrument (which includes a lease, s. 4 ante) until registration is effectual to pass any interest in land under the Act (s. 40 ante).
>
>
>
> "By virtue of the effect of the Judicature Act an unregistered lease of land under the Act for more than three years operates, not merely to create contractual rights and duties, but creates an equitable term of years . . .
>
> "Consequently in all the Australian States except New South Wales, where the Judicature Act is not in force, by the provisions of that Act and of the doctrine in *Walsh v. Lonsdale* (1882), 21 Ch. D. 9 a lessor is, as against his lessee, in as good a position to enforce the covenants in the lease when it is under seal and unregistered or even when it is in writing and unregistered and susceptible of specific performance as when it is registered in accordance with the provisions of the Act. In a matter resting on covenant it is the contract and not the estate which is the determining

factor: *Hallen v. Spaeth* (1923) A.C. 684, at p. 690; *Firth v. Halloran* (1926) 38 C.L.R. 261, at p. 269."

The learned authors of Kerr on the Principles of the Australian Lands Titles (Torrens) System at pp. 129, 130, 131 and 132 write:

"Unregistered Instruments and Documents in Form Incapable of Registration Operate Inter Partes.

"246. An instrument in statutory form until registration operates as a contract inter parties. In this respect it stands on the same footing as a document, which, owing to its being in a form which will not be accepted by the registrar, is incapable of registration. The mere execution of a registrable instrument transfers no interest in the land, but merely gives a right in personam.

.

"248. An unregistered lease in statutory form operates inter partes in like manner as an agreement for lease does under the general law.

"Whilst at law the lessee is a tenant at will only, yet in equity the unregistered document is binding and effectual as between the parties to it, and an action lies on the covenant for payment of rent, and the landlord's ordinary remedies, such as distress and re-entry would be open to him.

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"255. There is nothing in the Torrens Statutes to prevent registered proprietors being compelled by courts of equity to fulfil their contracts. The holding of a certificate of title does not as between the immediate parties to a contract alter their rights and liabilities to each other."

In my opinion, all the above quoted extracts would be applicable in Uganda, except the statement that an unregistered lease operates to create an equitable term of years. I would not agree that in Uganda any estate or interest in land is created by an unregistered lease. Such a document may, however, give a right to require a registrable lease and its terms may be enforceable as a contract.

Mr. Khanna pressed upon us the case of *Davis v. McConochie* (6) (1915), 15 S.R. 510. In that case the full court of New South Wales held that the lessor under an unregistered lease could not sue for rent even thought the instrument contained an express covenant to pay rent.

Pring, J., said:

"Section 41 of the Real Property Act provides that 'no instrument until registered in manner hereinbefore prescribed shall be effectual to pass any estate or interest in any land under the provisions of this Act'. According to the facts as set out in the plea, the lease was not in the form prescribed by the Act, neither was it registered; of course if it was not in the form prescribed by the Act, it could not be registered under the Act. The contention on the part of the plaintiffs is that, nothwithstanding that the plaintiffs are entitled to sue upon the covenant for the payment of rent, the defendant's answer to that contention is that, inasmuch as rent issues out of the land, he is not liable to pay the rent. I think that contention must prevail. There are several authorities which show that, in the case of covenants to pay rent, to repair and some others, unless an estate passes by the lease to the tenant he is not liable. One is *Pitman v. Woodbury* 3 Ex. 4. I need not deal with the facts, but there is a passage in the judgment of the court which, I think, bears out what I have just said, it is this: 'But with respect to leases by indenture the older authorities show that the covenants, which depend on the interest of the lease, and are made,

> because the covenantor has that interest – such as those to repair and pay rent during the term, are not obligatory if the lessor does not execute – not because the lessor is not a party, but because that interest has not been created to operate, as such covenants undoubtedly do not, if the term ends by surrender and are suspended by eviction by the lessor, so they do not begin to operate unless the term commences: the foundation of the covenant failing, the covenant fails also. Unless there be a term a covenant to repair during it is void'. In *Toler v. Slater* (L.R. 3 Q.B. 45) Cockburn, L.C.J., says: 'I quite agree that if a man enters into a deed as lessee, under which he binds himself by covenants, he expects as the consideration that he shall have a valid lease granted to him in return; and the principle of the cases is perfectly good and intelligible which decide that, where the lessor does not get the consideration on which the covenants attach, viz. the grant of a term, and the tenant is not bound by the covenants although he has executed the deed'."

This is the argument which Mr. Khanna puts forward. He says that rent issues out of the land and that the grant of a term is the consideration for the covenant to pay rent and that, in the present case, the appellant did not get by the agreement the term for which he had bargained, or any term or any estate or interest in the land, and therefore, the consideration for the covenant to pay the rent wholly failed.

No doubt that contention might be right if the present suit were, as *Davis v. McConochie* (6), was, an action at law pure and simple. The Judicature Act was not, when *Davis v. McConochie* (6), was decided, in force in New South Wales and the court which decided *Davis v. McConochie* (6), did not have jurisdiction to apply equitable principles. *Pitman v. Woodbury* (7) (1848), 3 Ex. 4 and *Toler v. Slater* (8) (1867), L.R. 3 Q.B. 45 were decided before the Judicature Act was enacted. The principle on which they were decided ceases to have force once the intending lessee can compel specific performance of the agreement by the lessor to grant him a term, for then the consideration for the lessee's covenant to pay rent has not wholly failed. As Pring, J., himself said in *Davis v. McConochie* (6);

> "It is true that since the Judicature Act in England a plaintiff in the position of the plaintiffs here would be entitled to recover because there being a deed of lease, invalid in itself, the defendant, the lessee, would nevertheless be able to compel the landlord in a court of equity to grant him a valid lease that is a proper lease by memorandum under the Real Property Act. The Judicature Act entitling the courts there to deal with matters of law and equity, the plaintiff in this case would I think be entitled to recover. The same may be said of the Victorian cases because those were decided since the Judicature Act was adopted in Victoria."

The High Court of Uganda is of course entitled and bound to apply the doctrines of equity to the extent mentioned in s. 15 of the Uganda Order-in-Council, 1902, and, as I have already said, to give effect to the agreement as a contract is not to override the Ordinance by an equitable rule, as Mr. Khanna suggests, but is merely to apply an equitable doctrine to the extent that is applicable without creating an estate or interest in the land or infringing the provisions of Ordinance. So far as I can ascertain, it has been uniformly held in many, if not in all, jurisdictions subject to Torrens systems of registration of title where the court has jurisdiction to apply equitable principles, that an agreement for a lease or an unregistered lease operates as a contract inter parties. That does not (as Mr. Khanna suggested) depend upon express provisions to that effect in the legislation.

In New South Wales the position is different because equitable principles are not applicable.

Baalman in his Commentary on the Torrens System in New South Wales (1951 Edn.) at p. 125 writes:

> "The judgment in *Davis v. McConochie* would appear, at first sight, to support the literal construction of s. 41 (1). In that case the full court held that the lessor under an unregistered lease could not sue for rent, even though the instrument contained an express covenant to pay rent. It should be noticed, however, that that was an action at law. As PRING, J., said at p. 515, it could not happen in Victoria, or in any other jurisdiction which had adopted the system of the English Judicature Acts. In a suit in equity the plaintiff would have been entitled to recover."

and, at p. 126 and p. 127 in the commentary on s. 41 of the Real Property Act, 1900, of New South Wales which is very similar to s. 51 of the Registration of Titles Ordinance, the learned author says:

"Unregistered Leases.

> "A lease for a term exceeding three years, like any other instrument which is required by the Act to be registered, comes under the effect of s. 41. Such leases were discussed by Jordan, C.J., in *Carberry v. Gardiner*, where he said:
>
> > 'As regards land under the provisions of the Real Property Act, 1900, no instrument until registered in manner prescribed is effectual to pass any estate or interest therein; s. 41; and no instrument is registrable unless it is in accordance with the provisions of the Act; s. 39. When any such land is intended to be leased for any term of years exceeding three years, a memorandum of lease must be registered; s. 53. It follows that, subject to any exception introduced by s. 53, no common law term can be created in such land by an instrument unless it is both registrable and registered. An informal instrument may, however, be treated as evidencing an agreement for a formal lease, of which a court of equity may decree specific performance by the execution of a registrable instrument: *Wellington City Corporation v. Public Trustee*. And although the informal instrument of itself creates no common law term in the land: *Davis v. McConochie*; entry under it will constitute a common law tenancy at will inter partes, upon which payment of rent may produce the effect provided for by s. 127 of the Conveyancing Act, 1919. There is nothing in the Act to prevent a common law tenancy at will from arising, inter partes, by implication, out of occupancy; *Josephson v. Mason*: nor irrespectively of any occupancy, to prevent the creation, inter partes, of a common law term by means of an oral lease at the best rent taking effect in possession for a term not exceeding three years: *Daniher v. Fitzgerald*.'
>
> "Again, in *A.P.A. Co. v. Rogers*, Jordan, C.J., said of a woman who claimed under an unregistered lease for seven years:
>
> > 'Indeed nothing prevented her from obtaining a common law term of seven years except the fact that she neglected to register the instrument, a neglect which she could have repaired at any time. Unless and until she chose to register it, it operated merely as an agreement specifically enforceable in equity, but not of itself creating a term in the land. The acts done by her, however, in pursuance of the instrument, in entering into possession under it, and proceeding to pay some, although not all, of the rent provided for by it, had the effect of bringing into existence a common law tenancy at will, terminable only by a month's notice in writing, but otherwise upon all the terms of the unregistered memorandum

of lease applicable to such a tenancy: Conveyancing Act, 1919, s. 127. *Carberry v. Gardiner*'."

It seems that even at common law entry under an unregistered lease for more than three years creates a tenancy at will. A tenancy at will involves no definite interest in the land, but merely a personal relation for which, however, a rent may be reserved: BAALMAN, supra, and Hill and Redman Law of Landlord and Tenant (11th Edn.) pp. 20 to 22.

Whether, therefore, the covenant to pay rent contained in the agreement be looked at as contractual stipulation in a document of which specific performance could be obtained in equity or as a term of common law tenancy at will, it is, I think, enforceable.

The appellant could have required from the respondent a registrable sublease (as in fact the appellant did on June 29, 1956, and March 11, September 17, 1957). Not having received a registrable sub-lease, the appellant could have brought a suit for specific performance of the agreement and for a registrable sub-lease, in which suit, if necessary, the Registrar of Titles could have been joined. I may here mention, with respect to the Registrar of Titles (who appeared at the request of this court and as amicus curiae and for whose argument and for the loan of various Australian and other authorities the court is much indebted) that I think he was wrong in saying that no "sub-sub-lease" could be registered under the Ordinance. A "sub-sub-lease" is a sub-lease; and s. 111 of the Ordinance applies the provisions of the Ordinance affecting leases, lessors and lessees to sub-leases, sub-lessors and sub-lessees. Accordingly, s. 108 and the form in the Tenth Schedule to the Ordinance (with any necessary modification: see s. 209) would apply to "sub-sub-leases". If the agreement was not registrable in its existing form, the lessee could have called for a sub-lease in a form which was registrable, and, if he did not get one, he could have sued for it. The Registrar of Titles is, as he himself pointed out, subject to the jurisdiction of the court, and could have been compelled to register a "sub-sub-lease" in proper form. The appellant chose, however, to surrender possession of the premises. It was suggested in argument that he did this because he could not get a registered sub-lease. There was no finding on this point; but I think that on the evidence and the correspondence, in particular the letter from the appellant's solicitors dated August 16, 1958, and the evidence of Mr. Thomas, the appellant's accountant, that up to March, 1957, the accounts of the club showed heavy losses, the strong probability is that the appellant surrendered possession of the premises because the club was unprofitable and not because the appellant could not get a registered sub-lease. The appellant's accountants had been told by the Registrar of Titles that there was no necessity to register the agreement: the appellant had possession and enjoyment of the club premises and no one was disputing its right thereto. The balance of probabilities is heavily in favour of the premises having been surrendered because the club was unprofitable and not because of any failure to obtain a registrable sub-lease.

Of course, the agreement could not be given effect to as a contract if there was no consideration to support it; but there was consideration. The appellant took possession under it and remained in occupation and enjoyment of the premises for a very considerable time.

Mr. Khanna argued that because the respondent, at the date of the agreement, had itself no registered title and did not register its transfer of the sub-lease until September 15, 1958, the agreement was not specifically enforceable. Before that date, he argued, there was no co-existence of privity of estate and privity of contract between the appellant and the respondent and both must exist before the agreement could be specifically enforced. He cited as an authority for that proposition *Purchase v. Lichfield Brewery Co*. (9), [1915]

1 K.B. 184. That, however, was a case of an assignment where the assignee had neither privity of contract with the landlord, nor privity of estate. Here there was privity of contract between the appellant and the respondent. The respondent could have registered its transfer from George Burloyanis at any time and had registered it before action brought. In a suit for specific performance of the agreement brought by the appellant at any time after the date of the agreement, the respondent could (subject to any question of limitation) have been compelled to register its transfer and give a registrable sub-lease to the appellant: *Ariff's* case (2).

I think, therefore, notwithstanding the able and persuasive argument of Mr. Khanna, that his contention that the covenant to pay rent contained in the agreement is uneforceable fails.

I will now consider the other grounds of appeal seriatim: Mr. Khanna contended (ground 1 of the memorandum of appeal) that the respondent had disentitled itself from suing for specific performance by conduct; for instance by re-taking possession, attempts to re-let the premises, election to sue for damages and the like. In my opinion, provided that an unregistered lease or sub-lease can be specifically enforced, it may operate as a valid contract to grant a lease or sub-lease whether a suit to enforce it is actually filed or not. In the present case the respondent is not suing for damages for breach of the agreement, but is suing to enforce a term of the agreement: the respondent's claim is for payment of the amount which the respondent says is due under the agreement for the period during which the appellant was in occupation and enjoyment of the premises. Except in respect of the last quarter, the claim is a claim for payment of the sums due under a contract to pay rent (or under a tenancy at will on agreed terms) for a period during which the appellant had had possession and enjoyment of the property. As in *Hallen v. Spaeth* (10), [1923] A.C. 684 at p. 690, it is the contract between the sub-lessor and its sub-lessee and not the estate which passed or did not pass which is the determining factor. As to re-taking possession, the respondent did not resume possession until the appellant company, having moved out, had voluntarily surrendered the keys to the respondent's accountant. The learned judge found, and there was evidence to support that finding, tha the keys were not handed to a servant or agent of the respondent and that the respondent's consent to the surrender of possession by the appellant was never obtained. In my opinion, there was nothing in the respondent's conduct which would disentitle it from suing for specific performance of the agreement. I may here mention that I see no reason why the keys of the premises should not have been accepted without prejudice to the rights of the respondent: *Unsworth v. Elder Dempster Lines Ltd*. (11), [1940] 1 K.B. 658. It is unnecessary, however, to decide the point as the learned judge held as a fact that Mr. Jones was not the respondent's agent or servant authorised to accept the surrender.

Ground 2 of the memorandum of appeal avers that no contract inferable in equity was ever pleaded and avers that it was never pleaded that the agreement was capable of specific performance or that the respondent was at the date of the suit ready and willing to perform all the obligations under the contract. The respondent pleaded the agreement, exhibited it to the plaint and sued for rent under it. Not only had the respondent been ready and willing to perform the agreement but had part performed it by giving the appellant possession of the premises. That was pleaded. In my opinion that was a sufficient pleading in the circumstances of this case.

In ground 3 of the memorandum of appeal it is averred that

> "para. 8 of the plaint is inconsistent with the respondent having reserved to himself the remedy of suing to enforce specifically any contract inferable in equity (if any)."

Paragraph 8 of the plaint reserved the right to sue the appellant for breach of the agreement before its expiry. It is not clear to me why it should be inconsistent with a claim for rent under a lease to say that the plaintiff reserves a right to sue for any damages it may have suffered by a premature determination of the lease. Such damages could arise, for instance by failure to pay rates and taxes or to perform covenants in the head lease or throught leaving the premises empty.

Ground 5 asserts that

> "in jurisdictions in Australia other than New South Wales an express statutory provision exists in the Registration Laws about an unregistered lease operating as an executory agreement to take and accept a lease in future."

Mr. Khanna did not point to any such statutory provision and I have not been able to find any in the text books on the Torrens system in Australia which are available to me. There is, in s. 42 (2) (*e*) of the Transfer of Land Act, 1954, of the State of Victoria, a provision (referred to by Mr. Khanna) to the effect that land which is included in a registered instrument shall be subject to (among other incumbrances) the interest of a tenant in possession of the land. But I cannot see that that has anything to do with the enforceability of a covenant to pay rent contained in an unregistered lease or sub-lease. There is a somewhat similar provision in the proviso to s. 61 of the Registration of Titles Ordinance.

Grounds 6 and 7 of the memorandum of appeal aver that

> "no equity can take the case out of a statute such as the Registration of Titles Ordinance and that no equity can co-exist with s. 3 and s. 51 of that Ordinance."

As I have already indicated, there is no question of equity conflicting with s. 3 or s. 9 or s. 51 or taking the case out of the Registration of Titles Ordinance so as to create an estate or interest in land which the Ordinance says may not be created. The question is not the creation of an estate or an estate or interest in land but whether a term in a contract or a term of a tenancy at will can be enforced. Of course, an equity can co-exist with the provisions of s. 3 and s. 51 of the Ordinance so long as the equity is not inconsistent with these sections.

Ground 8 of the memorandum asserts that the learned trial judge held that equity could override s. 3 and s. 51 of the Ordinance. I do not think that he did. I think that he was right in treating the agreement as a contract which was specifically enforceable.

In my opinion, grounds of appeal Nos. 1, 2, 3, 5, 6, 7 and 8 of the memorandum of appeal fail.

I pass on to consider ground 4 of the memorandum of appeal which alleges that the parties sold or permitted the sale of spirituous liquor contrary to the Liquor Ordinance (Ordinance No. 5 of 1955) and the Liquor Rules, 1955 (L.N. No. 31 of 1955) and always knew and meant the occupation to be for such illegal purposes and that, accordingly, the claim for rent was tainted with illegality.

The learned judge decided this issue in favour of the respondent thinking that r. 14 (2) of the Liquor Rules, 1955, covered the point. He, however, overlooked the fact that r. 14 applies to club liquor licences which are licences for the sale of non-spirituous, and not spirituous liquor.

Mr. Khanna argued that cl. 4 (*e*) of the agreement was a sham and not intended to be operated and he pointed to the fact that applications for spirituous liquor licences for 1957, 1958 and 1959 had been made in the name of, and by, the respondent company and not by the appellant. Mr. Baerlein, for the respondent, denied that the agreement was a sham. He relied on cl. 4 (*e*) of

the agreement and pointed to the evidence of Mr. Sawyer, a director of the respondent company who testified:

> "We did contemplate parting with our licences for club. We were obliged to do this by cl. 4 (*e*) of our agreement. We were not bound to help defendant get a licence under our agreement. The defendant had to apply for the licence."

The appellant was not called as a witness. Mr. Smith, an employee of the Kampala Municipality was the only defence witness called. He produced a file showing no change of ownership of the licence of the Black Cat Club since 1956 and proved that the appellant had never made an application for a club licence. The agreement was on the face of it a perfectly legal agreement and there was no evidence that the parties when they entered into it had any illegal purpose in contemplation. In my opinion, it was not rendered unenforceable by the respondent by the fact that the appellant failed to apply for the liquor licence as under cl.4 (*e*) it was bound to do. The appellant having failed to perform its obligation in this respect, the club would have lost its licence to the detriment of both appellant and respondent if the respondent had not applied. If the respondent in so doing misrepresented the position to the Licensing Authority, it is for that Authority to take action. There is no evidence that when the agreement was made, the parties intended to act illegally, and the fact that the appellant failed to honour his undertaking contained in cl. 4 (*e*), thereby forcing the respondent to apply for the licence or stand by and see it lost did not, in my view, taint a legal agreement with illegality or render it incapable of enforcement.

Ground 9 of the memorandum of appeal avers that, as licences with a view to letting on the respondent's own account were applied for between September 16, 1958, and December 12, 1958, there was no continued occupation (by the appellant) or consideration for the quarter's rent from September 15 to December 15, 1958. These licences were applied for by the respondent after the appellant had abandoned occupation of the premises. I think that it was for the appellant to satisfy the learned judge that the delivery of the keys of the club to the respondent's accountants was a valid termination of the contract, or of the tenancy at will whichever it be called, carried into effect before the Shs. 5,100/- payable in advance on September 15, 1958, fell due. The appellant failed to satisfy the judge of the facts necessary to establish this and I am not prepared to say that the judge was wrong. The fact that, as alleged in ground 9, licences may have been applied for by the respondent between September 16 and December 12, 1958, with a view to re-letting the premises would not establish that the key were delivered to a servant or agent of the respondent authorised to receive them and were received in time to save the appellant's having to pay for that quarter. In my opinion, that ground also fails.

I would dismiss the appeal with costs.

Gould JA: agree and have nothing to add.

Crawshaw JA: I also agree.

Appeal dismissed.

For the appellant:
D. N. Khanna and *S. A. Pinto*, Kampala

For the respondent:
Patel & Patel, Kampala
A. Baerlein

D. G. Thomas (Registrar of Titles, Uganda) as amicus curiae.

Premchand Nathu & Co Limited v The Land Officer

[1960] 1 EA 941 (CAD)

Division:	Court of Appeal at Dar-Es-Salaam
Date of judgment:	10 December 1961
Case Number:	67/1960
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. High Court of Tanganyika – Murphy, J.

[1] Landlord and tenant – Crown land – Right of occupancy subject to building conditions – Extension of time for compliance with conditions – Buildings not erected within extended time – Revocation of right of occupancy – Whether extension of time waives right of forfeiture – Land Ordinance (*Cap.* 113), *s.* 10, *s.* 11 (*T.*) – *Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114), *s.* 2 (*T.*) – *Conveyancing Act*, 1881, *s.* 14, *s.* 18 (7) – *Crown Lands Ordinance* (*Cap.* 155), *s.* 83 (*K.*) – *Law of Property Act*, 1925, *s.* 99 (7), *s.* 146 (6) – *Settled Land Act*, 1925, *s.* 42 (*i*), (*iii*) – *Settled Estates Act*, 1877, *s.* 46 – *Crown Lands Act*, 1829, *s.* 27 – *Coal Act*, 1938, *s.* 13 – *Crown Lands Act*, 1927, *s.* 208 – *Foreign Jurisdiction Act*, 1890.

Editor's Summary

By a certificate of occupancy signed by and in favour of the appellants they agreed, as occupiers, to erect a building on a plot in Moshi township of a value of Shs. 60,000/-, to submit plans of the building within six months from the commencement of the term of occupancy, so as to satisfy the township authority and ensure compliance with the building conditions, to commence building within three months after notification of approval of the plans and to complete the buildings within twenty-four months from the commencement of the term. The term was ninety-nine years from April 4, 1952. Plans for shops and offices were submitted for approval in principle only on March 5, 1953, and these were approved on September 24, 1953. Revised plans for shops, flats and a godown were submitted on February 20, 1954, and these were approved in principle on March 4, 1954. On March 11, 1954, the time for submission of detailed plans was extended to April 1954, 30, when the respondent also informed the appellants that if these plans were not submitted the right of occupancy would be revoked. The appellants complied, but by this time the term within which the buildings had to be completed had expired. By September, 1955, only the godown had been built, and on November 21, 1955, the respondent extended until January 31, 1956, the time for completing the shops and flats which had not then been started. The appellants then submitted altered plans, which were approved on February 15, 1956. They had already asked in January, 1956, for six more months, in which to complete the buildings, but the respondent in rejecting this application offered the appellants an extension until February 29, 1956, for starting building operations, with an assurance that if by then building was proceeding satisfactorily, a further short extension for completion would be granted, but if no building had by then been started, he would recommend

cancellation of the right of occupancy. The appellants replied, claiming that the godown had cost Shs. 60,000/-, and asking again for a six months' extension. On May 4, 1957, by which time no building, other than the godown, had been commenced, the right of occupancy was revoked. The High Court held, in proceedings brought by the respondent, that the right of occupancy had been lawfully revoked, and ordered the appellants to deliver possession to the respondent. On appeal the principal arguments for the appellants were that the failure to erect buildings was a single and not a continuing breach, which had been waived by the extensions of time granted, and

that the trial judge had erred in holding that s. 14 (1) of the Conveyancing Act, 1881, was not applicable in Tanganyika to termination of rights of occupancy for breach of a covenant or condition.

Held –

(i) the extensions of time did not amount to a waiver of the right of forfeiture, but as mere agreements not to exercise the option to forfeit provided certain conditions were fulfilled; in law there is nothing which will imply waiver of a forfeiture from the fact that the landlord merely stands by after a breach of covenant; a positive act is required.

(ii) the general rule is that statutes do not bind the Crown unless it is referred to directly or by necessary implication; in the Conveyancing Act, 1881, the Crown is not named directly, and since there was no reason to assume that the purpose of the Act would be frustrated unless the Crown were so bound, the Crown could not be held to be bound by the Act.

Appeal dismissed.

Cases referred to in judgment:

(1) *Diwan Singh v. The Commissioner of Lands*, [1958] E.A. 367 (C.A.).

(2) *Matthews v. Smallwood*, [1910] 1 Ch. 777.

(3) *Doe D. Rankin v. Brindley*, 4 B. & Ad. 84; 110 E.R. 387.

(4) *Ex parte Newitt. In re Garrud* (1880), 16 Ch. D. 522.

(5) *Marsden v. Sambell* (1880), 43 L.T. 120.

(6) *Charles Rickards Ltd. v. Oppenhaim*, [1950] 1 K.B. 616.

(7) *Bashir v. Commissioner of Lands*, [1960] A.C. 44; [1960] 1 All E.R. 117.

(8) *Commissioner for Lands v. Sheik Mohamed Bashir*, [1958] E.A. 45 (C.A.).

(9) *Province of Bombay v. Municipal Corporation of Bombay*, [1947] A.C. 58.

(10) *West v. Blakeway* (1841), 2 Man. & G. 729; 133 E.R. 940.

(11) *Central London Property Trust Ltd. v. High Trees House Ltd*., [1947] K.B. 130; [1956] 1 All E.R. 256.

(12) *Lyle-Miller v. A. Lewis & Co*. (Westminster) Ltd., [1956] 1 All E.R. 247.

(13) *Perry v. Davis* (1858), 3 C.B.N.S. 769; 140 E.R. 945.

The following judgments were read by direction of the court:

Judgment

Gould JA: This is an appeal from a decree of the High Court of Tanganyika at Arusha dated June 8, 1960, whereby it was held that a right of occupancy in respect of a plot in Moshi township had been lawfully revoked for good cause and the appellant company was ordered to deliver possession thereof to the respondent within fourteen days.

The certificate of occupancy in favour of the appellant was expressed to be for a term of ninety-nine years from April 4, 1952, subject to payment of annual rental, and to various other provisions, of which I will set out those relevant to the issues between the parties:

> "2. The occupier undertakes:
>
> (i) To erect buildings on the said land of a value of not less than Shillings Sixty thousand (Shs. 60,000/-).
>
> (ii) Within a period of six months from the date of commencement of the said right of occupancy to submit to the township authority, Moshi, (hereinafter called 'the said authority') such plans of the proposed buildings (including block plans showing the position of the buildings) drawing elevations and specifications thereof as will satisfy the said authority and as will ensure compliance with the building covenant contained in sub-para. (i) supra. Such plans and specifications shall be submitted in triplicate.

(iii) To commence building operations within a period of three months from the date of notification in writing by the said authority of approval of the plans and specifications, such buildings to conform to a building line decided upon and notified by the said authority.

(iv) To complete the buildings according to the said plans and specifications so that the said buildings are ready for use and occupation within a period of twenty-four months from the date of commencement of the said right of occupancy.

"5. Only one main building together with the usual and necessary outbuildings shall be erected on the said land and the said main building shall be used solely for commercial and residential purposes.

"6. Failure to comply with any of the terms or conditions herein contained or implied will be deemed to constitute good cause for revocation of the said right of occupancy."

The certificate of occupancy was signed by both parties. The history of the subsequent events is summarised in the judgment of the learned trial judge from which it will be convenient to quote extensively:

"On March 5, 1953, the first plans were submitted by the defendants to the township authority. The principal feature of these plans consisted of shops and offices at the front of the site. The plans were approved in principle on September 24, 1953. The reason for the delay was that the town planning officer requested that a decision on the plans be deferred pending consideration of a project for making a new road junction which might affect the boundaries of the plot.

"The plans submitted in March, 1953, were for approval in principle only and it was still necessary for the defendants to submit detailed plans and specifications such as would satisfy the township authority in accordance with para. 2 (ii) of the certificate of occupancy. On February 24, 1954, the plaintiff wrote to the defendants pointing out that this had not been done and requiring it to be done by March 30. In the meantime, however, on February 20, 1954, the defendants submitted to the township authority revised plans, which again were for approval in principle only. These plans included shops and flats at the front of the site and a godown at the rear. They were approved in principle on March 4, 1954. On March 11, 1954, the plaintiff again wrote to the defendants extending the time for the submission of detailed plans to April 30, 1954, and saying that if this was not done the right of occupancy would be revoked. The defendants complied with the requirements of this letter by submitting detailed plans for the godown on April 11, 1954, and detailed plans for the whole plot on April 29, 1954. These two sets of plans were approved on May 3 and May 20, 1954, respectively.

"It is to be noted that by this time the period in which the defendants were supposed to have completed the buildings had expired, this period being twenty-four months from the commencement of the right of occupancy. It was perhaps unwise of the defendants to agree to this particular condition, which they might through no fault of their own be unable to fulfil, and it would have been fairer if the time limit (though not necessarily of the same length) had been made to run from the date of approval of the plans. (This was in fact done in para. 2 (iii) of the certificate of occupancy which specified the period in which the defendants had to commence building operations, but not in para. 2 (iv) which specified the period for completion.) However, this is not really material because on January 26, 1955, the land officer wrote to the defendants extending the

time for completion to July 31, 1955, and indicating that the right of occupancy would be revoked if the building was not completed by that date. This represented an extension of nearly sixteen months beyond the original date for completion, which was fairly generous in view of the fact that the delay for which the township authority was responsible in approving the first plans was only 6 1/2 months.

"By September, 1955, the godown at the back of the site had been completed and the defendants had received permission from the township authority to occupy it. But the building of the shops and flats had not been commenced and on November 21, 1955, the plaintiff granted a further extension of time to January 31, 1956, for completion of this building. The defendants then submitted altered plans, which were subsequently approved by the township authority on February 15, 1956. The defendants also asked the plaintiff, through their architects, for an extension of six months in which to erect the building. The plaintiff in a letter dated January, 1956, replied that this was not approved and laid down other conditions as follows:

> 'This is the second time your clients have submitted fresh plans a short while before the date of expiry of a notice served on them. However, as it appears that plans have already been submitted to the township authority, Moshi, I am prepared to grant your clients an extension up to February 29 next in which time they must have their plans approved, and commence building operations. I will call for a further report during the first week of March next, and unless building operations are by then under way, I shall recommend to the Governor that the right of occupancy be revoked. If the report reveals that building is proceeding satisfactorily, then your clients will be granted a further short extension of time in which to complete the erection of the building.'

"It is to be noted that in this letter no definite time limit is fixed for the erection of the building, but there is an implication that it is to be completed within less than six months, since the application for an extension of six months is refused. The defendants replied in a letter dated February 8, 1956, of which the following are the first three paragraphs:

> 'We . . . regret to inform you that you seem to be under impression that we have built nothing on the plot No. 57 in question we have to bring to your kind notice that we have built a store, 60' x 40' and whose we are holding an occupancy certificate and which has cost Shs. 60,000/- approximately. Thus we have already spent more than the sum to be spent for building covenant in front. However we have submitted our plan for shops for approval to township authority and regret to inform you that we have not got it back approved. This would at least require a week and there after a four weeks' time would be at least required for inviting tenders from building contractors.
>
> 'Moreover, it does not appear economical to us to build shops at moment on above plot because there are many empty shops in the vicinity. So it is not worthwhile spending money at moment.
>
> 'Summarily, we have to say that your extension of the period up to February 29 should be further extended to at least six months so as to facilitate us to arrive at final decision.'

"In the first of these paragraphs there is the suggestion, made for the first time, that the defendants have fulfilled the condition of the right of occupancy by erecting the godown. This is one of their defences to the

present action. In the second paragraph they admit that it is at least partly from considerations of economy that they have not proceeded with the erection of the shops and flats. The plaintiff relies on this admission as showing the true reason why the shops and flats were never erected.

"On May 31, 1956, the plaintiff wrote to the defendants giving them thirty days in which to inform him of the reasons why construction of the main building had still not been put in hand. On May 4, 1957, the right of occupancy was revoked. I have no evidence of any further correspondence between these two dates.

"It is not disputed that no building other than the godown has ever been commenced on the plot."

The first three grounds of appeal as set out in the memorandum are as follows:

"1. The learned judge erred in accepting oral evidence that the demarcation of the plot was to be done by the appellant and should have held that, under cl. 2 and cl. 3 of the respondent's offer dated March 18, 1954, the survey and final demarcation of the plot was the duty of the respondent.

"2. The learned trial judge erred in holding that the appellant was obliged to erect shops and flats and should have held that the erection of a godown, of the required minimum value and duly approved by the township authority, was adequate compliance with the building covenant.

"3. The learned judge erred in failing to direct himself that the delay in erecting a building within the stipulated period was substantially, if not wholly, due to conduct and acts, on the part of the respondent or third parties nominated (sic) him, beyond the control of the appellant and that such delay was not a failure which could justify revocation of the right of occupancy."

I deem it necessary to say very little with regard to these grounds; the arguments upon which they are based have been expressly or impliedly dealt with by the learned trial judge in his judgment and I see no reason to differ from his conclusions. As to ground 1 he accepted that the boundary was sufficiently defined in the plan annexed to the certificate of occupancy and that the further demarcation requested by the township authority was for the assistance of their own building inspector. One argument presented to this court but not touched upon in the judgment was that the Moshi township authority, which originally requested delay in view of the possibility of the formation of a new road junction, at no time notified the building line decided upon, as required of them by para. 2 (iii) of the certificate of occupancy. I think this is sufficiently answered by the fact that the township authority, by approving plans showing the proposed buildings and their relationship to the boundaries of the plot, in effect agreed that the buildings were within their building-line requirements. Nothing turned on this point in any of the negotiations between the parties after the initial delay requested by the town planning officer.

As to ground 2 the learned judge held, upon sufficient evidence, that the appellant was obliged by the conditions of the certificate of occupancy to erect the shops and flats. I agree and do not propose to add anything upon this topic.

As to the argument under ground 3, the learned judge pointed out that the delay in approving the first plans for which the township authority was responsible amounted to only 6 1/2 months, whereas extensions up to July 31,

1955 (nearly sixteen months), were granted. In fact there was at least one subsequent extension. I am satisfied there is no merit in this ground of appeal.

In its fourth ground the appellant relied upon waiver:

> "4. The learned judge erred in failing to direct himself that failure to erect a building within the stipulated period was a single and complete, and not a continuing, breach and should have held that any right of forfeiture that may have accrued was waived by subsequent conduct on the part of the respondent in receiving rents and otherwise treating the tenancy as continuing."

Under this head, the argument of the advocate for the respondent was said by him to be

> "based on the various extensions of time granted after the expiration of the building period and more particularly on the respondent having permitted or forced the appellant to put up a godown in the belief that there would be no forfeiture."

I will set out the correspondence which bears upon this question.

On February 24, 1954, the respondent wrote:

> "I have the honour to refer to my letter No. 33150/20/AAK of March 16, 1953, and to draw your attention to the fact that you have failed to comply with the notice dated November 6, 1952, as amended by my above-quoted letter, in that although plans were submitted for approval in principle during September last, detailed drawings, as will satisfy the township authority, have not yet been submitted for approval.
>
> "I should be obliged if you would please let me know at your early convenience what action you are taking to ensure that satisfactory plans will be submitted to the township authority, and I must warn you that unless plans are submitted by March 30 next I shall be obliged to submit the facts to Government with a recommendation that the right of occupancy be revoked."

By the time this letter was written it was obvious that the building condition could not be complied with within the time limited, which expired on April 4, 1954. By giving the appellant until March 30, 1954, to submit the detailed drawings, the respondent impliedly undertook, in my opinion, to extend the time limit by a period reasonably sufficient to allow of the completion of the buildings, provided the drawings were submitted as requested. Prior to this letter, however, on February 20, 1954, the appellant had submitted revised plans for approval in principle – including the godown at the rear of the plot – and they were so approved on March 4, 1954. On March 11, 1954, the respondent wrote:

> "I have the honour to refer to the letter No. JH/317 dated March 2, 1954, addressed to me by Messrs. T. D. Gedrych and Peer Abben, with copy to you, and to inform you that the date by which you are required to remedy the breach of condition 2 (ii) of the above right of occupancy, as mentioned in the final paragraph of the notice dated November 6, 1952, is hereby extended to April 30, 1954. Please understand that this extension is final, and unless satisfactory plans have been submitted to and approved by the township authority, Moshi, on or before that date the right of occupancy will be revoked."

The reference there is probably to detailed plans and drawings, but in the event detailed plans were all submitted by April 29, 1954, and were approved on May 3, and May 20, 1954. The township authority issued a building permit

for the godown on May 3, 1954, but the godown was not completed until September, 1955.

The letters of February 24, and March 11, 1954, both referred to the plans, the submission of which was required by para. 2 (ii) of the certificate of occupancy. As I have said, in my opinion, they imply an undertaking to extend the time for compliance with para. 2 (iv) to a reasonable extent. The next letter from the respondent, dated January 26, 1955, relates to that paragraph and reads:

> "I have the honour to address you on the subject of the above plot and to draw your attention to the provisions of condition 2 (iv) of the certificate of occupancy, which requires that you complete the erection of a building of a value of not less than Shs. 60,000/- on the said plot within a period of twenty-four months from the date of commencement of the right of occupancy, namely April 4, 1952. I am informed by the executive officer, township authority, Moshi, that you have not yet completed the erection of the building on this plot, and you have therefore failed to comply with, and committed a breach of the said condition.
>
> "2. I now write to inform you that unless the building is completed in accordance with approved plans and specifications by the 31st day of July next, I shall be obliged to submit the matter to the Governor with a recommendation that the said right of occupancy be revoked for good cause under s. 10 of the Land Ordinance."

The advocate for the appellant stressed the use of the singular in the word "building" where it occurs in that letter, but in the context of the correspondence, and having regard to the fact that the township authority was dealing with the plans and the respondent with legal relations, I am unable to attach any importance to the point. There is no hint in the correspondence that the appellant did not fully accept as an obligation the building of both shops and flats and the godown until its letter of February 8, 1956.

The letter of January 26, 1955, extended the time allowed until July 31, 1955, by which time the godown would be nearing completion, but nothing had been done on any other building. On August 23, 1955, the respondent wrote:

> "I have the honour to refer to my letter No. 33150/41/AJD of January 26, 1955, in which you were informed that unless the building was completed in accordance with approved plans and specifications by July 31, 1955, I would be obliged to submit the matter to the Governor with a recommendation that the right of occupancy be revoked for good cause under s. 10 of the Land Ordinance.
>
> "2. I am informed by the executive officer, township authority, Moshi, that although the godown has been roofed and is nearing completion, the shops and flats included in the plan have not been commenced. I understand that plans for the shops and flats were approved in May, 1954.
>
> "3. You will appreciate that by reason of your failure to complete the buildings in accordance with approved plans and specifications, it is now open to His Excellency the Governor to revoke the right of occupancy, and to impose a revocation fee which may amount to the equivalent of three years' rent. However, and without prejudice to such rights as have already accrued to the Governor, I am prepared to postpone further action for thirty days from the date of this letter to enable you to inform me of the reason why you have failed to complete the buildings, and of what action you are taking to remedy the breach of your contractual obligations.

> "4. Please understand that in default of a satisfactory reply within the specified time, I shall be obliged to recommend to the Governor that the right of occupancy be revoked without any further notice to you."

The reply on behalf of the appellants was dated September 8, 1955:

> "We have been asked by our clients to reply to your letter 33150/44/AT of the 23rd ultimo, and to inform you that we are in the process of making certain alterations to the plans as originally approved, these will take about four weeks to complete and after this we have to call for tenders, therefore, some two months must elapse before work can be started.
>
> "It is therefore requested that an extension of time for the completion of these premises be granted, bearing in mind that a building, such as the one proposed, will take about nine months to complete from the date of starting.
>
> "Your sympathetic consideration will be appreciated."

This letter is a request for a substantial extension of time to complete the shops and flats. The reply by the respondent was dated November 21, 1955:

> "I have the honour to refer to your letter No. JN/317 of September 8, 1955, and to inform you that, without prejudice to such rights as have already accrued Governor, I am prepared to give your clients, Premchand Nathu & Co. Ltd., time to complete the buildings on the above plot according to approved plans and specifications by January 31, 1956.
>
> "2. Please inform your clients that, if the buildings are not completed within the specified time, I shall refer the matter to the Governor with a recommendation that he should revoke the right of occupancy without any further notice to them."

There was apparently a further request, on January 3, 1955, for a six months' extension, which has not been made an exhibit, but which is referred to in the following letter from the respondent dated "January, 1956":

> "I have the honour to refer to your letter No. 317 of January 3, 1956, in which you requested an extension of six months on behalf of your clients in which to erect the building on the above plot, and to inform you that your application has not been approved. Your clients have been given various extensions of time and it now appears that they have submitted fresh building plans for approval after receiving the notice dated November 21, 1955, requiring them to complete the erection of the building on this plot. This is the second time your clients have submitted fresh plans a short while before the date of expiry of a notice served on them. However, as it appears that plans have already been submitted to the township authority, Moshi, I am prepared to grant your clients an extension up to February 29 next in which time they must have their plans approved, and commence building operations. I will call for a further report during the first week of March next, and unless building operations are by then under way, I shall recommend to the Governor that the right of occupancy be revoked. If the report reveals that building is proceeding satisfactorily, then your clients will be granted a further short extension of time in which to complete the erection of the building.
>
> "2. Please make it quite clear to your clients that under no circumstances will any further extension be granted unless their plans are approved, and building operations commenced by February 29 next."

There is here another implied promise that, provided the appellant showed that it definitely was commencing operations by the first week in March, further time would be allowed. On February 15, 1956, revised plans were approved

by the township authority but on February 8, 1956, the appellant wrote the letter the material contents of which are set out in the passage above quoted from the judgment of the learned judge. There is a definite change of position in that letter, and the six months' extension then requested was not for the purpose of erecting the building but to enable the appellant to decide whether it was worthwhile to spend the money. The respondent's last letter, dated May 31, 1956, reads:

> "Further to my letter No. 33150/AJD of February 17, 1956, and with reference to your letter dated February 8, 1956, I am informed by the executive officer, township authority, Moshi, that the building plans of the main building to be erected by you on this plot were approved on February 15, last but that building operations have not as yet commenced. Having regard to this and to the contents of my previous letters on the subject of this plot, you will appreciate that your failure to erect the main building constitutes a breach of the terms and conditions of the right of occupancy and this renders your right of occupancy liable to revocation. However, and without prejudice to such rights as have accrued to the Governor, I am prepared to postpone further action for thirty days from the date of this letter to enable you to inform me of the reasons why the construction of the main building has not been put in hand and of what action you propose taking to remedy the present breach of your contractual obligations.
>
> "2. Please understand that unless I receive a satisfactory reply to this letter by June 30 next, I shall be obliged to consider taking further action with the view to a recommendation being made to the Governor that the right of occupancy be revoked."

The question is whether there is anything in this correspondence and the actions of the respondent which amounts to a waiver of the right of the Governor to revoke the right of occupancy. That right arises by virtue of s. 10 of the Land Ordinance (Cap. 113 of the Tanganyika Revised Laws), the relevant portion of which is as follows:

> "10. It shall not be lawful for the Governor to revoke a right of occupancy granted as aforesaid save for good cause. Good cause shall include –
>
>
>
> (*f*) breach of any term or condition contained or to be implied in the certificate of occupancy or in any contract made in accordance with s. 7;"

Wording similar to that in sub-para. (*f*) of s. 10 is incorporated in para. 6 of the certificate of occupancy and in view of these provisions nothing turns upon any possible distinction between a condition and a covenant.

It is convenient to deal at once with the question of acceptance of rent, which is referred to in ground 4 of the memorandum of appeal. It is conceded that rent has been paid beyond the material date but that is of no avail to the appellant on the question of waiver. Section 11 of the Land Ordinance is as follows:

> "11. The acceptance by or on behalf of the Governor of any rent shall not be held to operate as a waiver by the Governor of any forfeiture accruing by reason of the breach of any covenant or condition, express or implied, in any contract under s. 7 or in any certificate of occupancy granted under this Ordinance."

Although this section negatives waiver by acceptance of rent it is silent as to waiver of forfeiture by other unequivocal acts, with the consequent implication that the ordinary principles of law as to such acts are applicable. So far as waiver of forfeiture is concerned it was not disputed that the right of occupancy was to be regarded as a lease. The law to be applied is that provided by s. 2 of the Land (Law of Property and Conveyancing) Ordinance (Cap. 114 of the Tanganyika Revised Laws) which is as follows:

> "2.(1) Subject to the provisions of this Ordinance, the law relating to real and personal property, mortgagor and mortgagee, landlord and tenant, and trusts and trustees in force in England on the first day of January, 1922, shall apply to real and personal property, mortgages, leases and tenancies, and trusts and trustees in the Territory in like manner as it applies to real and personal property, mortgages, leases and tenancies, and trusts and trustees in England, and the English law and practice of conveyancing in force in England on the day aforesaid shall be in force in the Territory.
>
> "(2) Such English law and practice shall be in force so far only as the circumstances of the Territory and its inhabitants, and the limits of Her Majesty's jurisdiction permit.
>
> "(3) When such English law or practice is inconsistent with any provision contained in any Ordinance or other legislative act or Indian Act for the time being in force in the Territory, such last mentioned provision shall prevail."

Counsel for the appellant relied strongly upon the case of *Diwan Singh v. The Commissioner of Lands* (1), [1958] E.A. 367 (C.A.) in which a number of the English authorities on waiver were referred to. It will be of advantage to set out again the passage from *Matthews v. Smallwood* (2), [1910] 1 Ch. 777 at 786 which was quoted by the learned president of this court in *Diwan Singh's* (1) case, at p. 371:

> "Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognising the continued existence of the lease. It is not enough that he should do the act which recognises, or appears to recognise, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place. It is also, I think, reasonably clear upon the cases that whether the act, coupled with the knowledge, constitutes a waiver is a question which the law decides, and therefore it is not open to a lessor who has knowledge of the breach to say 'I will treat the tenancy as existing, and I will receive the rent, or I will take advantage of my power as landlord to distrain; but I tell you that all I shall do will be without prejudice to my right to re-enter, which I intend to reserve'. This is a position which he is not entitled to take up. If, knowing of the breach, he does distrain, or does receive the rent, then by law he waives the breach, and nothing which he can say by way of protest against the law will avail him anything."

The judgment of the learned president then continued:

> "It seems that a waiver of a lessor's right to re-enter may arise from the doing by the lessor, with knowledge of the facts upon which his right to re-enter arises, of some unequivocal act recognising the continued existence of the lease, notwithstanding that the lessor's actual intention may

> not be to effectuate a waiver. Once the unequivocal act is done, with knowledge, the law presumes an intention to waive the forfeiture: *Matthews v. Smallwood; Davenport v. R.* (1877), 3 App. Cas. 115, 131, 132; *Bevan v. Barnett* (1897), 13 T.L.R. 310."

In that case the unequivocal act from which intention to waive a forfeiture was presumed was the approval of building plans by the agent for the lessor with full knowledge that the building condition had not been complied with and that the period allowed for building had long since expired. I do not find any parallel to those circumstances in the present case. I have already indicated my opinion that the respondent's letter of February 24, 1954, properly construed, contained an implied undertaking to make a reasonable extension of the time allowed for building; the same applies to the letter of March 11, 1954. The letter of January 26, 1955, written when the respondent was advised that the building had not been erected, contained a definite extension until July 31, 1955, which no doubt the respondent considered reasonable in the circumstances. The respondent's letter of August 23, 1955, evoked an application for a further extension, which was granted, though not for the period requested, on November 21, 1955. There was another request for an extension on January 3, 1956, and a further implied promise to grant time provided certain conditions were fulfilled.

All this amounts to no more, in my opinion, than a series of implied or express agreements to extend the time limit for the building condition – some voluntarily offered by the respondent and some entered into at the express request of the appellant. It would be a hard rule, and particularly hard upon building lessees, if agreements of that nature necessarily involved waiver of a right of forfeiture. Landlords would be driven to insistance upon their strict legal rights. Such agreements, if made with due formality may amount to actual variations of the terms of a lease; otherwise, in my opinion, if acted upon, they would bind the landlord at least by quasi-estoppel. It may be that a right of forfeiture arose in the present case when the extension granted up to July 31, 1955, expired without completion of the buildings, though the appellant, had the question then arisen, might have argued that the extension specified was not the reasonable extension that he had been impliedly promised. But even if there was a breach of the building condition at that date, I do not think that the subsequent extensions amounted to waiver of the right of forfeiture, but as mere agreements not to exercise the option to forfeit, provided certain conditions were fulfilled. The right was in fact suspended. I think that the giving of time to remedy a breach which would give rise to a forfeiture, is not an act (such as distraining for rent) dependent upon the continued existence of the lease but an agreement with relation to the right of forfeiture which has arisen.

The case of *Doe D. Rankin v. Brindley* (3), 4 B. & Ad. 84 (110 E.R. 387) is in point. A lease contained a proviso for re-entry in case of non-repair within three months after notice. The landlord gave the notice but before the expiry of the three months he brought an action for ejectment on other grounds. That action was withdrawn upon the making of a court order by consent, that the lessee should do the repairs by a certain date later than the expiry of the three month period. The judgments of the three members of the court were as follows:

> "Parke, J. I think there ought to be no rule. As to the first point, the notice to repair was given on January 6, 1832; and the right of re-entry, in default of repair, would have accrued in three months from that time. Before the expiration of the three months, an ejectment was brought; and the lessor of the plaintiff being unable to support that action, put an end to it by consenting to the order of court made at the March Assizes,

> 1832. It was the same as if the parties after January 6, and before the expiration of the three months, had made an agreement between themselves, that the time for repairing should be extended to June 24: it was merely a consent to postpone the time of completing the repair for the benefit of the defendant; and on his failing to comply with the terms, the lessor of the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time. The receipt of rent was only an admission that the defendant was tenant until March 25, and could not operate as a waiver of the forfeiture. As to the objection founded on the Statute 11 G. 4, and 1 W. 4, c. 70, s. 36, it seems to me that could not be taken at Nisi Prius; and if it could, the answer is, that the landlord's right to re-enter, which is said not to have been enforced in proper time, was postponed by agreement of the parties.
>
> "Taunton, J. I am of the same opinion. The order of Nisi Prius did not supersede the notice, but only enlarged the time and suspended the right of re-entry.
>
> "Patteson, J. The notice to repair may be connected with the agreement at Nisi Prius in the first ejectment. The other point is mere matter of irregularity."

The situation there was described as a postponement of the right to re-enter by agreement of the parties, the only point of distinction being that it was an agreement made before the right had arisen. I do not think that it is of any consequence that in the present case agreements may have been made both before and after the accrual of the right. I think it would be carrying the effect of the authorities on the subject of waiver too far, to hold that the law will presume an intention in the landlord to waive, once and for all, a right of forfeiture, when the only basis for such a presumption is an agreement which itself connotes a contrary intention. It is true that the decision in *Doe D. Rankin v. Brindley* (3), was questioned by James, L.J., in *Ex parte Newitt In re Garrud* (4) (1880), 16 Ch. D. 522 at p. 531; but I think that even in that case the possibility of an effective agreement for an extension of time for completion of a building was not ruled out – as when JAMES, L.J., said, in the course of the argument, at p. 528:

> "If the day for completion had passed, and then, with the knowledge and acquiescence of the landowner, the builder finished the houses, could the landowner seize the materials? No new day being appointed for completion, how does the default continue?"

It was part of the submission of the advocate for the appellant that there was waiver because the respondent had permitted the appellant to erect a godown upon the land in the belief that there would be no forfeiture. In *Matthews v. Smallwood* (2), Parker, J., said, at p. 786:

> "The right to re-enter is a legal right which, apart from release or abandonment or waiver, will exist, and can be exercised, at any time within the period fixed by the Statutes of Limitation; and if a defendant in an action of ejectment based upon that right of re-entry alleges a release or abandonment or waiver, logically speaking the onus ought to lie on him to show the release or the abandonment or the waiver."

This, however, must be read in the light of the decision in *Marsden v. Sambell* (5) (1880), 43 L.T. 120, in which it was held that the election to forfeit must be made before the party against whom it is claimed is allowed to alter his position on the faith of the continuance of the lease. The advocate for the appellant relied on *Marsden v. Sambell* (5), but I am unable to agree that there

are any circumstances which bring the present case within the principle there laid down. It is one thing to stand by while a lessee expends money upon a property which you have allowed or caused him to think will not be forfeited; it is quite another to inform him that there will be no forfeiture provided he remedies a breach of covenant by a certain date. That was the present case. For these reasons, in my judgment there was no waiver of a right of forfeiture in the present case, but rather a waiver of strict compliance with the requirements of a condition with regard to time. It is more akin to the position which frequently arises in commercial contracts, in relation to which Denning, J.L., said in *Charles Rickards Ltd. v. Oppenhaim* (6), [1950] 1 K.B. 616 at p. 623:

> "If the defendant, as he did, led the plaintiffs to believe that he would not insist upon the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it."

The respondent in the present case led the appellant to believe that he would not insist upon the stipulation as to time, but only within limits which he specified. In law there is nothing which will imply waiver of a forfeiture from the fact that a landlord merely stands by after a breach of covenant; a positive act is required. I know of no authority which indicates that he may not, without waiving the forfeiture, state that he would stand by and not exercise his option to forfeit provided the lessee did certain things by a certain time. If that promise is acted upon, and the landlord, in the words of Denning, L.J., "cannot afterwards go back on it", I think that the tenant must be equally bound by his express or implied acceptance of the promise.

In my opinion the submission based on waiver fails. Ground 5 of the memorandum of appeal reads:

> "5. The learned judge erred in holding that s. 14 (1) of the Conveyancing Act, 1881, was not applicable in Tanganyika to termination of rights of occupancy for breach of a covenant or condition."

The learned trial judge rejected this ground on the basis that, in his opinion, s. 14 (1) of the Conveyancing Act, 1881, does not apply to the termination of a right of occupancy for breach of a covenant or condition as not being consistent with the special provisions of the Tanganyika Land Ordinance. I prefer to express no opinion upon this question but to approach this ground of appeal from the point of view of the submission by counsel for the respondent that the Conveyancing Act, 1881, does not bind the Crown and that therefore no notice under s. 14 (1) thereof was necessary.

This is a point upon which there appears to be singularly little direct authority. The case of *Bashir v. Commissioner* of Lands (7), [1960] A.C. 44, on appeal from a judgment of this court in *Commissioner for Lands v. Sheik Mohamed Bashir* (8), [1958] E.A. 45 (C.A.), was relied upon. It will first be convenient to quote, rather extensively, from the judgment of the learned president of this court. He said, at p. 57:

> "Having found that s. 83 of the Crown Lands Ordinance does not apply to the breach of the building condition in the respondent's grant, it is not necessary to decide the question of whether or not, in giving relief against forfeiture for breach of lessee's covenant under s. 83, a court should be guided by the principles of English law set out in s. 14 of the Conveyancing

> Act, 1881. However, as the question has been fully argued and may arise in future if a court is asked to relieve against forfeiture for breach of a lessee's covenant, e.g. a covenant contained in a Crown Lease executed before 1919, perhaps I should state my opinion on it."

The relevant portion of s. 83, to which the learned president refers, reads:

> "In exercising the power of granting relief against forfeiture under this section the court shall be guided by the principles of English law and the doctrines of equity."

The judgment continues, at p. 58:

> "Hitherto it has been assumed (and it was so held in *Hassanali Dedhar's* case) that the principles of English law by which the court was to be guided in granting relief were the principles set out in s. 14 (2) of the Conveyancing Act, 1881, that is to say that the court might grant or refuse relief, as the court having regard to the proceedings and conduct of the parties under the foregoing provisions of s. 14 and to all the other circumstances thought fit, and might grant relief on terms as set out in the sub-section. But it has now been contended for the appellant that, as the Conveyancing Act, 1881, does not bind the Crown in England, those principles are inapplicable here. The result of this would be that the court could not relieve against forfeiture for breach of a lessee's covenant except in cases where relief could be granted apart from the Conveyancing Act, 1881, i.e. relief for non-payment of rent, failure to insure, and rare cases of accident or surprise. The question is how are the words 'the principles of English law' to be construed. In this context they are far from plain. I am unable to believe that it was the intention of the legislature in 1915 to continue to empower the court in the main enacting part of the section to give relief on such terms as might appear just and then, by an additional paragraph in this form, so to restrict the court's powers as to prevent it doing justice. All the above-mentioned cases in which relief could be granted apart from the Conveyancing Act, 1881, (except perhaps failure to insure) could be relieved against under the 'doctrines of equity' without invoking any of the 'principles of English law', so that the interpretation contended for would give no meaning, or next to no meaning to the words 'the principles of English law'. And, as the doctrines of equity would apply in any event, without the 1915 addition to the section, that addition, if construed as the Crown contends, would have been unnecessary. Moreover, such a restriction as is suggested would be repugnant to the main enacting part of the section the object of which clearly is to permit relief upon such terms as may appear just. I have no doubt that the intention was to direct that the Supreme Court in granting relief against forfeiture for breach of lessee's covenants in Crown leases should be guided by the principles of English law as between subject and subject and the doctrines of equity, and that if the legislature had intended to exclude the operation of s. 14 (2) of the Conveyancing Act, 1881 (which was the main provision of English law governing relief against forfeiture for breach of covenants in leases, though not, it is true, in Crown leases) they would have said so in plain terms. To give effect to the Crown's contention would, in my view, be to offend against various canons of construction of statutes. It would be to defeat the manifest object of the legislature, to render certain words in the section nugatory, and to permit the 1915 addition, which though not in form a proviso, is somewhat similar to a proviso, to control the main enacting part of the section. I would, therefore, reject this contention."

As the learned president said, this finding did not constitute an essential part of his judgment but as the Privy Council reversed the decision of this

court in other respects, it became an essential part of the judgment of their lordships, who said (1960) A.C. 44, 62):

> "For the reasons given in the judgment of Sir Kenneth O'connor, P., (at p. 152 and p. 153 of the record) their lordships cannot accept the argument that the second paragraph of s. 83 does not import a reference to s. 14 of the Act of 1881 because that Act did not bind the Crown in England."

This does not constitute a finding that s. 14 of the Conveyancing Act, 1881, did not bind the Crown, but only that, by reason of the wording of s. 83 of the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya)

> "the principles upon which the English courts exercised their power of granting relief as between subject and subject under the relevant English statute law"

(p. 61) were to be applied, although the Crown was a party. Nevertheless the words in the passage of the judgment of the learned president above set out, "though not, it is true, in Crown leases", with reference to s. 14 (2) of the Conveyancing Act, 1881, were apparently accepted by their lordships, as they indicated no dissent from them. Had their lordships been of the opinion that s. 14 of the Conveyancing Act, 1881, did bind the Crown they would no doubt have said so, and there would then have been no necessity for them to consider the argument dealt with by the learned president, or to adopt his reasons for not accepting it. I think, therefore, that their lordships may justifiably be taken as being of the opinion that, in England, the Crown was not bound.

The general rule concerning the applicability of statutes to the Crown is so universally accepted that it is unnecessary to quote authority for it. The Crown is not bound unless it is referred to directly or by necessary implication. It is a rule particularly applicable if the prerogative or (as here) the Crown's rights or property are involved. In the Conveyancing Act, 1881, the Crown is not named directly; so far as s. 14 is concerned the only factor which could possibly give rise to a "necessary implication" is the presence of s. 14 (4), which reads:

> "(4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any act of parliament."

Section 146 (6) of the Law of Property Act, 1925, is in identical terms, and in the notes to that sub-section in Halsbury's Statutes of England (2nd Edn.), Vol. 20, p. 747 are references to s. 99 (7) of the same Act and s. 42 (1) (iii) of the Settled Land Act, 1925. Each of those sub-sections contains a requirement that every lease contemplated by the respective sections shall contain a condition of re-entry on non-payment of rent. In the year 1881 similar provisions were contained in s. 18 (7) of the Conveyancing Act, 1881, and s. 46 of the Settled Estates Act, 1877. In the fifth edition of Chitty's Statutes, a note to s. 14 (4) of the Conveyancing Act, 1881, refers to a number of private Acts and also to s. 27 of the Crown Lands Act, 1829, which requires leases under the Act to contain a proviso or condition for re-entry on non-payment of rent or non-observance or non-performance of covenants (see Halsbury's Laws of England (1st Edn.) Vol. 7, p. 163). The note in Chitty's Statutes adds:

> "but quaere, whether the Crown is bound by this fourth sub-section not being expressly named."

Woodfall on Landlord and Tenant (25th Edn.) in note (*c*) on p. 1006, calls attention to s. 13 of the Coal Act, 1938, as another example, but, with

specific reference to the Crown Lands Act, 1927, which repealed and replaced (inter alia) s. 27 of the Crown Lands Act, 1829, the text book states:

> "The Crown not being named in the Law of Property Act, 1925, s. 146 of that Act (see infra, chap. 18, s. 6 (*b*)), which provides for relief against forfeiture for breach of covenant, would seem not to apply to any lease under the Crown Lands Act."

(See note (*g*) p. 103 and note (*c*) p. 1006.) I am, with all respect to the learned editors of the text book, rather at a loss to understand the statement that the Crown is not named in the Law of Property Act, 1925, as it is clearly named and its position defined in s. 208. It is possible that the note has been handed down from earlier editions in which the reference was to the Conveyancing Act, 1881. At the same time I think that the note indicates an opinion that the existence of s. 146 (6) of the Law of Property Act, 1925, does not of itself create a necessary implication that the Crown is bound by the section. That opinion may justifiably be applied to s. 14 (4) of the Conveyancing Act, 1881.

The decision of the Privy Council in *Province of Bombay v. Municipal Corporation of Bombay* (9), [1947] A.C. 58 can be referred to with advantage. One aspect of the judgment is most concisely expressed in the headnote, at p. 59, as follows:

> "To hold that the Crown is bound 'by necessary implication' if it can be shown that the legislation cannot operate with reasonable efficiency unless the Crown is bound, is to whittle down the general principle and is unsupported by authority."

In the judgment (at p. 63) the following passages relate to an argument based on statutes said to be passed "for the public good":

> "Every statute must be supposed to be 'for the public good,' at least in intention, and even when, as in the present case, it is apparent that one object of the legislature is to promote the welfare and convenience of a large body of the King's subjects by giving extensive powers to a local authority, it cannot be said, consistently with the decided cases, that the Crown is necessarily bound by the enactment."
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>
> "Their lordships prefer to say that the apparent purpose of the statute is one element, and may be an important element, to be considered when an intention to bind the Crown is alleged. If it can be affirmed that, at the time when the statute was passed and received the royal sanction, it was apparent from its terms that its beneficent purpose must be wholly frustrated unless the Crown were bound, then it may be inferred that the Crown has agreed to be bound. Their lordships will add that when the court is asked to draw this inference, it must always be remembered that, if it be the intention of the legislature that the Crown shall be bound, nothing is easier than to say so in plain words."

I think that both of these passages are applicable to the present case. There is no question of the legislation being unable to operate with reasonable efficiency unless the Crown is bound, or of its purpose being wholly, or even in part, frustrated. The only argument which could be relied upon in support of a submission that the Crown should be bound by s. 14 of the Conveyancing Act, 1881, is that such Crown leases as were governed by s. 27 of the Crown Lands Act, 1829, would contain a proviso or stipulation of the nature referred to in s. 14 (4) of the Conveyancing Act. This in my view is not sufficient. In every case in which the question whether the Crown is bound by a particular enactment is considered, there must be scope for the operation of the enactment against

the Crown – otherwise the question would not arise. There is clearly room for the operation of s. 14 (4) apart from the Crown Lands Act, 1829, even though the operation of s. 14 (4) in relation to the other enactments mentioned in Halsbury's Statutes and Chitty's Statutes (detailed above) may be limited by the operation of s. 14 (8) which provides that the section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. In my judgment, therefore, the Crown is not bound by s. 14 of the Conveyancing Act, 1881.

It is next necessary to ascertain the effect of this in relation to the law of Tanganyika. I have already set out s. 2 of the Land (Law of Property and Conveyancing) Ordinance which applies to the territory the general English law relating to conveyancing in force on January 1, 1922. It is common ground that, by virtue of that Ordinance, s. 14 of the Conveyancing Act, 1881, is in force in Tanganyika between subject and subject. It is argued for the respondent that the same Ordinance also imports the law that s. 14 aforesaid is not binding on the Crown in England, and therefore does not bind the Crown in Tanganyika. Against this submission counsel for the appellant advanced two arguments. First he submitted that the position of the Crown in a trusteeship territory was different from its position in a colony. Counsel did not enlarge upon this to show why such a difference, if it exists, should extend to deprive the Crown of its prerogative or make it any less the fount of legislation. No authority was quoted and I think that I need none for rejecting the submission as one without merit. Under art. 4 of the Trusteeship Agreement (Vol. V of the Laws of Tanganyika, 1947, at p. 2) the administering authority is responsible for the peace, order and good government (inter alia) of the territory, and by art. 5 has full powers of legislation, administration and jurisdiction. The administering authority is "His Majesty" – art. 2. The jurisdiction, legislative and administrative authority has been exercised by various Orders-in-Council and Royal Instructions as in the case of a colony. In my view where the Crown is actually exercising under the Foreign Jurisdiction Act, 1890, full legislative authority in a territory, its traditional position with regard to that legislation is not altered by the fact that it has assumed responsibility for that legislation by agreement with an international organisation.

Counsel's second argument was based upon the decision in *Bashir v. Commissioner of Lands* (7), which indicated that the Crown in Kenya was bound by s. 14 (2) of the Conveyancing Act, 1881. I have already quoted the relevant passages from the judgment of their lordships of the Privy Council and of the learned president of this court. They indicate clearly that the question depended entirely upon the interpretation of s. 83 of the Crown Lands Ordinance (Cap. 155 of the Laws of Kenya, 1948) in the context of an Ordinance dealing specifically with Crown leases. It was held that the intention of s. 83 was to import the English law as between subject and subject, into the law of Kenya relating to Crown leases. There is no parallel in the present case. The Land (Law of Property and Conveyancing) Ordinance of Tanganyika does not deal with Crown leases but, on the contrary, is in perfectly general terms. There are no inferences to be drawn from s. 2 thereof, such as were drawn from s. 83 of the Kenya Crown Lands Ordinance. Section 2 imports a body of law which includes the law that the Crown is not bound by s. 14 of the Conveyancing Act, 1881; it follows that in my judgment the respondent was not bound to give the notice required by s. 14 (1) of that Act. I have not found it necessary to consider whether the Land (Law of Property and Conveyancing) Ordinance, itself binds the Crown in Tanganyika; the resolution of that question is not essential, in view of the opinions on the law that I have expressed.

For the reasons I have given the appeal cannot in my opinion succeed. I note however that in a letter dated March 27, 1958, from the Department

of Lands and Surveys, it was stated to be the intention of the Government, after re-allocation of the plot, to account to the appellant for the value of the buildings. The effect of this decision may not, therefore, be so burdensome upon the appellant as it might seem at first sight.

I would dismiss the appeal with costs.

Sir Alastair Forbes VP: I am in agreement with the judgment which has just been read, but wish to add a few words in regard to ground 4 of the memorandum of appeal, as I have found it far from easy to reach a conclusion upon that ground.

Paragraph 2 of the certificate of occupancy, which is set out in the judgment of Gould, J.A., contains three building conditions related to time, that is to say sub-para. (ii), which requires the submission of plans and specifications to the township authority within six months from the date of commencement of the right of occupancy; sub-para. (iii), which requires that building operations be commenced within three months from the date of notification by the township authority of approval of the plans and specifications; and sub-para. (iv), which requires the buildings to be completed within a period of twenty-four months from the date of commencement of the right of occupancy.

As regards sub-para. (ii), the six months limitation for the submission of plans was apparently never insisted upon, and can only be regarded as having been waived. Fresh plans and specifications were submitted by the appellants from time to time for approval, and no objection was taken by the respondent to the approval of such plans and specifications by the township authority. The last of such plans and specifications were approved by the township authority on February 15, 1956.

As regards sub-para. (iii), I can see nothing in the correspondence or conduct of the parties which amounts to a waiver of the condition that building operations must be commenced within three months after approval of the plans and specifications by the township authority; and I have no doubt that the condition relates to the main building to be erected, that is the shops and flats. As I have mentioned, the last plans and specifications were approved by the township authority on February 15, 1956, and the approval was notified to the appellant's agents on the same date. In fact, building operations on the shops and flats were not commenced within the three months period, or at all apparently, and it seems to me that there was therefore a clear breach of this condition which would have justified revocation of the certificate of occupancy. The certificate of occupancy was not, however, revoked on the ground of breach of this condition, but expressly on the ground of breach of condition 2 (iv), and accordingly I think that the respondent, for the purposes of this case, is restricted to reliance on the alleged breach of condition 2 (iv). If there has been a waiver of that condition, then I think the appeal ought to succeed.

So far as the law is concerned I do not think there is any doubt, and the difficulty arises from the application of the law to the facts of this case. The law is concisely stated in the passage from the judgment of the learned president of this court in *Diwan Singh v. The Commissioner of Lands* (1), which is set out in the judgment of Gould, J.A., and which I repeat here:

> "It seems that a waiver of a lessor's right to re-enter may arise from the doing by the lessor, with knowledge of the facts upon which his right to re-enter arises, of some unequivocal act recognising the continued existence of the lease, notwithstanding that the lessor's actual intention may not be to effectuate a waiver. Once the unequivocal act is done, with knowledge, the law presumes an intention to waive the forfeiture: *Matthews v. Smallwood; Davenport v. R.* (1877) 3 App. Cas. 115, 131, 132; *Bevan v. Barnett* (1897), 13 T.L.R. 310."

It is also, I think, settled law that there cannot be a waiver, otherwise than by an instrument of the same nature as that by which the contract was created, before a breach has occurred (Woodfall on Landlord and Tenant (25th Edn.), p. 591; *West v. Blakeway* (10) (1841), 2 Man. & G. 729, 752; 133 E.R. 940, 949); though a promise may be made which is legally binding on a lessor if it is intended to be acted upon and is actually acted upon (*Central London Property Trust Ltd. v. High Trees House Ltd*. (11), [1947] K.B. 130; *Lyle-Miller v. A. Lewis & Co.* (*Westminster*) *Ltd*. (12), [1956] 1 All E.R. 247). Further, I think it is settled law that merely standing by and seeing the lessee committing a breach of covenant does not operate as a waiver on the part of the lessor (Woodfall on Landlord and Tenant (25th Edn.), p. 592; *Perry v. Davis* (13) (1858), 3 C.B.N.S. 769; 140 E.R. 945).

Were it not for the express statutory provision, contained in s. 11 of the Land Ordinance, that acceptance of rent shall not be held to operate as a waiver by the Governor of any forfeiture accruing by reason of the breach of any covenant or condition in any certificate of occupancy granted under the Ordinance, I would have no doubt that, on the authority of *Matthews v. Smallwood* (2), the continued acceptance of rent after the right of re-entry arose must, in the circumstances of this case, have constituted a waiver of the breach of condition 2 (iv), and that it was immaterial that the respondent intended to reserve his right of re-entry. Since, however, by virtue of s. 11 of the Land Ordinance the acceptance of rent does not have this effect, the question is, has the respondent done any other unequivocal act recognising the continued existence of the right of occupancy.

The respondent's letter of February 24, 1954, was written before a breach of condition 2 (iv) had in fact occurred and cannot, in my opinion, operate as a waiver of the prospective breach; though the implied promise in that letter not to enforce forfeiture if the buildings were completed within a reasonable time may, on the basis of the decision in *Central London Property Trust Ltd. v. High Trees House Ltd*. (11), have been legally enforceable.

On April 4, 1954, the appellant was in breach of condition 2 (iv). On January 26, 1955, August 23, 1955 and November 21, 1955, letters (the full text of which are set out in the judgment of Gould, J.A.) were written by the respondent promising, in effect, not to enforce forfeiture of the right of occupancy if the buildings were completed within further specified periods. Was the sending of any of such letters an unequivocal act recognising the continued existence of the right of occupancy? In my opinion it was not. Each of those letters appears to me to be no more than a promise (which may well have been legally enforceable) to stand by and not take action to enforce forfeiture for a limited time. Since the continued acceptance of rent does not operate as a waiver of the breach, I cannot see that the mere promise to stand by and not enforce the forfeiture for a limited time is such an unequivocal act of recognition of the continued existence of the right of occupancy as would amount to a waiver of the breach. The position seems somewhat similar to one in which, in a territory where the ordinary rule as to waiver by receipt of rent applies, a lessor after breach refused rent, but undertook to stand by for a limited period to enable the breach to be remedied. I know of no authority covering such a situation, but it seems to me that in such case the lessor's act would not amount to waiver of the breach.

I accordingly agree that there has not, in this case, been a waiver of the right of forfeiture which accrued on April 4, 1954.

The appeal is dismissed with costs.

Crawshaw JA: have had the advantage of reading the judgment of the learned justice of appeal, with which I entirely concur.

I associate myself with his view that the extensions of time granted by the respondent did not constitute waiver, and were no more than agreements to withhold the exercise of the right of forfeiture on conditions. The right was not lost by the respondent allowing the appellant to build the godown. The godown was a building ancillary to the main building to be erected, and was included in the approved plans. It was merely that, of the buildings to be erected by the appellant, the appellant decided to construct the godown first. At the time the godown was constructed there was no question of forfeiture provided the buildings as a whole were put up within the time allowed, of which the appellant was well aware.

Appeal dismissed.

For the first appellant:
Reid & Edmonds, Moshi
A. Reid

For the respondent:
The Attorney-General, Tanganyika
W. R. Wickham (Crown Counsel, Tanganyika)

Riano s/o Lenalaimer and another v R
[1960] 1 EA 960 (CAN)

Division:	Court of Appeal at Nairobi
Date of judgment:	19 December 1960
Case Number:	164/1960
Before:	Sir Alastair Forbes VP, Gould and Crawshaw JJA
Sourced by:	LawAfrica
Appeal from:	H.M. Supreme Court of Kenya – Goudie, J.

[1] Criminal law – Trial – Evidence – Trap question to witness – Question making assumption contrary to fact – Whether question proper.

[2] Criminal law – Appeal – Grounds of appeal – Grounds lacking particularity – General ground alleging conviction against weight of evidence – Whether appellant entitled to argue any point under general ground – Eastern African Court of Appeal Rules, 1954, *r.* 34 (2).

Editor's Summary

At the trial of the appellants on a charge of murder the judge asked a witness for the defence a question which involved an assumption contrary to fact. The witness was entrapped and his evidence was later

rejected by the judge. On appeal against conviction, Crown counsel complained that the grounds of appeal lacked particularity.

Held –

(i) it is not permissible to mislead a witness by putting questions which involve assumption contrary to fact.

(ii) it is not a sufficient ground of appeal to allege that a conviction was bad in law, or that a conviction was against the weight of the evidence, and where an appellant is represented by counsel he will not be allowed to argue any point under a general ground of appeal.

Appeal of first appellant dismissed. Appeal of second appellant allowed.

Cases referred to in judgment:

(1) *Aladesuru v. R.*, [1956] A.C. 49.

(2) *Fazelabbas Sulemanji and Another v. R.* (1955), 22 E.A.C.A. 395.

(3) *R. v. Ramzan Ahmed Jamal* (1955), 22 E.A.C.A. 504.

Judgment

Gould JA, read the following judgment of the cour: The two appellants were convicted by the Supreme Court of Kenya on September 23, 1960, of the murder of Hassan s/o Wardere at Batsaloi in the Northern Frontier District on or about April 30, 1960. Separate memoranda of appeal were filed but the appeals were heard together; at the conclusion of the hearing we dismissed the appeal by the first appellant Riano s/o Lenalaimer but allowed that of the second appellant Ilpapui s/o Lemalaso, whose conviction and sentence we quashed. We now give our reasons for these decisions.

There is no doubt that Hassan was the victim of a murderous attack on the day in question and the only real issue at the trial was the question of the identification of two of the three assailants as the appellants. There were three assailants but one was himself killed. The following passage from the judgment of the learned trial judge gives the facts as found by him:

> "Late in the afternoon of April 30, 1960, an African called at the shop run by Mohamed Mahmoud which consisted of a temporary hut inside a thorn boma at Barsaloi and after a short conversation left the duka. After a short while this same African returned with two other Africans and remained outside the boma whilst the other two entered. The latter after some general conversation with Mohamed informed him that further down the hill a lion was eating a cow and suggested he go down to see. Mohamed became suspicious by reason of the man who had called earlier remaining outside and took his rifle, and went outside and asked to be shown the place where the lion was. The first African who had remained outside came up to him and pointed downwards towards the bush saying, 'There it is'. Mohamed told them he could not go to the bush and turned round intending to walk back into the shop. One of the other Africans rushed at him and attempted to take away his rifle and caught him from behind pinioning his arms and the rifle. The third African jumped towards him with a spear and raised it with the apparent intention of spearing him but Mohamed dodged and took the blow on his forearm. This spear broke and fell to the ground. The deceased Hassan came with a large torch and hit the African holding Mohamed with the torch on the head. The third African picked up the broken spear and after bending the head portion with his foot used it like a panga to slash the deceased cutting him on the forearm and practically serving his arm from his body. The first man who had remained outside rushed towards the fight. Emuk caught the third African from behind when the latter raised his spear for the second time to spear Hassan. The first African struck Mohamed in the back with a club. Mohamed, still held by the second African struggled to enter the shop and Hassan (deceased) struggled to follow him inside. Mohamed heard Hassan say 'A – Ah' in the doorway and observed the first African who had at first remained outside removing the spear from Hassan's back. Hassan collapsed at Mohamed's feet. The second African then told the first man to leave the long spear and fetch the short broken one. The first man went for the broken spear but Mohamed managed to get his left hand free and started to 'fix' his rifle – apparently to load it by putting a round in the breach. The first man was by this time approaching with the broken spear but the second man told him to run, apparently fearing they might be shot. The first and second Africans both began to run after the second man had thrown Mohamed aside. Emuk called that the third man was still there and Mohamed pointed the rifle at him but he made a dash for it and was shot dead by Mohamed attempting to escape. Hassan died shortly afterwards. The dead African was identified as a Samburu tribesman whose father's name was Letikitik."

For convenience we will take first the case against the second appellant,

whose appeal we allowed. The evidence against him appeared to us to be meagre. He was put on an identification parade but the witness Emuk failed to identify him and Mohamed Mahmoud made a mistaken identification at first. He gave evidence that he then went behind the parade and identified the second appellant "by the shoulders". The learned judge ruled out any evidence from the police officer conducting the parade as to this incident as "unfair to the accused" and advised the assessors to treat the case as one in which the second appellant had not been identified on the parade. Presumably he considered that the identification in the circumstances described by Mohamed Mahmoud could carry no weight. In view of the failure of the witnesses to identify the second appellant at the identification parades, their identification of him in court as one of the assailants also could carry no weight.

The case against the second appellant then, being accepted as one in which no direct identification had been made, depended entirely upon circumstantial evidence. There were only two matters upon which the Crown could rely. The first related to the presence of the second appellant in the area. One Ngumei s/o Lerandile said that, about ten days before the police made enquiries from him, three men visited him at his manyatta, which is called Larandele. They were the first and second appellants, who were well known to him, and a man called Letikitik. They had slept the previous night in a neighbouring manyatta called Lelesengai, the owner of which gave confirmatory evidence. The member of the attacking group who was killed was identified (though not by the owners of these two manyattas) as a man named Letikitik. This evidence was discovered by Constable Lior Lesalo who, with tribal police, followed two sets of tracks from the scene of the crime to the neighbourhood of the two manyattas mentioned, apparently on May 2, 1960. We agree with the learned trial judge that "the vagueness of those tribesmen regarding dates is almost incredible" but the fact remains that the only evidence as to the date of the visit is Ngumei's estimate of about ten days before the police came. Even allowing for vagueness that does not connect the visit with the date of the crime. There was no evidence that the two men who had made the tracks were seen at any time after the tracks were made. Ngumei said that his manyatta was "far from" Barsoloi, but there was no definite evidence indicating how far.

The second matter relied upon by the Crown was that teh second appellant, when arrested, had a wound on the top of his head, and it will be recalled that evidence was accepted by the learned trial judge showing that the assailant holding Mohamed Mohmoud from behind had been hit on the head with a large torch. The second appellant was examined by a doctor on June 8, 1960, more than five weeks after the crime. The doctor estimated the age of the wound to be about three weeks or – "it could have been a week longer". The injury was consistent with having been caused by a blunt weapon, including a heavy blow from the torch in question. The doctor at first said that he ruled out completely the possibility that it had been caused by contact with a blunt piece of wood protruding over the door of a hut; he later qualified this by saying that it was unlikely that it could have been so caused. In view of the age of the wound we think this evidence should have been treated with some degree of caution.

At its best this evidence amounted to very little. The second appellant was seen at some ill defined time before the crime with the first appellant, who was identified as one of the assailants, and a man of the same name as the assailant who was killed, at a place not particularly close to the scene of the crime. Apparently the three were some distance away from their homes but there is nothing to show whether this was an unusual occurrence. The second appellant had a wound on his head which could have been occasioned by a blunt instrument such as a large torch. Apart from the question of the inherent weakness of this evidence we had to take into consideration that it was circumstantial,

and that the learned judge had failed, in his summing up and his judgment, to direct the assessors and himself that where the case for the prosecution depends entirely upon circumstantial evidence a conviction is not justified unless the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. The necessity for such a direction has been pointed out very frequently by this court, and had it been given in this case, we do not think that the learned judge would have arrived at the same conclusion. For that reason we found it necessary to quash the conviction.

There is another aspect of the case of the second appellant which we desire to mention though we did not need to take it into consideration in arriving at our decision. In support of his defence that he had nothing to do with the crime, and of his explanation that he had injured his head by hitting it upon a protruding piece of wood, the second appellant called one Samaji s/o Lenteye as a witness. He gave evidence that he had been present when the second appellant had so injured himself. When he had completed his evidence the learned judge asked him a question which was not recorded, but to which the following passage of the judgment relates:

> "Further his defence witness did not bear out his story in the detail thereof and when I asked him whether a fictitious personage whose name I had invented was present he described where the accused and he allegedly met this fictitious person. Clearly this defence witness had not been sufficiently coached in detail and thought that accused 2 must have mentioned this man's name."

We are unable to approve the asking of such a question, which was obviously in the nature of trap, by the learned judge, and we deprecate the fact that it should have been put. It would not have been a permissible question in cross-examination, as the following passage from Phipson on Evidence (9th Edn.) at pp. 501-502 shows:

> " . . .; nor is it allowable for counsel to mislead a witness by making assumptions contrary to fact, or to entrap him by misstatements;"

In the present case the question assumed, contrary to fact, that a person named "ole Letito" existed.

The case against the first appellant was a great deal stronger than that against the second. He was identified at an identification parade by both Mohamed Mahmoud and Emuk. There was some complaint by the first appellant concerning this parade as he said that time he was dirty and he had not put any fresh paint on his face; the paint (red ochre) had worn off. Of the others on the parade some were painted, some had beads on their necks and clean clothes. The learned judge called the attention of the assessors to the complaint, which was not made a specific ground of appeal. Two of the assessors were satisfied of the guilt of the first appellant and the third was uncertain. We did not consider that the complaints concerning the parade were sufficient to vitiate the identification, in relation to which the evidence concerning the presence in the area of the first appellant assumes somewhat greater consequence. In the case of the first appellant also, as there was direct identification, the absence from the summing up and judgment of a direction upon the effect of circumstantial evidence is not material.

Counsel for the appellant submitted that the learned judge should have made a specific finding as to whether it was light or dark at the time of the crime. The general trend of the evidence was that the fight lasted for some time and that it was light at least when it started. There was no evidence that either of two torches was ever switched on and Mohamed Mahmoud stated categorically that neither was. As the learned judge pointed out to the assessors,

Mohamed Mahmoud had seen the first appellant twice and had much more opportunity of seeing him than he did the second appellant. We saw nothing in this submission, nor in a submission that the learned judge had unjustifiably asked the accused whether he knew any reason why the prosecution witnesses should tell lies, which would induce us to interfere with the conviction of the first appellant. We considered that the evidence amply justified his conviction.

That completes the narration of our reasons for the decisions arrived at, but there are two further matters which we would mention. The first is that an application was made to this court by counsel for the appellants to adduce further medical evidence to refute the medical witness' opinion that the injury to the second appellant's head could not have been made by a protruding stick. Counsel fairly conceded that he could not claim that the evidence was unobtainable at the time of the trial and that there was no question of the defence having been taken by surprise. For these reasons, and also because we doubted the cogency in such a matter, of evidence arising from an examination made more than six months after the event, we refused the application.

The second matter arises from a complaint made by Crown counsel at the outset that the memoranda of appeal lacked particularity and were difficult to understand. No adjournment was asked for and the matter was satisfactorily arranged by counsel for the appellants giving the required explanations then and there. We would however draw attention to Practice Note No. 8 of 1955 which appears at p. 544 of vol. 22 of the Eastern African Court of Appeal Reports. It reads:

> "(8) Eastern African Court of Appeal Rules, 1954, Rule 34 (2). Memoranda of appeal in criminal matters must particularise the matters complained of. Where an appellant is represented by counsel, he will not be allowed to argue any point under a mere general ground of appeal, such as, 'The conviction was bad in law,' or 'The conviction was against the weight of evidence'. In particular, details must be given of any alleged misdirection."

In England it is clear that it is not a sufficient ground of appeal to allege that a verdict is "against the weight of evidence". Their lordships of the Privy Council, in *Aladesuru v. R.* (1), [1956] A.C. 49, said at p. 55:

> "The position is correctly stated at p. 346 of the thirty-third edition of Archbold's Criminal Pleading, Evidence and Practice as follows: 'In order to succeed an appellant must show, in the words of the statute, that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of evidence'."

At p. 56:

> "A number of cases, most of them from the early English Criminal Appeal Reports, were cited by counsel for the appellants in the headnotes of which the phrase 'against the weight of evidence' occurs with reference to applications to the Court of Criminal Appeal. It was submitted that this phrase had thus been treated as synonymous with 'unreasonable or which cannot be supported having regard to the evidence'. There can be no doubt that this phrase is inaccurate and is one which cannot properly be substituted for the words of the statute, although it has in one or two cases found its way into the judgments, though always with qualifying language."

It is true that that decision was based on the particular wording of the Criminal Appeal Act, 1907, which has no counterpart in Kenya, where the use of the

phrase aforesaid in appeals to the Supreme Court receives authority drawn from s. 352 (3) of the Criminal Procedure Code. The judgment of this court in *Fazelabbas Sulemanji and Another v. R.* (2) (1955), 22 E.A.C.A. 395, followed in *R. v. Ramzan Ahmed Jamal* (3) (1955), 22 E.A.C.A. 504 uses language indicative of its view that the phraseology adopted in England correctly describes the principle to be applied. In the former case, at p. 401, the judgment reads:

> "The onus was upon the accused on first appeal to show that the findings of the magistrate were unreasonable or could not be supported having regard to the evidence, and there is no indication in the judgment of the High Court that the learned judge appreciated and applied this principle."

This matter did not arise in the present case and we desire only to call attention to what is contained in the practice note above quoted concerning the necessity to particularise the matter complained of on the appeal.

Appeal of first appellant dismissed. Appeal of second appellant allowed.

For the appellants:
Mervyn Morgan & Co., Nairobi
M. J. E. Morgan

For the respondent:
The Attorney-General, Kenya
J. P. Webber (Deputy Public Prosecutor, Kenya)

Biffo s/o Mandirire v R
[1960] 1 EA 965 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	30 November 1960
Case Number:	568/1960
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Criminal law – Trial – Open court – Part of trial held in private premises at night – Whether trial held in open court – Criminal Procedure Code, s. 76 (1) (*T.*).

Editor's Summary

The appellant, a room-boy employed at Government House, Dar-es-Salaam, was convicted of attempting to steal a wallet, the property of a guest staying there overnight. The trial was opened by the resident magistrate and the whole evidence of the complainant was taken at 9.30 p.m. on the day of the incident in

the library of Government House. Thereafter the trial was adjourned to the following day, when it was continued and completed, in the district court building. On appeal

Held –

(i) notwithstanding that the latter part of the trial was conducted in a regular court house, the trial as a whole was not held "in open court" as required by s. 76 (1) of the Criminal Procedure Code.

(ii) non-compliance with s. 76 (1) was an irregularity not curable under s. 346 of the Criminal Procedure Code, and consequently the whole trial was a nullity.

Appeal allowed. Conviction and sentence set aside.

Cases referred to in judgment:

(1) *Muriu s/o Wamia v. R.* (1955), 22 E.A.C.A. 417.

(2) *Willy John v. R.* (1956), 23 E.A.C.A. 509.

(3) *R. v. Lewes Prison* (*Governor*), *Ex parte Doyle*, [1917] 2 K.B. 254.

(4) *Scott v. Scott*, [1913] A.C. 417.

(5) *McPherson v. McPherson*, [1936] A.C. 177.

Judgment

Sir Ralph Windham CJ: The appellant, a room-boy employed at Government House, Dar-es-Salaam, was convicted of attempting to steal a wallet containing 200 dollars, the property of one Sir Jeremy Raisman, who was staying overnight as a guest at Government House. The incident took place in the latter's room, at about 4.20 p.m. The complainant testified that he entered his room to find the appellant handling his wallet which contained the money, having removed it from a larger wallet which the complainant had left in an air-passenger bag on his chest of drawers. At his trial the appellant denied having touched the wallet at all. He was disbelieved, and the learned trial magistrate, accepting the evidence of the complaint, found that the only reasonable inference was that the appellant had been caught while attempting to steal the contents of the wallet. The evidence was a little thin, but it was in my view just sufficient to support the conviction for attempted theft. The very unusual feature of the case, however, concerns not the evidence, nor even the manner in which the trial was conducted, but the place in which, and the hour at which, part of the trial was held.

The trial was opened by the learned resident magistrate, and the whole of the evidence of the complainant was taken, at 9.30 p.m. on the day of the incident, in the library of Government House. Thereafter the trial was adjourned to the following day, when it was continued and completed by the taking of the evidence of a police witness and that of the appellant, in the district court building in the ordinary way. The record makes no mention of why the trial was opened, and the whole of the incriminating evidence against the appellant taken, at such an hour and in such a forum. It may well be that the reason, though not the justification, for so holding it was that the complainant, who was the sole witness to the incident, was leaving the country early on the following day, though so far as the record goes this is no more than conjecture. But, whatever the reason, and however well-intentioned the decision may have been, the question immediately arises whether such a trial can be said to have been wholly held in open court.

Section 76 (1) of the Criminal Procedure Code (Cap. 20) provides as follows:

> "76(1) The place in which any court is held for the purpose of inquiring into or trying any offence shall be deemed an open court to which the public generally may have access, so far as the same can conveniently contain them:
>
> "Provided that the presiding judge or magistrate may, if he thinks fit, order at any stage of the inquiry into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or buildings used by the court."

There was no order by the learned trial magistrate under the proviso to s. 76 (1), excluding the public from access to the library that was being used as a court-room. The question whether in any event it would have been proper for him to have made any such order in the circumstances of the case does not therefore arise. It is not inappropriate, however, to draw attention to the judgment of the Court of Appeal for Eastern Africa in *Muriu s/o Wamai v. R.* (1) (1955), 22 E.A.C.A. 417, in which the following passage appears at p. 420 with regard to the proviso of s. 77 of the Kenya Criminal Procedure Code, which is identical with s. 76 (1) of the Tanganyika Criminal Procedure Code:

> "Having said this we must emphasise with all the powers at our command that the seemingly wide discretion given to a judge or magistrate under the proviso to s. 77 should only be exercised for a most compelling

> reason. Both s. 77 and s. 168 by the very wording used in them indicate that a court of law must ordinarily be open to the public at all times, and in exercising a discretion to exclude we hope that no judge or magistrate will ever overlook the general principle that justice must not only be done but must be seen to be done."

The question that does arise, then, is whether the library of Government House, at 9.30 p.m., was an "open court to which the public generally may have access". One point may be disposed of at the outset. The words "shall be deemed an open court" in s. 76 (1) might possibly be construed to mean, but cannot, either in their context or upon any reasonable interpretation, mean

> "shall be irrebuttably presumed to be an open court, even if not in fact an open court."

The words must mean "shall be treated as an open court and made accessible to the public as such". Such was the meaning given to the identical words in s. 64 of the Seychelles Criminal Procedure Code, by the Court of Appeal for Eastern Africa in *Willy John v. R.* (2) (1956), 23 E.A.C.A. 509, where they were held to require the place of trial to be "treated as an open court to which the public had access".

Now no doubt, upon the presumption of regularity, a court-house may ordinarily be presumed to be open to the public, and thus an "open court", until the contrary is shown. Such would be the case where a trial was conducted in ordinary working hours in a court-house regularly used as such. Nor is there any legally necessary ceremony in the nature of the "consecration" of a building as a court-house. Any building can be so used. But in order to establish that it is an "open court", for the purpose of s. 76 (1) of the Criminal Procedure Code, it must be shown, either by presumption or by proof: first, that it is open, as of right, to any of the public who may present themselves for admission (though nobody need have so presented himself); vide *R. v. Lewes Prison* (*Governor*), *Ex parte Doyle* (3), [1917] 2 K.B. 254, at pp. 270-271; *Willy John v. R.* (2): secondly, that the public are aware that the building or room in question is either habitually used for the trial of cases or is being or about to be used for the trial of a particular case. Without this second requirement being satisfied, it would be but an empty form of words to say that a room or building seldom or never before used as a place of trial was an "open court" merely because the public would not be excluded from it if they should come. They must know that there is something for them to come for; there must be publicity. Without it, justice cannot be "open". In this connection it may be noted that in England, under s. 123 of the Magistrates' Courts Act, 1952, a place may be appointed as an "occasional court-house" (i.e. as opposed to a regular petty-sessional court-house), but that it

> "shall not be used as such unless public notice has been given that it has been appointed."

The vital importance of publicity was emphasized in the following strong language by Lord Shaw of Dunfermline in the House of Lords in *Scott v. Scott* (4), [1913] A.C. 417, at p. 477:

> "It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. 'In the darkness of secrecy, sinister interest and evil in every shape have full swing. Only in proportion as publicity has place can any of the checks applicable to judicial injustice operate. Where there is no publicity there is no justice.' 'Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge

> himself while trying under trial.' 'The security of securities is publicity.' But amongst historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of parliament as a guarantee of public security, is not likely to be forgotten: 'Civil liberty in this kingdom has two direct guarantees; the open administration of justice according to known law truly interpreted, and fair constructions of evidence; and the right of parliament, without let or interruption, to inquire into, and obtain redress of, public grievances. Of these, the first is by far the most indispensable; nor can the subjects of any state be reckoned to enjoy a real freedom, where this condition is not found both in its judicial institutions and in their constant exercise'."

Applying these principles to the present case, there is nothing on the record to show that the library of Government House was open to the public from 9.30 p.m. onwards on the night in question, nor that the public had been informed that a trial was to be held, or at least begun, at that hour and place. And the hour and place were such that it certainly cannot be presumed that the public would know this or, even if they knew, that they would realise that they had a right to attend the trial in so normally very private a spot. In *McPherson v. McPherson* (5), [1936] A.C. 177, a divorce action was tried in the Judges' Law Library in the regular court-house. The judge announced that the trial would be "in open court". Entry to the library was by two unlocked swing-doors, on the outer of which was a brass plate with "Private" written on it. It was held by the Privy Council that, by reason of this notice alone, the judge was, albeit unconsciously, denying his court to the public in breach of their right to be present, and that accordingly the trial had not been "in open court" as the law required it to be. In the present case the privacy of the forum was announced not, perhaps, by any explicit notice saying "private", but tacitly by the very fact of its being situated in a private house, and especially in the particular house in question.

For these reasons, and notwithstanding that the latter part of the appellant's trial was conducted in a regular court-house, I hold that the trial as a whole was not held "in open court" as required by s. 76 of the Criminal Procedure Code. I am ready to accept that so much of the trial as was held in the library was conducted with the utmost fairness; certainly the appellant was given the opportunity of cross-examining the complainant there, and availed himself of it. And it may well be that the taking of the complainant's evidence at the hour and place when it was taken was the only practicable means of getting it at all, and thus, since he was the sole eye-witness to the incident, the only means of securing the conviction of the appellant. But that is an unimportant consideration when weighed against the necessity that justice should be done openly. Save in special circumstances for which statutory provision to the contrary is made, and save in certain other very unusual circumstances within which the present case certainly does not fall, it is better that a man should not be brought to justice at all than that justice should be done to him without the public being given the opportunity of seeing it done.

In these circumstances, and particularly by reason of the complainant's evidence having been not merely of a formal or unimportant nature but the sole incriminating evidence in the case, I cannot hold that the non-compliance with s. 76 of the Criminal Procedure Code was an irregularity curable under s. 346 of the Code, but must hold that it was such as to render the whole trial a nullity. I do so hold. The appeal is accordingly allowed, and the conviction and sentence are set aside.

Appeal allowed. Conviction and sentence set aside.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika

A. R. Gonsalves (Crown Counsel, Tanganyika)

Lombard Banking Kenya Ltd v Shah Bhaichand Bhagwanji
[1960] 1 EA 969 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	22 November 1960
Case Number:	1408/1960
Before:	Miles J
Sourced by:	LawAfrica

[1] Practice – Parties – Action in name of wrong plaintiff – Bona fide mistake – Application to substitute name of right plaintiff – Failure to obtain written consent of new plaintiff – Civil Procedure (*Revised*) *Rules*, 1948, *O. I, r.* 10 (1) *and* (3) (*K.*) *– Rules of the Supreme Court, O. XVI, r.* 2 *and r.* 11.

Editor's Summary

Under O. I, r. 10 (1) of the Civil Procedure (Revised) Rules, 1948, the plaintiff company applied to the court to substitute the name of Lombard Banking Limited as plaintiff in place of its own name and also for consequential amendments to the plaint on the ground that the suit had been so instituted through a bona fide mistake. The application was opposed on the grounds that the consent in writing of the new substituted plaintiff had not been obtained as required by O. I, r. 10 (3) and that this was not a case of bona fide mistake within the meaning of r. 10 (1).

Held –

(i) although O. I, r. 10 (3) of the Civil Procedure (Revised) Rules, 1948, and O. XVI, r. 2 of the Rules of the Supreme Court do not expressly require the consent of a plaintiff in the case of substitution, as in the case of addition, there is no difference between the two.

(ii) while a defendant may be joined as a party without his consent, no person ought to be compelled to bring an action without his consent; accordingly in the absence of the consent of the proposed plaintiff no substitution could be allowed.

(iii) a mistake is not necessarily excluded from O. I, r. 10 merely because it is a negligent mistake, provided it has been made honestly.

Application allowed on terms that the written consent of the proposed plaintiff be filed within twenty-one days.

Cases referred to in judgment:

(1) *The Duke of Buccleuch*, [1892] P. 201.

(2) *Re Nos*. 55 *and* 57, *Holmes Road, Kentish Town*, [1958] 2 All E.R. 311.

(3) *Ayscough v. Bullar* (1889), 41 Ch. D. 341.

Judgment

Miles J: This is an application by the plaintiff company, who are Lombard Banking Kenya Limited, to substitute the name of Lombard Banking Limited as plaintiffs in the place of the present plaintiffs, and that consequential amendments may be made to the plaint. The application is made under the following circumstances. The suit is brought on a promissory note. Owing to an error on the part of the advocate who drafted the plaint it escaped notice that the promissory note in question had been made in favour of Lombard Banking Limited and not Lombard Banking Kenya Limited, who are the present plaintiffs. In the supporting affidavit the advocate in question says,

> "As I was at that time drafting a number of plaints for Lombard Banking Kenya Limited, I negligently assumed that it was payable to Lombard Banking Kenya Limited".

The plaint was checked by another advocate in the same firm, who also overlooked the error.

The material rule is r. 10 (1) of O. I of the Civil Procedure (Revised) Rules, 1948:

> "Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit."
>
>
>
> "(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto."

Mr. Khanna for the defendant opposes the application. His first objection is that the consent in writing of the proposed new substituted plaintiff has not been obtained, as required by sub-r. (3). Sub-rule (3) makes no express requirement that the consent of the proposed plaintiff shall be obtained in the case of a substitution as opposed to an addition, but the note to O. XVI, r. 2 of the English Rules in the Annual Practice for 1959 states:

> "Rule 11, infra, must be read herewith, and so the person sought to be added or substituted must consent in writing."

Rule 11 or O. XVI contains a similar requirement to sub-r. (3) of the Kenya Rules and likewise makes no mention of substitution.

Mulla's Code of Civil Procedure (12th Edn.), Vol. 1, p. 517 states:

> "No person can be added or substituted as plaintiff under sub-r. (1) without his consent. Thus, a company cannot be made a plaintiff in a suit without its consent."

Although sub-r. (3) of the Kenya Rules and O. XVI, r. 2 of the English Rules do not expressly require the consent of a plaintiff in the case of substitution as in the case of addition, I am clearly of opinion on principle that there is no difference between the two. It is, of course obvious that a plaintiff is in a different position from a defendant. While a defendant may be joined as a party without his consent, no person ought to be compelled to bring an action without his consent, and it seems to me clear, therefore, that in the absence of the consent of the proposed plaintiff, which has not been obtained as required by sub-r. (3), the proposed substitution cannot be made. The English case of *The Duke of Buccleuch* (1), [1892] P. 201, supports the view that r. 11 of O. XVI applies to substitution. In that case the Order was made with the condition that the written consent of the proposed plaintiff to be added must be obtained within a limited period.

There is a second ground upon which this application has been opposed. Mr. Khanna contends that this is not a case of bona fide mistake within the meaning of r. 10 (1) and he cites the case of *Re Nos.* 55 *and* 57, *Holmes Road, Kentish Town* (2), [1958] 2 All E.R. 311, where the facts were that:

> "On April 16, 1957, landlords, B.B. (Properties) Ltd., who were assignees of the freehold reversion on a lease of business premises originally granted by another company, B.B. Ltd., served a notice, under s. 25 of the Landlord and Tenant Act, 1954, on their tenants terminating the tenancy at

> Christmas, 1957. Though the two companies, B.B. (Properties) Ltd., and B.B. Ltd., were closely related and had the same directors, secretary and office, neither company was a subsidiary of the other. The tenants knew that B.B. (Properties) Ltd., were their landlords and duly gave notice to them that they would not be willing to give up possession. On July 30, 1957, the tenants issued an originating summons, applying under s. 24 (1) of the Act of 1954 for a new tenancy. B.B. Ltd., was made respondent to the summons, which was served on the secretary of the two companies on August 8, 1957. On August 12, 1957, the companies' solicitors told the tenants' solicitors that the wrong company was respondent to the summons. On August 16, 1957, the four months limited by s. 29 (3) of the Act of 1954 for bringing an application under s. 24 (1) expired. On October 17, 1957, leave was granted to amend the summons by altering the name of the respondent to B.B. (Properties) Ltd. That company having subsequently taken objection to the amendment having been allowed,
>
> "**Held:** – leave to amend the summons should not have been granted . . ."

At p. 316 Harman, J., said:

> "Counsel for the tenants, in a persuasive argument, submitted that this was merely a case of the landlord being sued in the wrong name; the tenants intended to sue the right respondent, but, by a slip of the pen, a word was left out and the wrong corporate name was given, but the identity of the person (albeit an artificial person) remained the same. Therefore, said counsel, the application was made within time, and the mere amendment of the name would not be against the policy of the law. The answer put forward to that argument – and I think the conclusive answer – is that there are two existing companies, one Birch Bros. Ltd., and the other Birch Bros. (Properties) Ltd. The tenants knew that there were two such companies. They knew also that Brich Bros. (Properties) Ltd., were their landlords, but they chose to sue Birch Bros. Ltd. Why they did that, I do not know, and I cannot speculate. I cannot say that they intended, when they used the one title, to use the other. It is not as if the other title were that of a non-existing person, or as if the tenants were under any misapprehension. For some reason which I cannot fathom, the tenants simply gave the name of an existing company whom they knew were not their landlords, as respondents to the summons. In those circumstances it is not open to me, in my view, to say that this was a mere misnomer."

Mr. Khanna argues that the situation is the same in the present case since the existence of the two companies was known to the plaintiff's advocates. It is to be noted that one of the grounds for refusing the leave to amend the summons was that B.B. (Properties) Ltd. had a vested right when the time limited for bringing proceedings expired, and the discretion conferred by O. LXX, r. 1 and O.LIII, r. 13 (3) should not be exercised so as to defeat that right.

In that case it was not decided under O.XVI – there were special circumstances which do not exist here. It is true that there was negligence in the present case, but almost any mistake in procedure, if made by a barrister or solicitor may be said to amount to negligence. I do not think that a mistake is necessarily excluded from r. 10 of O. I merely because it is a negligent mistake, provided it is one that has been honestly made.

I consider that the decision in *Re Nos.* 55 *and* 57, *Holmes Road*, *Kentish Town* (2), is not conclusive against the plaintiffs here.

The manner in which O. XVI, r. 2 of the English rules is to be applied, is stated in the note thereto at p. 326 of the 1959 Annual Practice as follows:

> "The tendency of modern practice is to allow the amendment where the defendant can be safeguarded as to costs, and the addition or substitution is necessary to enable the question at issue to be determined."

Both these conditions are satisfied in the present case. There being no consent in writing by the proposed plaintiffs, the question is whether I should dismiss the action out of hand or make an order as in the *Duke of Buccleuch* (1), allowing the applicants time to file a written consent. Mr. Khanna argued that I should take the first course on the grounds that in the case cited the proceedings had progressed right up to the House of Lords and to make any other order would mean that the whole of the previous proceedings would be abortive.

I see nothing in the judgment in that case, however, to warrant the view that the Court of Appeal was actuated by any such reasons in giving time. The only question under consideration was whether the substitution could be made at that stage. In my view it would be unduly oppressive to dismiss the application when the omission can so easily be rectified and the defendant can be amply compensated in an order as to costs.

The order will be that the substitution and consequential amendments be allowed as prayed. The written consent of the proposed plaintiff, Lombard Banking Ltd, to be filed within twenty-one days.

The next question is what order should be made as to costs. *Ayscough v. Bullar* (3) (1889), 41 Ch. D. 341 which was a case of addition, the order was that if on the trial it appeared that the first plaintiff was not entitled to maintain the action and that the added plaintiff was so entitled, the first plaintiff must pay the costs of the action up to the time of the joinder of the added plaintiff. In the instant case it is plain that the present plaintiff has no cause of action.

The order will be that the plaintiffs pay the costs of the action up to the time of substitution and all costs of and occasioned by the substitution and consequential amendments together with the costs of the present application. Since this substitution order was as a result of the negligence of the advocates, for the plaintiffs, I direct that these costs be borne by them. Such costs unless agreed are to be taxed and paid within fourteen days of taxation.

Application allowed on terms that the written consent of the proposed plaintiff be filed within twenty-one days.

For the plaintiff:
Kaplan & Stratton, Nairobi
K. B. Keith

For the defendant:
D. N. & R. N. Khanna, Nairobi
D. N. Khanna

Said Bin Suleiman El Busaidi v Mohamed Bin Suleiman Soudy

[1960] 1 EA 973 (HCZ)

Division:	HM High Court of Zanzibar at Zanzibar
Date of judgment:	21 October 1960
Case Number:	2/1960
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] Rent restriction – Personal occupation – Tenant deprived of possession during his absence – Tenant absent temporarily – Whether tenant entitled to regain possession – Rent Restriction Decree, 1953, *s.* 2 (1) *and s.* 19 (1) (*e*) (*Z.*) *– Increase of Rent and Mortgage Interest* (*Restrictions*) *Act,* 1920, *s.* 12 (2).

Editor's Summary

On the landlord's application an ex parte order for possession of residential accommodation was made during the absence from Zanzibar of the tenant and pursuant thereto the tenant's belongings were moved to and stored in another room in the building. Some months later the tenant obtained an order from the Zanzibar Rent Restriction Board setting aside the ex parte order for possession. A second application by the landlord to the board for possession was dismissed on the ground that no notice to quit had been given whereupon the landlord appealed. His grounds of appeal were that since the tenant shared a kitchen in the building his occupation was not exclusive so as to entitle him to the protection of the Rent Restriction Decree, that the tenant was not in personal occupation of the premises and that a claim by the tenant for damages was misconceived as the tenant had been evicted by the order of the board and not by any wrongful act of the landlord.

Held –

(i) from the finding of the board that the tenancy included the kitchen it followed that if another person used the kitchen the board would have held that this was with the permission of the tenant.

(ii) the application of the tenant to set aside the ex parte order for possession showed that the tenant had not abandoned his desire to regain possession and on the evidence had never ceased to assert his claim to possession; he should have been treated as only temporarily absent from the premises.

(iii) the tenant had a cause of action against the landlord for breach of the implied covenant for quiet enjoyment, as it was the landlord who was responsible for putting into motion the process of the law for evicting the tenant.

Appeal dismissed.

Case referred to in judgment:

(1) *Skinner v. Geary,* [1931] 2 K.B. 546; [1931] All E.R. Rep. 302.

Judgment

Horsfall Ag CJ: This is an appeal by a landlord appellant from the order of the Zanzibar Rent Restriction Board dismissing his application for recovery of possession of two rooms on the first floor of

house No. 731 at Malindi, Zanzibar.

A brief history of the case is as follows: On September 5, 1957, the landlord appellant in Application No. 143 of 1957 obtained an ex parte order against the tenant-respondent for vacant possession of the suit premises and in October, 1957, the landlord-appellant obtained actual possession thereof persuant to the order of ejectment made by the subordinate court in execution

of the order made by the Rent Restriction Board. The tenant-respondent's articles, which were in the suit premises, were removed therefrom and stored in a room on the ground floor of the said house. In February, 1958 the tenant-respondent applied to set aside the ex parte order and on December 20, 1958, the Rent Restriction Board, persuant to the application made by the tenant-respondent set aside the ex parte order made by it on September 5, 1957, and on May 16, 1959, dismissed the landlord-appellant's application for possession under s. 19 (1) (*e*) on the ground that no valid notice to quit had been given.

Learned counsel for the landlord-appellant argued three grounds in his amended memorandum of appeal. He first confined his argument to ground 6. So far as a kitchen was concerned the occupation of the suit-premises by the tenant-respondent was not exclusive, because although he had an exclusive right to use one room on the first floor the sharing of the kitchen with the landlord-appellant's son or family prevented the suit premises from being let as a separate dwelling within the definition of "dwelling house" in s. 2 (1) of the Rent Restriction Decree, 1953. Counsel quoted English cases establishing the proposition that a kitchen is a living room for the purpose of the doctrine that a sharing of living accommodation will exclude the application of the Rent Acts.

First of all it is essential to discover what were the suit premises comprised in this case. This point relating to "sharing" was never taken before the board and this court consequently does not have advantage of knowing what attitude the board would have taken. But the court has the following finding in the ruling of the board:

> "On the evidence we are satisfied and hold it as a fact that the respondent was a tenant of one of the two rooms on the first floor of house No. 731 and a passage on the same floor and a store and a kitchen on the second floor of the said house, paying a rent thereof at the rate of Shs. 13/50 per month."

There we have a clear finding that the tenancy consisted of one room and a passage on the first floor and a store and kitchen on the second floor. A little earlier in the ruling the board had stated that wherever the evidence of the respondent-tenant conflicted with that of the appellant-landlord's son and attorney they preferred the evidence of the respondent-tenant. The board obviously based their finding of what the suit-premises comprised on the evidence of the respondent-tenant and if the point relating to "Sharing" had been brought to their minds, I am sure that they must have also considered the following piece of evidence given by the respondent-tenant in cross-examination:

> "There are three rooms on the first floor. The store is on the second floor on the left and the kitchen on the right. Abdulla was also using the kitchen since he moved in. The space for cooking is large. I agree there is nothing like a kitchen."

Counsel for the landlord-appellant has argued that there is no evidence that Abdulla had no right to use the kitchen except by permission of the respondent tenant. As there is only one kitchen for the house the correct inference is that Abdulla was sharing the kitchen by right of his being the landlord's son. I do not agree. I consider that, in view of the board's finding of what the suit premises contained, they must have gone on to find that whatever use Abdulla or any other of the landlord-appellant's family made of the kitchen, passage or even store such user was due entirely to the permission of the respondent tenant.

My attention has been drawn to English cases under the Rent Acts stating that in cases of "sharing" it is important to ascertain which of the parties is

in the "dominant position". I consider that on the facts as the board must have found them, that even if Zanzibar law is the same as the English law, the respondent-tenant would be entitled to protection. But I think that the Zanzibar law is different from the English law. Section 12 (2) of the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, contains no definition resembling the definition of "dwelling house" in s. 2 (1) of the Zanzibar Rent Restriction Decree, 1953. There is no doubt in my mind that a tenancy of the kind I have just described is within the protection of the Decree.

In relation to ground 5 learned counsel for the landlord-appellant contended that the tenant-respondent was not in physical occupation of the suit premises and therefore not entitled to the protection of the Decree.

During the hearing of the appeal he accepted, what had not been up till then clear owing to a blank in the record, that the tenant-respondent had in fact in February, 1958, made application to the board to set aside the ex parte order. He contended that, apart from his solicitors writing a letter dated May 16, 1960, the respondent-tenant had taken no steps since the setting aside of the ex parte order on December 20, 1958, to manifest his right to possession. He quoted *Skinner v. Geary* (1), [1931] 2 K.B. 546

> "that the fundamental principle of the Rent Restriction Acts being to protect a tenant who is residing in a house, a tenant, to be entitled to the protection of the Acts, must be in personal occupation, or actual possession of the premises in respect of which he seeks that protection."

It is clear on the evidence that the tenant-respondent was deprived of the corporeal possession of the suit premises in October, 1957, by the ejectment order and that his articles were shifted to the room on the ground floor. He had no knowledge of this since he was absent in Pemba. His applying in February, 1958, to set aside the ex parte order shows that he had not abandoned his desire to regain possession. When the board did set aside the ex parte order on December 20, 1958, it made no order for the landlord-appellant to hand over possession. Until the application was dismissed on the merits on May 16, 1959, the parties were in the same position as at the beginning of the application. On that same day the solicitor for the respondent-tenant them wrote the letter (exhibit 4 in the hearing before the board) claiming vacant possession. In the circumstances it is clear that the respondent-tenant never ceased to assert his claim to the possession of the suit premises. In my opinion he should be regarded as one temporarily absent. To quote the Rent Restriction Acts by R.E. Megarry (7th Edn.) at p. 189.

> "It is obvious that it would be impossible to say that, because a man goes away for reasons of either business or pleasure, for a day or a week or even a few months, intending to come back, he cases to reside at the premises."

Talbot, J**.,** in *Skinner v. Geary* (1), was laying down a principle. It seems immaterial to me that in the quotation he refers to business or pleasure as being the reason for keeping the tenant out of possession while in the instant case the reason is an abortive court order.

The last ground argued was ground 4 of the memorandum of appeal. The respondent-tenant is not entitled to any damages as he was lawfully evicted by court order and not by the landlord-appellant's wrongful act. I consider that the reason for the respondent-tenant renting the other accommodation was because he could not get possession of the premises from which he had been evicted. The increased rent paid for these other premises is damages directly flowing from his being deprived of the suit premises if that deprivation was activable. When the application for possession was heard on May 16, 1959, the board dismissed it on the ground that there was no proper notice to

quit. I consider that the respondent-tenant has a right of action against the appellant-landlord for breach of the implied covenant for quiet enjoyment. See Halsbury Laws of England (2nd Edn.) Vol. XX, para. 268.

> "it is now settled that a like covenant is implied from the mere contract of letting, in whatever form it is expressed."

and also at para. 271.

> "The covenant for quiet enjoyment operates according to its terms to secure the lesser, not merely in the possession, but in the enjoyment of the premises for all usual purposes."

It is in my view immaterial that the immediate cause of the respondent-tenant being evicted from possession was the ex parte order of the court. The landlord-appellant was responsible for putting into motion the process of the law. He was responsible for ensuring that when the application was heard on its merits that he had a good cause for asking for the eviction of the tenant. When the application was dismissed for want of a valid notice to quit he is responsible in my view for recompensing the respondent-tenant for damage suffered.

The appeal is dismissed with costs.

Appeal dismissed.

For the appellant:
Fraser Murray, Thornton & Co., Zanzibar
W. D. Fraser Murray

For the respondent:
Wiggins & Stephens, Zanzibar
K. S. Talati

Maria R. S. Godinho v The Commissioner of Income Tax
[1960] 1 EA 977 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	4 November 1960
Case Number:	1-3/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Income tax – Assessment excessive – Alienation of income – Parol trust – Burden of proof – Whether burden of proof on taxpayer – East African Income Tax (*Management*) *Act*, 1958, *s.* 110, *s.* 111 *and s.* 113 (*c*).

Editor's Summary

The appellant, a widow, who had a life interest in her husband's estate, which on her death was divisible between their children, appealed against the refusal of the Commissioner of Income Tax to amend assessments for the years of income 1955 to 1957. Since her husband had intended his estate to be divided equally between the entire family, the appellant expressly adopted his wish on two occasions in 1954 and 1956 and in 1955 informed her advocate that she had created a trust and had given the income to the children and herself in equal shares but it was not until three years later that instructions were given for preparation of a deed of family arrangement. By this deed executed in 1959 the appellant and one son were appointed as trustees and the estate investments were transferred to them on trust for the appellant and the children in equal shares. The appellant claimed that the deed took effect retrospectively and that the assessments for the years of income 1955 to 1957 should be amended.

Held –

(i) the onus of proving that an assessment is excessive lies under s. 113 (*c*) of the East African Income Tax (Management) Act, 1958, upon the taxpayer but the decision rests upon a balance of probabilities;

(ii) since the income tax returns of the appellant for the years 1954 to 1957 did not show the dependent children as having any income of their own, the accounts did not reflect a trust in favour of the children and the deed did not recite the parol declaration of the appellant in 1954, the appellant had not satisfied the court that she had divested herself of the income and given the children enforceable interests.

Appeals dismissed.

Case referred to in judgment:

(1) *O. et al v. The Commissioner of Income Tax* (Case No. 15), 1 E.A.T.C. 124.

(2) *Mandavia v. The Commissioner of Income Tax*, [1958] E.A. 407 (C.A.).

(3) *Commissioner of Inland Revenue v. Allan*, 9 T.C. 234.

(4) *F. v. The Commissioner of Income Tax* (Case No. 6), 1 E.A.T.C. 36.

Judgment

Sheridan J: These three appeals, which have been consolidated, are made under s. 111 (1) (*b*) of East African Income Tax (Management) Act, 1958, against the refusal of the Commissioner of Income Tax, under s. 110 (3) of the Act, to amend the assessments made on the appellant in respect of the years of income 1955, 1956 and 1957. The facts in each appeal are identical and it is only the amounts of the assessments which vary.

The undisputed facts are that the appellant is the widow of Norman Godinho who died on March 6, 1952. She and eight children survived him. He left a will dated February 28, 1929, whereby the appellant and a person since deceased were appointed the executors. She inherited a life interest in the income of the estate and thereafter the capital and income went to the children in equal shares as tenants in common. The sudden death of the testator left the estate in a parlous condition. Liquid assets had to be forthcoming in order to meet building covenants and the heavy estate duty which was eventually settled at Shs. 570,000/-, and which was payable over a period of four years. It was almost entirely due to the exertions and business acumen of Carlos Godinho, the second son, that, between 1952 and 1958, the estate was put on a sound and profit-making basis. The income was used to meet the commitments to which I have referred and the appellant drew nothing. During his lifetime the testator had formed the private limited company of Norman Godinho & Sons Ltd., confined to members of the family, and it was his intention to transfer his many properties to it. This was not done owing to the very heavy stamp duty that would have been payable and the cash was not there. I accept it that the testator may have intended that his estate should be divided equally between the family – although it is a little curious that the did nothing about it before his death – and that the appellant gave expression to that wish and adopted it as her own on the occasions of the wedding of Carlos in 1954 and of the wedding of his sister, Lydia to Caetano Martins (D.W. 4), in Dar-es-Salaam in 1956. In 1955 Carlos instructed Mr. Korde (D.W. 3), the family lawyer, to prepare a trust deed. Mr. Korde's recollection is that the appellant told him that she had created a trust with herself and Carlos as trustees and that she had given the income arising out of the deceased's properties to the children and herself in equal shares. Despite this nothing was done until late in 1958 when instructions to draft the deed of family arrangement were given. It was finally executed on June 25, 1959 (a copy is annexed to the statement of facts). It recites the will and the desire of the executrix (the appellant) and her children to vary the trusts declared by it. She and Carlos were appointed the trustees of the Trust Fund to which the investments and other property of the deceased's estate were transferred. Under the terms of the deed the income of the trust fund was to go to the appellant and to each child in equal shares. By a reciprocal arrangement the appellant was to receive a ninth interest in the capital of the estate.

The issue in this appeal is the very narrow one whether the deed refers back to and is only evidence of a duly completed parol declaration of trust by the appellant in 1954 or whether it was executed in pursuance of the appellant's *intention* to create a trust.

Under s. 113 (*c*) of the Act the onus of proving that the assessment objected to is excessive is on the appellant. The nature of this onus was considered in *O. et al v. The Commissioner of Income Tax* (Case No. 15) (1), 1 E.A.T.C. 124, at p. 129 per Briggs, J.A.

> "In order to arrive at a decision in favour of the Crown it was not necessary for the High Court affirmatively to find that the facts were as the Crown alleged: it was only necessary to find that there was insufficiently good evidence to justify a finding for the taxpayers."

See also *Mandavia v. The Commissioner of Income Tax* (2), [1958] E.A. 407 (C.A.).

It is accepted by both sides that I have to decide the question on the balance of probabilities. I have to be satisfied that in 1954 the appellant did something as a result of which she deprived herself of the income to which she was entitled under the will save 1/9th of it and that she vested it as to 8/9th in the children so that from that date they would have had enforceable interests.

Apart from a carbon copy of a letter which Carlos wrote to the appellant on June 3, 1955, (exhibit "A") the documentary evidence points one way and the parol evidence the other way. Here I may say that I am not concerned with a possible consequence – if these appeals succeed – that the children may find that they are taxable on income which they have not received. The law relating to parol declarations of trust is authoritatively stated in *The Commissioners of Inland Revenue v. Allan* (3), 9 T.C. 234, which reached the House of Lords. There the respondent held shares in a company of which he was a director. At a directors' meeting in February, 1917, he informed the directors that he was holding the shares on trust and that the transfer of the shares from him to himself and his wife as trustees was authorised. Prior to the meeting he had told his wife that the shares were to be transferred into their joint names as part of a trust fund and that until the transfer was completed he would himself hold the shares on trust. In March, 1917, an account was opened in the company's books in his and his wife's name as trustees for their daughter, and from that date all dividends were paid into and accumulated in the account, neither he nor his wife receiving any part thereof, but owing to delays the shares remained in his name until March, 1919. It was held that he had not effectively divested himself of the shares or dividends thereon, by the creation of a valid trust, until the execution of a deed of settlement in April, 1919. The following passage from the speech of Lord Cave, L.C., at p. 256 is relevant:

> "My Lords, it is admitted that the deed did not create the necessary trust, partly because it was not executed until after the material period had elapsed, and partly because by a clause in that deed (cl. 9) it was provided that the deed should not affect any trust property therein mentioned until the date of its becoming vested in the trustees, and these shares did not become vested in the trustees until some time in March, 1919. The whole case therefore turns upon the effect and meaning of the parol declaration found by the Commissioners to have been made by the appellant to his wife.
>
> "What then did that declaration mean? The exact terms of it are not given, and in this respect the statement of facts is somewhat vague and ambiguous. It is suggested on behalf of the appellant that the effect of the declaration was to make Mr. Allan a trustee of these shares for his wife and his daughter absolutely and in equal shares. My Lords, I do not think it is possible to put that interpretation upon the declaration. The appellant, Mr. Allan, at that date had in his pocket or in his possession a draft settlement of these shares which he, as it is found, intended to make – a settlement which, whatever its exact form, was plainly inconsistent with a declaration of trust for his wife and daughter absolutely. Further, the fact that two years afterwards he executed a deed wholly inconsistent with any such absolute trust for the wife and daughter cannot be put out of account. Reading all the facts as found by the Commissioners, I do not think it possible to infer that he meant at this period, namely, in February, 1917, to declare an absolute trust for his wife and daughter. Lord Justice Moore put a different interpretation upon the statement, for the thought that the intention and effect of the declaration was to impress the shares with a trust on the part of Mr. Allan to legally transfer them to the trustees as soon as he could do so. I am not sure that I entirely agree with that interpretation. It appears to me that, putting the matter as high as possible for the appellant, the declaration came to this: the appellant, Mr. Allan, in effect said to his wife, 'I intend to settle these shares upon you and our daughter; it may take some time to complete the settlement, but in the meantime until the settlement is made I will consider myself a trustee of the shares, that is to say, I will not deal with them as

> my own and I will at the proper time transfer them to the trustees of the settlement upon the trusts which I may then declare'. I am not sure that that construction is right; but at all events it gives an intelligible meaning to the appellant's statement that he would hold the shares in trust and is consistent with the other facts of the case. But it is clearly not sufficient to enable the appellant to succeed in this appeal, for such a declaration left it open to him to frame and mould the trust at some future time as he might then think fit; it was not an immediate and complete declaration of trust, but merely a declaration of his intention to settle the shares and of his intention meanwhile to keep them *in medio*, so that they might be ready when the trust was effectively declared."

There must be consistency between the parol declaration and the subsequent deed. If I were satisfied that the declaration had been made I would be inclined to hold that there was no inconsistency here and that the appeal fell to be decided along the lines of the judgment of Pearson, J., in *F. v. The Commissioner of Income Tax* (Case No. 6) (4), 1 E.A.T.C. 36. It is true that the letter of June 3, 1955, refers to the settlement of the estate duty and goes on to say

> "Now that we know where we stand we can proceed with the settlement of your life interest from daddy's estate which you declared at the time of my wedding".

However, I do not regard this letter as unambiguous. The words "we can proceed" suggest that steps remained to be taken in order to implement an expression of intention. It is true that the income had been spent in paying off the estate duty and in meeting the building covenants and so can be said to have been used to benefit the children, but is it likely that the firm declaration would be made before these matters had been sorted out. If the eight children had enforceable interests Carlos and the appellant would have had to secure their consent before the income was used in this way. Of the children only Carlos has been called. He and the appellant were giving evidence of a conversation which took place six years ago, and it would be understandable if they were not clear as to its exact terms. The amended statement of facts states that the appellant made the declaration in the presence of her family. That is not strictly true as there were several absentees. There is no real evidence that the other children were informed of their rights. There is nothing in writing. If the eldest son Hubert, an alleged spendthrift, had asked for his share of the income before 1958 I am sure that he would have met with a refusal. It is of considerable significance that in her income tax returns for the years of income 1954 to 1957 (exhibits "B" to "E") the dependant children are shown as having no income of their own. Mr. Shah (D.W. 5) was unable to give a satisfactory explanation as to why his accounts did not reflect a declaration of trust in favour of the children. Then there is the question of the delay in preparing the deed. Carlos says this was because he was preoccupied with the affairs of the estate. Mr. Korde was left with the impression that Carlos was not serious about it. But what weighs with me most strongly is that the deed itself is silent as to any parol declaration in 1954. I cannot agree with Mr. Korde that it was not necessary to recite this all-important declaration in the deed. Firm instructions to prepare the deed were given only after the duty had been paid off. That was the time for making a resettlement of the income and capital of the estate in accordance with the appellant's wishes. In *Allan's* case (3), the respondent said that he would hold the shares in trust but the House of Lords held that that was not a sufficient declaration of trust. The appellant did nothing as positive as that in 1954. Also it is a point that by then she knew that she was going to be assessed in respect of the whole income of the estate. It was for her to satisfy the court that she had made a declaration.

of trust on a particular date which had the automatic effect of divesting herself of the income of the estate and of investing her children with it so that from that date they had enforceable interests. She has failed to do so. The appeals are dismissed with costs.

Appeal dismissed.

For the appellant:
Hunter & Greig, Kampala
K. Bechgard, Q.C., and *H.G. Hanbury-Sparrow*

For the defendant:
The Legal Secretary. E.A. High Commission
C.D. Newbold, Q.C., and *B.A.K. Le Champion* (Legal Secretary and Senior Assistant Legal Secretary, E.A. High Commission)

Henry Kato v R
[1960] 1 EA 981 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	24 October 1960
Case Number:	216/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Criminal law – Practice – Sentence – Accused charged under two statutes – All charges founded upon same incident – Plea of guilty to all charges – Whether accused should be punished twice upon charges laid under two statutes – Traffic Ordinance, 1951, *s*. 43, *s*. 57, *s*. 60 *and s*. 70 (*T*.) – *Penal Code s*. 9, *s*. 209, *s*. 212, *s*. 219A, *s*. 220, *s*. 230 (*T*.) – *Criminal Procedure Code*, *s*. 207 *and s*. 318 *and s*. 331 (*T*.) – *Penal Code*, *s*. 10 (*K*.).

Editor's Summary

The appellant was prosecuted in one criminal case before the magistrate at Masindi on three charges under the Traffic Ordinance 1951, namely, reckless driving, failing to report an accident and failing to stop after an accident. It was alleged that the appellant drove his lorry so recklessly that he "mowed down" three cyclists, one with a pillion passenger, that he failed to stop, and was only apprehended after his lorry had broken down. He pleaded guilty to these charges. In another criminal case founded on the same incident and facts the appellant was prosecuted on four charges of unlawfully doing grievous harm under s. 212 of the Penal Code. To these charges, which were heard by the magistrate on the same day as the other case, the appellant also pleaded guilty. The magistrate sentenced the appellant to one year's

imprisonment on the first count in the first case and imposed a global fine of Shs. 800/- or four months' imprisonment in default on the second and third counts and in respect of the second case he sentenced the appellant to six years' imprisonment on each of the four counts, all to run concurrently. On appeal,

Held –

(i) instead of a global fine a separate fine should have been imposed on each count.

(ii) if the Penal Code were to be invoked, the more appropriate section was s. 220 (*a*) under which the offence was punishable only as a misdemeanour, whereas a person convicted under s. 212 was liable to imprisonment for seven years.

(iii) there was only one act which was punishable under two different laws, namely, the Traffic Ordinance and the Penal Code, and in view of s. 20 of the Code, the court could only impose one punishment.

(iv) as the appellant had already been punished for reckless driving he could not be punished again for an offence under the Penal Code.

Sentence of six years' imprisonment set aside and a caution under s. 318 (1) (*b*) of the Criminal Procedure Code substituted. Appellant disqualified from holding a driving permit for three years.

Case referred to in judgment:

(1) *Mohanlal Nathoo Bakrania v. R.* (1951), 18 E.A.C.A. 248.

Judgment

Sheridan J: This appeal has been consolidated with Criminal Appeal No. 217 of 1960. Between them they tell a curious story.

On March 12, 1960, the appellant was before the magistrate, Masindi, in Masindi Criminal Case No. 52 of 1960 (Criminal Appeal No. 216 of 1960) on the following three charges under the Traffic Ordinance, 1951: (*a*) reckless driving contra s. 70 of the Ordinance (this section refers to the reckless driving of vehicles other than motor vehicles. The correct section is s. 43. This is but one of the instances of carelessness in the prosecution and hearing of this case. However, no objection has been taken to it); (*b*) failing to report an accident; and (*c*) failing to stop after an accident contra s. 57 (1) and (4) of the Ordinance. He pleaded guilty to these charges and the magistrate made a note "Further proceedings on Case No. 53/60".

In that case on the same day the appellant was charged on four counts of unlawfully doing grievous harm to four different people on March 11, 1960, at mile one Masindi – Atura Road, contra s. 230 of the Penal Code. The defence advocate pointed out at the trial, after the appellant had been charged, that this should be s. 212. The magistrate amended the charge accordingly and ruled, rightly in my view, that the appellant had not been prejudiced by this figurative mistake as the particulars clearly indicated an offence contra s. 212. In answer to each of these charges he said: "I admit it". The prosecuting officer then proceeded to outline the facts which were to the effect that the appellant drove his lorry in such a reckless manner that he "mowed down" three cyclists, one with a pillion passenger. He then failed to stop and was only apprehended after his lorry had broken down. It was clearly a bad case of reckless driving.

In the allocutus the appellant asked for leniency and further admitted his guilt. Without formally recording a conviction, as he should have done, the magistrate then remanded him in custody to March 26 for sentence.

On that date the magistrate remarked on the seriousness of the case and while observing that the appellant had no previous record and had unequivocally pleaded guilty, he proceeded to sentence him to six years' imprisonment on each of the four counts in Criminal Case No. 53/60 and to a year's imprisonment – the maximum term – on count one in Criminal Case No. 52/60 – these five sentences to run concurrently. On the second and third counts he imposed a global fine of Shs. 800/- or four months' imprisonment in default. There was a further order that the fine, if paid, should be distributed between the three cyclists as compensation for damage to their bicycles and that Shs. 200/- should be used to defray the cost of towing the appellant's lorry to Masindi. There is nothing on the files to indicate that the fines have been paid. There is now no appeal with regard to the conviction and sentence on the second and third counts in Criminal Case No. 52/60 and all I need say about it is that a separate fine should have been imposed in respect of each count.

Mr. Maloney, for the respondent, concedes that this is an unusual case and that the sentences are excessive, but he seeks to uphold the convictions for unlawfully doing grievous harm. He submits that sections of the Penal Code can be applied to offences for which they are not primarily designed. In my

experience, this is the first case in which a prosecution arising out of one set of facts has been laid both under the Traffic Ordinance and under the Penal Code. If the Penal Code were to be invoked, the more appropriate section would be s. 220 (*a*) which covers the driving of a vehicle by a person in a manner

so rash or negligent as to endanger human life or to be likely to cause harm to any other person, but an offence under this section is punishable only as a misdemeanour whereas a person convicted under s. 212 is liable to imprisonment for seven years. If the victims in this case had died, the appellant would have been liable under s. 219A of the Code to a maximum of three years' imprisonment or Shs. 400/- fine or both. To my mind, this prosecution smacks of persecution.

At first blush I would say that reckless driving and unlawfully doing grievous harm are mutually inconsistent in that in the case of the latter offence, there must at least be the intention to do the act. Section 9 of the Code provides that subject to express provisions relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will or for any event which occurs by accident. I would say that when the appellant collided with the cyclists it was an act independent of his will and that it is only if the words "by accident" can be construed to exclude acts which are caused neither wilfully nor by negligence that the conviction under s. 212 can be upheld but that would seem to contradict the opening words of s. 9.

A common instance of an offence contra s. 212 would be where A intentionally inflicted a beating on B which resulted in B's arm being fractured and the prosecution, being unable to establish the intention to cause that grievous harm and so secure a conviction under s. 209 of the Code, is content with a conviction for the lesser offence under s. 212, the beating being unlawful albeit intentional. However, in *Mohanlal Nathoo Bakrania v. R.* (1) (1951), 18 E.A.C.A. 248, where the corresponding Kenya section (s. 230) was under consideration it was held that it covered cases of causing grievous harm by criminally reckless or negligent conduct. To quote from the judgment of the Court of Appeal at p. 249:

> "Prima facie the word 'unlawfully' includes all unlawful acts whether done intentionally or by criminal recklessness or negligence. It is true that in some sections of the Code the context requires it to be read as limited to intentional acts or conduct, as, for example, in s. 216 (1) and (2); in s. 228, and again in s. 233 (2). On the other hand there is no such restriction on its meaning in s. 233 (1). The intentional causing of grievous harm is made an offence by the provisions of s. 227, cl. 1, and is punishable with imprisonment for life. It therefore seems reasonable to conclude that s. 230 with its lesser maximum punishment of seven years is intended to be limited to cases where grievous harm is caused otherwise than in the circumstances contemplated in s. 227. These cases would include the causing of grievous harm by criminally reckless or negligent conduct."

In that case s. 10 of the Kenya Penal Code which is in the same terms as the Uganda s. 9 was not considered. For the reasons which I have attempted to set out, I respectfully doubt the correctness of that decision; nevertheless, I am bound by it. It follows that while I disapprove of the way in which these convictions have been obtained, I cannot interfere with them. But that is not the end of the matter. Section 20 of the Code provides:

> "A person shall not be punished twice either under the provisions of this Code or under the provisions of any other law for the same offence."

Section 2 of the Code defines "offence" as "an act, attempt or omission punishable by law". In the instant case there was only one act which was punishable under two different laws, namely, the Traffic Ordinance and the Penal Code, and in view of s. 20 of the Code, the court could only impose one punishment. The appellant had already been punished for reckless driving and he could not be punished again for an offence under the Penal Code.

When he was charged for the latter offence, he could, under s. 207 (5) (*b*) of the Criminal Procedure Code, have pleaded that he had been previously convicted of the same offence and the court would then have had to try the issue whether such plea was true in fact or not. Instead he pleaded guilty and I cannot go behind that plea; but the punishment must be set aside.

Accordingly I set aside the six years' imprisonment on the four counts in Criminal Case No. 53/60 and substitute a caution under s. 318 (1) (*b*) of the Criminal Procedure Code. Further, I reduce the one year on count one in Criminal Case No. 52/60 to nine months.

Finally, as it is desirable to keep the appellant off the roads for some time, in exercise of the powers conferred on me by s. 60 (1) (*a*) of the Traffic Ordinance by virtue of s. 331 of the Criminal Procedure Code, I cancel the appellant's driving permit and disqualify him from obtaining another permit for a period of three years from the date of his conviction.

Sentence of six years' imprisonment set aside and a caution under s. 318 (1) (*b*) *of the Criminal Procedure Code substituted. Appellant disqualified from holding a driving permit for three years.*

For the appellant:
Carasco & Mistry, Kampala
K. S. Mistry

For the respondent:
The Attorney-General, Uganda
M. T. Maloney (Crown Counsel, Uganda)

J A Dias v Ahmed Salum Swedan
[1960] 1 EA 984 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-salaam
Date of judgment:	6 December 1960
Case Number:	25/1960
Before:	Law J
Sourced by:	LawAfrica

[1] Appeal – Time for lodging appeal – Time lost in obtaining copies of decree and judgment – Time lost during application for review – Whether such time to be computed – Indian Limitation Act, 1908, *s.* 5, *s.* 12 (2) *and the Schedule thereto, Art.* 156.

[2] Practice – Pleading – Set-off and counter-claim – When set-off and counter-claim may be pleaded – Indian Code of Civil Procedure, 1908, *O. VIII, r.* 6.

Editor's Summary

The plaintiff sued the defendant for the return of Shs. 3,200/- alleged to have been paid to the defendant as a deposit. The claim was contested and the defendant pleaded set-off and counter-claimed Shs. 5,000/- averring that the Shs. 3,200/- was part payment by the plaintiff on the sale of a motor vehicle. The magistrate rejected the evidence of the plaintiff and gave judgment for the defendant. On appeal the plaintiff contended that the magistrate had no jurisdiction to entertain the counter-claim as it was incompetent in the proceedings before him and that he had not considered all the evidence. The respondent objected that the appeal had been lodged out of time.

Held –

(i) when computing the time within which an appeal should be lodged, an appellant is entitled to deduct the period during which an application for review is pending, if that application is filed promptly and prosecuted diligently; likewise the additional time requisite for obtaining a copy of the judgment and decree for an appeal is by s. 12 (2) of the Indian Limitation Act, 1908, specifically excluded from the computation of time.

(ii) a defendant who has a claim against the plaintiff for a sum exceeding the plaintiff's claim can assert that claim by way of set-off and counter-claim provided

(*a*) the requisite court fee is paid as on a claim contained in a plaint;

(*b*) the set-off and counter-claim is for an ascertained amount;

(*c*) the amount is recoverable by the defendant (or by all the defendants if more than one) from the plaintiff (or from all the plaintiffs if more than one);

(*d*) the amount is within the pecuniary jurisdiction of the court in which the suit is brought;

(*e*) both parties fill, in the defendant's claim, the same character as they fill in the plaintiff's suit.

(iii) since the magistrate's findings on the evidence were founded almost entirely on the credibility of witnesses he had seen and heard an appellate court would not readily interfere with those findings and there were no grounds for such interference in the instant case.

Appeal dismissed.

Cases referred to in judgment:

(1) *Brij Indar Singh v. Kanshi Ram* (1917), 45 Cal. 94 (P.C.).

(2) *Kanji Devsi v. Velji Haridas* (1950), A.I.R. Bom. 350.

(3) *Saya Bya v. Maung Kyaw Shun* (1924), 2 Rang. 276; 82 I.C. 721.

Judgment

Law J: This is an appeal against the judgment and decree in Dar-es-Salaam District Court Civil Case No. 1214 of 1959.

The first question for decision is whether the appeal has been lodged in time. By Art. 156 of the Schedule to the Limitation Act, a civil appeal to the High Court must be lodged within ninety days from the date of the decree or order appealed from. In this case the decree was passed on April 4, 1960, and the appeal was lodged on August 25, 1960, involving a lapse of 143 days. Mr. Chaddah for the appellant submits that the appeal is nevertheless in time, having regard to the provisions of s. 5 of the Act, as sufficient cause exists for preferring the appeal out of time. Mr. Chaddah claims that the following periods should be excluded from computation:

> Seventeen days which elapsed between his application for copies of the decree and judgment required for the purpose of an application for review made to the lower court;
>
> Thirty-four days which elapsed between his application for a review and the magistrate's decision thereon, dismissing the application; and
>
> Twelve days which elapsed between his application for copies of the decree and judgment required for the purpose of lodging the appeal.

These periods total sixty-three days, and if excluded from computation would result in the appeal having been lodged within eighty days and thus being within the period of limitation prescribed for appeals. There is ample authority for the proposition that an appellant is entitled to deduct the period during

which an application for review is pending, where the application for review has been filed with promptitude and prosecuted with diligence and there is reasonable prospect that the applicant will obtain all by the review that he could obtain by an appeal (*Brij Indar Singh v. Kanshi Ram* (1) (1917), 45 Cal. 94

(P.C.)). I am satisfied that the review proceedings in this case were filed with reasonable promptitude and prosecuted with diligence, and that the thirty-four days spent on these proceedings should be excluded from computation.

There remain the two periods of seventeen and twelve days respectively which elapsed between the applications for copies of the decree and judgment required for the review proceedings and for the appeal. The first period was, in my opinion, part and parcel of the review proceedings. As regards the time requisite for obtaining a copy of the decree and judgment for the appeal, that is specifically excluded from the computation of time by s. 12 (2) of the Act. Mr. Harjit Singh for the respondent submits that two periods of time cannot be allowed in respect of applying for and obtaining copies of the same decree and judgment, and he cites in support a recent Indian case (*Kanji Devsi v. Velji Haridas* (2) (1950), A.I.R. Bom. 350) which is unfortunately not available here. Without reading that case, I cannot be satisfied that it applies to separate applications for copies of a decree and judgment for two separate objects – a review and an appeal. In these circumstances, I consider that both periods should be excluded from computation, and I hold that this appeal has been lodged in time.

As regards the appeal itself, the first ground (described by Mr. Chaddah as the main ground) is:

> "That the learned magistrate erred in allowing the respondent to continue their (sic) action in respect of counter-claim as the counter-claim itself is incompetent and the court has no jurisdiction to entertain it as such".

In the course of the hearing of the appeal, Mr. Chaddah conceded that the point was without real merit and indicated that he no longer relied on this first ground of appeal. The point is, however, of sufficient interest to deserve consideration, especially as it would seem not to be covered by any authority. It is true that the Indian Code of Civil Procedure nowhere deals with the bringing of a cross-suit by a defendant in the form of a counter-claim. By O. 8, r. 6, a defendant may set off against the plaintiff's demand, in a suit for the recovery of money, any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, if both parties fill the same character as they fill in the plaintiff's suit. By sub-r. 2, the written statement of the defendant claiming such a set-off shall have the same effect as a cross-suit so as to enable the court to pronounce a final judgment in respect of both the original claim and of the set-off. It will be noticed that under this rule a set-off is not limited to the amount of the plaintiff's claim, but may exceed it, and the court may make a decree in the defendant's favour for any amount recovered by the defendant in excess of the amount recovered by the plaintiff. In the suit now under appeal, the plaintiff claimed the return of Shs. 3,200/- paid by him allegedly as a deposit. The defendant alleged that this sum was a part-payment of an agreed sum of Shs. 5,000/- payable on the sale of a motor vehicle, and he prayed to set-off and counter-claim this amount. This form of pleading is in accordance with the practice of the courts in Tanganyika for the last forty years. Can it be said that, in entertaining counter-claims, the courts have been acting without jurisdiction, because the right to counter-claim is not specifically conferred in the Code? I think not. In Mulla's Commentary on the Code of Civil Procedure (10th Edn.), at p. 581, the following appears at the end of the notes to O. 8, r. 6:

> "Counter-claim. Though the Code does not provide for counter-claims, there is nothing to prevent a court from treating the counter-claim as a plaint in a cross-suit, and hearing the two suits together, provided the requisite court fee on the counter-claim has been paid."

An Indian case (*Saya Bya v. Maung Kyaw Shun* (3) (1924), 2 Rang. 276; 82 I.C. 721) is quoted as authority for this proposition, which tends to support the view that the practice which has evolved in Tanganyika does not offend against the provisions of the Code. In my view, a defendant who has a claim against the plaintiff for a sum exceeding the amount of the plaintiff's claim can assert his claim in the form of a set-off and counter-claim, provided:

(*a*) the requisite court fee is paid, as on a claim contained in a plaint;

(*b*) the set-off and counter-claim relate to an ascertained amount;

(*c*) the sum claimed is legally recoverable;

(*d*) it is recoverable by the defendant or by all the defendants if more than one;

(*e*) it is recoverable from the plaintiff or all the plaintiffs if more than one;

(*f*) it does not exceed the pecuniary jurisdiction of the court in which the suit is brought; and

(*g*) both parties fill, in the defendant's claim to set-off and counter-claim, the same character as they fill in the plaintiff's suit.

The counter-claim in the suit now under consideration fulfilled all these requirements and was accordingly competent and within the jurisdiction of the lower court to try. The first ground of appeal fails.

The second ground of appeal is that the learned resident magistrate failed to consider all the material facts and circumstances in this case, especially in doubting the authenticity of a document without any proper evidence before him. The document in question was a receipt produced by the plaintiff. The magistrate expressed doubts as to its authenticity. Mr. Chaddah submits that if the magistrate had such doubts, he should have referred the matter to the police for investigation. But that is no part of a court's duties. A suit is decided on the evidence adduced by the parties. In the suit now appealed from, the defendant deposed that the receipt was a forgery, and the magistrate expressed the opinion that it probably was. I can see nothing wrong in this. In any event the magistrate did not base his decision on a finding that the receipt was in fact a forgery. As he said:

> "the case resolves itself into a question of which (party) I believe. This fortunately is a simple matter. While neither the plaintiff nor defendant were perfect witnesses, the former's evidence was characterised by a shifty evasiveness which conveyed the worst possible impression, while the latter, though irritatingly talkative and liable to answer the question he thought counsel ought to have asked, appeared quite frank when kept on the paths of relevancy. I unhesitatingly prefer the defendant's word to the plaintiff's".

An appellate court would be slow to interfere with such a finding as to credibility, arrived at by a magistrate who has had the advantage of hearing and seeing the witnesses concerned. Mr. Chaddah has certainly not succeeded in persuading me that the magistrate came to a wrong conclusion. Having carefully studied the record, I have no doubt he was right. The second ground of appeal also fails, with the consequence that this appeal is dismissed, with costs to the respondent.

Before I conclude, I must once again refer to a matter which I have more than once touched on before, and that is the way civil suits are conducted in the district courts by certain advocates, including the two who have appeared in this appeal. The record in the suit now appealed from is typical of several I have recently seen. The actual trial of the issues which the parties want decided takes up but a small part of the record; the rest consists of so-called

preliminary points, which are argued at great length and take up much time, but are almost invariably futile and consequently fail. The unfortunate parties naturally have to bear the costs of these intellectual exercises. In this particular case, the suit was first set down for hearing on June 29, 1959. Mr. Harjit Singh took the preliminary point that the plaint disclosed no cause of action. Two days were devoted to argument on this point, which the learned magistrate rejected, with costs to the plaintiff, on July 10, 1959. The hearing of the suit was then fixed for August 18, 1959, and the proceedings opened with an application by Mr. Harjit Singh for a change of venue, on the grounds apparently of alleged bias on the part of the magistrate, allegations which I have no doubt were completely unfounded. The application was rejected. One might have hoped that the stage had now been reached when the issues which the parties wanted decided would be put before the court. Instead Mr. Chaddah then made a lengthy submission that the counter-claim disclosed no cause of action and that the procedure by way of counter-claim was incompetent, although it is a procedure which he admits he himself has followed, even as recently as June, 1960, in another suit. This submission took three days to argue, and was the subject of a long and careful ruling delivered on October 22, 1959, rejecting the submission with costs to the defendant. In the course of this ruling, the learned magistrate had occasion to say:

> "Finally, I must address counsel, and I do so most reluctantly, on their incessant bickering and interruptions not only between themselves but also, with the Bench. I can only quote to them what was said by Singleton, L.J., in *Beevis v. Dawson*, [1956] 2 All E.R. at page 837. With this in mind I am sure that they will proceed to trial protecting their clients' interests to the best of their skill and at the same time rendering every assistance to the court which will endeavour to see that justice is done".

The hearing was then fixed for January 25, 1960, and took two days. Judgment was delivered in favour of the defendant on April 4, 1960. On July 12, 1960, another magistrate heard an ex-parte application by Mr. Chaddah for a review of the judgment and decree, on the grounds that new and important evidence had been discovered which after due diligence could not be discovered at the time of the hearing. In fact the evidence had been known to the plaintiff ever since the events giving rise to the suit. This application was dismissed on July 30, 1960. The next step was the instant appeal. The typescript of the subordinate court proceedings occupies thirty-six pages; of these thirteen relate to the actual hearing and judgment, and twenty-three to the so-called "preliminary points" and the application for a review, every one of which failed. I need hardly say that the parties have to pay the expenses of these abortive proceedings. I again remind counsel that the primary object of civil proceedings is the just determination of the issues which the parties have submitted for the decision of the court. The stage is approaching when this court will have to intervene to protect those parties from having to bear the expense of collateral proceedings, where in the opinion of this court those proceedings are instigated by the advocates without specific instructions or are frivolous, unnecessary, vexatious or designed to delay or to cause undue inflation of the bills of costs for which the parties are ultimately liable. Such intervention will take the form of referring the proceedings to the Law Society, for disciplinary action, or of making the advocates personally liable for costs unnecessarily incurred.

Appeal dismissed.

For the appellant:
M. S. Chaddah, Dar-es-Salaam

For the respondent:
Harjit Singh, Dar-es-Salaam

Tarlochan Singh Rai v J S Gopal and Others
[1960] 1 EA 989 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	2 November 1960
Case Number:	30/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Advocate – Negligence – No cross-examination by advocate on details of a claim – No material given on which to cross-examine – Failure to appeal against judgment – Advocate advised not to appeal – What constitutes professional negligence.

Editor's Summary

The plaintiff claimed Shs. 33,093/71 damages for negligence against the first defendant, an advocate, and against the second defendants, a firm of advocates consisting of the first defendant and one, Haque. The firm came into existence on March 1, 1957. The sum claimed was the amount which the High Court in another suit had awarded against the plaintiff personally instead of in his capacity as receiver for a firm known as Kawempe Saw Mills and Furniture Mart. In January, 1956, the plaintiff, who had been appointed receiver of this firm, instructed the first defendant to apply for the directions of the court upon a claim against the firm for Shs. 33,091/71. On this application which was ex parte, the court orally ordered that the claim be rejected but no formal order was drawn up. Later in 1957 the claimant sued the plaintiff, as receiver, for this sum and the defence filed for the plaintiff by the first defendant denied liability and relied on the oral order. The court found for the claimant and the first defendant filed notice of appeal and then consulted counsel who advised against an appeal. Subsequently the successful claimant, through his advocate, sought to enforce the judgment against the plaintiff personally. The plaintiff in his action against the defendants alleged that they were negligent in not challenging at the trial the details of the claimant's account and in not prosecuting the appeal. The defendants alleged that the plaintiff had given them no material upon which to challenge the account and that they had not undertaken to appeal but had also been advised not to do so.

Held –

(i) the plaintiff failed to provide the first defendant with any material on which he could fairly challenge the account for Shs. 33,093/71.

(ii) the first defendant had not contracted to appeal and he was not in breach of any duty in tort when he omitted to appeal against a judgment which, at that time, appeared to be perfectly sound.

(iii) the plaintiff had failed to establish his claim and, consequently, the second defendants were not liable.

(iv) in any event the plaintiff remained the first defendant's personal client after the formation of the

partnership in March, 1957, and during the consideration of a possible appeal arising out of the suit, and on that ground, too, the second defendants were not liable.

Suit dismissed with costs.

Case referred to in judgment:

(1) *British Homes Ass. Corp. Ltd. v. Paterson*, [1902] 2 Ch. 404.

Judgment

Sheridan J: The plaintiff claims Shs. 33,093/71 plus interest at six per cent. per annum as damages for negligence against the

defendants. The plaintiff is an accountant. The first defendant is an advocate and the second defendants are a firm of advocates consisting of the first defendant (Mr. Gopal, D.W.1) and Mr. Haque (D.W.2) which was entered into on March 1, 1957.

The facts leading up to this claim are somewhat tortuous and it is necessary to set them out in detail. On March 25, 1955, by order of the court in Civil Case No. 312 of 1954, the plaintiff was appointed receiver of the firm of Kawempe Saw Mills and Furniture Mart (hereinafter referred to as "Kawempe"). In January, 1956, he instructed Mr. Gopal to make an application to the court for directions, inter alia, as to the rejection of a claim for Shs. 33,091/71 made against Kawempe by one Shantilal Patel. It is pleaded that on February 13, 1956, GRIFFIN, C.J., made a verbal order that the plaintiff, as receiver, should reject this claim. No formal order was drawn up.

On August 2, 1956, Shantilal instituted a suit against the plaintiff, as receiver of Kawempe, claiming Shs. 33,093/71 as a debt due by Kawempe to him (H.C.C.C. No. 104 of 1956 – Jinja Registry). The plaint was filed by Messrs. Hunter & Greig. Mr. Gopal, on behalf of the plaintiff, filed a written statement of defence repudiating the claim and relying on the verbal order of Griffin, C.J. On May 16, 1957, the suit was heard by Mckisack, C.J., and on July 19 judgment was entered in favour of Shantilal.

At the trial Mr. Gopal abandoned the second line of defence, as he was obliged to, in the absence of a formal order. In the plaint (para. 8 (*c*) this is relied upon as a particular instance of negligent conduct on the part of Mr. Gopal. It appears now that Mr. James, for the plaintiff, does not rely on this ground. All I need say about the verbal order, if it was made, is that it was made on an ex parte application and so could not deprive Shantilal of his right to try and assert his claim. It merely put him to proof of it. But Mr. Gopal's failure to challenge the correctness of Shantilal's account is made a ground of complaint of negligent conduct by Mr. Gopal (para. 8 (*b*) of the plaint). Despite the plaintiff's contention to the contrary, I am satisfied that he failed to provide Mr. Gopal with any material on which he could fairly cross-examine Shantilal or his witness, Arjan Singh, a partner in Kawempe, as to the accuracy of the account. In cross-examination Arjan Singh admitted that when he signed Shantilal's account, he had no knowledge of it. Mohinder Singh, another partner, who was called for the present plaintiff, also admitted that he had no knowledge of Shantilal's claim. This may be gathered from p. 15 and p. 18 of the record of E.A.C.A. Civil Appeal No. 35 of 1958 (exhibit K). In these circumstances it is not surprising that Mr. Gopal refrained from challenging the account generally or in respect of any particular items. Para. 8 (*b*) also fails as an instance of Mr. Gopal's negligent conduct.

On August 2, 1957, Mr. Gopal filed a notice of appeal (exhibit C). A conflict now arises as to whether this was done on the plaintiff's instructions that he desired to appeal or whether, as Mr. Gopal contends, this was done in order to safeguard the right of appeal, a matter on which a decision would be taken after Mr. Gopal had obtained and perused the judgment. He says that having done this and having taken further advice from Mr. Phadke (P.W. 2), with the plaintiff's concurrence, on September 30 it was decided not to appeal and the plaintiff was so advised.

Mr. Phadke was of the firm opinion – and still is – that an appeal would be fruitless. By the time he gave that opinion only one day remained for filing the memorandum of appeal. This would point to slackness on the part of Mr. Gopal, provided, of course, that an appeal had any chance of success. The plaintiff states that the first intimation which he had that his appeal was not being prosecuted was on October 15, 1957, when the decree holder served on him a notice to show cause under O. 19, r. 34.

On this I am satisfied that the plaintiff left the question of a possible appeal entirely in the hands of Mr. Gopal with liberty to consult a senior counsel. He paid no fees and no decision was taken. Mr. Gopal had not contracted to appeal and he was not in breach of any duty in tort when he omitted to appeal against a judgment which, at that time, appeared to be perfectly good on the face of it.

On October 29, 1957, before Keatinge, J., Mr. Phadke successfully argued that the application was misconceived in that the plaintiff, as a receiver appointed by the court, was not personally liable. Mr. Hooper, of Hunter & Greig, agreed that this was so and the application was dismissed (p. 21 of exhibit K). This has some significance because at the trial Mr. Keeble, of the same firm, had submitted that, although the plaintiff was a proper party as receiver, he was nevertheless personally liable. If this remark was correctly recorded Mr. Keeble seems to have overlooked para. 2 and para. 3 of his plaint which averred that the plaintiff was being sued only in his capacity as receiver of Kawempe and in respect of a debt due by Kawempe to Shantilal. It is true that the decree (p. 50 of exhibit K) does not so describe the plaintiff, but Mr. Gopal denies that he had anything to do with the drafting of it and, I was informed from the Bar, that in accordance with a practice which has been only recently changed, it was in fact drawn up in the registry without reference to the advocates engaged in the suit. Despite Mr. Hooper's admission – which one would have thought gave rise to an estoppel – on February 17, 1958, Mr. Keeble applied under O. 19, r. 46 to attach the plaintiff's share in a partnership. Although Mr. Phadke vigorously opposed the application, McKisack, C.J., held that the decree was against the plaintiff in his personal capacity. I am convinced that this decision came as "a bolt from the blue" to all concerned. Mr. Phadke sought unavailingly to appeal to the East African Court of Appeal. Without giving reasons the court dismissed the appeal.

This brings me to the remaining ground of negligence which is:

> "8.(*a*) He failed to plead and/or argue that the said suit was incorrectly instituted against the plaintiff but should have been instituted against the said firm of Kawempe Saw Mills and Furniture Mart or the partners thereof."

In this context I would first remark that this could not have been made a ground of appeal as it was neither pleaded nor argued in the court of first instance and if the plaintiff's advocate had sought to argue it I am fairly sure that the Court of Appeal would have declined to listen to him. Mr. James submits that this ground covers the failure of Shantilal to obtain the leave of the court to sue the plaintiff as receiver and the further failure of Mr. Gopal to resist the suit for the absence of such leave. Leave was probably necessary because there was no suggestion that the plaintiff had in any way misconducted himself as receiver. Nevertheless the plaintiff is bound by his particulars and I can only consider whether or not the suit should have been properly instituted against Kawempe itself instead of against the plaintiff as receiver. Without going through the authorities this appears to be a vexed question of law, and it may be that the correct mode of approach by Shantilal should have been by way of an application in the cause in which the plaintiff had been appointed as receiver of Kawempe. In addition to consulting Mr. Phadke, an advocate of considerable experience, the plaintiff admits that he consulted Mr. Nazareth, Q.C., of Nairobi and, apart from the order of McKisack, C.J., with which I respectfully disagree, it does not seem to have dawned on anyone that the defendants could be held to have been professionally negligent in that they had allowed judgment to be entered against the plaintiff in his personal capacity, until the letter dated December 18, 1958, addressed by Messrs. Baerlein & James to Mr. Haque (exhibit H) – nearly eighteen months after the

disposal of the suit. The previous letters addressed to Mr. Gopal (exhibits F and G) make no such suggestion. In view of the unexpected and unmerited result of the order for the plaintiff, I should have thought that an application to the Court of Appeal to appeal out of time – even at a late stage – might have been sympathetically considered, but this would be no concern of the defendants as they disappeared from the picture in October, 1957.

The principles governing the duty of care owed by an advocate to his client in contentious matters are set out in Halsbury's Laws of England (2nd Edn.), Vol. 31, p. 133 (para. 180). It is not for every mistake that an advocate can be held to be professionally negligent. If it were so, his life would be intolerable. If Mr. Gopal erred, he erred in good company. I find that the plaintiff has failed to establish his claim.

It follows from this that the second defendants are not liable. In case I am wrong about this I would say that on the evidence, the plaintiff remained Mr. Gopal's personal client after the formation of the partnership in March, 1957, and during the consideration of a possible appeal arising out of the suit. There is nothing in law to prevent this. Mr. Gopal's authority continued after judgment and so long as the right of appeal existed. That was not a fresh matter. See Cordery's Law Relating to Solicitors (4th Edn.), p. 135. He was acting as a principal on his own account and the plaintiff knew of this (*British Homes Ass. Corp. Ltd. v. Paterson* (1), [1902] 2 Ch. 404). The notice of appeal (exhibit C) and the letters (exhibits F and G) to which I have already referred, support this conclusion.

The suit is dismissed with costs.

Suit dismissed with costs.

For the plaintiff:
Baerlein & James, Kampala
A. I. James

For the first defendant:
Wilkinson & Hunt, Kampala
P. J. Wilkinson, Q.C., and *B.E. D'Silva*

For the second defendants:
Korde & Esmail, Kampala
M. L. Patel

The Insurance Company of North America v Baerlein and James
[1960] 1 EA 993 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	11 October 1960
Case Number:	982/1959
Before:	Sheridan J

Sourced by: LawAfrica

[1] Advocate – Negligence – Advocate instructed to prepare bill of sale and guarantee – Documents held invalid by court – Whether circumstances amount to negligence – Measure of damages – Indian Contract Act, 1872, *s.* 127 – *Evidence Ordinance*, *s.* 91 (*U.*).

Editor's Summary

The plaintiff sued the defendants, a firm of advocates, for damages for breach of contract plus Shs. 8,933/15 representing costs incurred in an unsuccessful suit. The plaintiff had consulted the defendants regarding Shs. 93,352/40 due to them from their agent at Kampala, one Howitt. It was agreed that this sum which represented premiums collected by Howitt for the plaintiff should be treated as a loan to him and its repayment should be secured by a bill of sale, the assignment of two life insurance policies and a guarantee by Mrs. Howitt. The defendants were instructed to prepare the necessary documents which they did. A bill of sale was prepared embodying a list of chattels including a car which was to be brought in at a future date and in the guarantee the bill of sale was treated as the consideration. Subsequently, the plaintiffs sued and having failed to recover anything from Mr. Howitt sued Mrs. Howitt under her guarantee. The action was dismissed, the High Court holding that the bill of sale was absolutely void and that the guarantee was void for want of consideration. The plaintiffs thereupon sued the defendants alleging negligence. At the trial the main issue was whether the guarantee was supported by consideration.

Held –

(i) the plaintiffs could only recover for default under the bill of sale; if the bill of sale was void there could be no default under it and so the guarantee was useless as it was limited to what should be paid under a valid bill of sale.

(ii) the bill of sale was entered into before the guarantee; consequently there was no fresh consideration to support the guarantor's promise to pay on default by the principal debtor.

(iii) it was a condition of the guarantee that there should be a valid and enforceable bill of sale and as there was not such a bill owing to the defendants' mistake, the guarantor could avoid liability and the plaintiffs were unprotected.

(iv) the negligent drafting of and defects in the bill of sale and the guarantee went beyond an error of judgment and constituted professional negligence for which the defendants were liable in damages.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Morley v. Boothby*, 130 E.R. 455.

(2) *Frith v. Frith*, [1906] A.C. 254.

(3) *Turner v. Forwood and Another*, [1951] 1 All E.R. 746.

(4) *Nanak Ram v. Mehin Lal* (1877), 1 All. 487.

(5) *Ghulam Hussain v. Faiyaz Ali* (1940), 15 Luck. 656.

Judgment

Sheridan J: By an amended plaint dated January 22, 1960, the plaintiffs claim Shs. 82,480/81 damages against the defendants for breach of contract plus Shs. 8,933/15 representing the costs which they incurred in their unsuccessful suit against Mrs. Howitt (P.W. 2) in Uganda H.C.C.C. No. 355 of 1958 (exhibit E in the case file). The plaintiffs are an insurance company and the defendants are a firm of advocates carrying on business at Jinja and in Kampala. Their Kampala branch is managed by Mr. Tron, an advocate.

The facts leading up to this claim are not really in dispute, the defendants having elected not to call any evidence and they are as follows:

In March, 1956, the plaintiffs appointed a Mr. Howitt to be their chief insurance agent in Kampala. He was authorised to seek and receive premiums from customers and to account for them to the plaintiffs. He failed to do so regularly and by September, 1957, he was indebted to the plaintiffs in the sum of Shs. 93,352/40. In that month Mr. Riley (P.W. 1), the plaintiffs' chief accountant who lives in Johannesburg, came to Kampala in order to try and sort the matter out. Between September 26 and 30 he had conversations with Mr. and Mrs. Howitt, the outcome of which was that the plaintiffs agreed to reinstate Mr. Howitt as their chief agent provided that the debt was treated as a loan to him and that its repayment was secured by (1) a bill of sale; (2) the assignment of two life insurance policies; (3) a guarantee by Mrs. Howitt that she would meet any default in payment by Mr. Howitt or in the event of the agency agreement being terminated, Mr. Tron was instructed to prepare the necessary documents and he did so. They are respectively exhibits A, C and B. It is agreed that the guarantee was the last document to be signed.

The list of chattels embodied on the schedule to the bill of sale was prepared by Mr. Howitt and Mr. Riley. It comprises office furniture, household effects and a Peugeot car which has to be taken as included in the schedule as from January 1, 1958, to the total value of Shs. 27,465/-. According to Mr. Riley, Mr. Tron brought up the question of consideration for the guarantee and stated that he considered that he could, somehow, bring in the bill of sale as consideration. He further informed Mrs. Howitt, before she signed the guarantee, that he had a bill of sale. Mrs. Howitt confirmed this. Under its terms the plaintiffs were entitled to retain all commission due to Mr. Howitt in his capacity as their agent in payment of the debt. He also undertook to pay twenty-five per cent. of all commission credited and/or paid to him on or after February 1, 1958, by the Manufacturers' Life Insurance of Canada.

The guarantee – omitting provisions which do not apply – is in the following terms:

"Guarantee.

"In consideration of the Insurance Company of North America of Cargen House, P.O. Box 20,000, Nairobi, Kenya (hereinafter referred to as the Company), having agreed to the request of Sydney Warhurst Howitt (hereinafter referred to as the debtor) that he be allowed to pay to the said Company the sum of Shillings Ninety-three thousand three hundred and fifty-two and cents forty in which sum he is indebted to the Company by instalments as set out in the Bill of Sale entered into between the debtor and the Company and dated the 30th of September, 1957.

"Now I, Esme Leslie St. Vincent Howitt of P.O. Box 3108, Kampala (hereinafter called the guarantor), hereby undertake and agree with the Company to pay to the Company such sum or sums as shall from time to time or at any time become due to the Company from the debtor under the said Bill of Sale and not paid by him when payment shall become due and to recoup and indemnify the Company for any loss sustained by it

owing to the failure of the debtor to pay such sum or sums.

> "2. In the event of the debtor failing, refusing or neglecting to pay to the Company such sum or sums as may for the time being be due from him or of any petition being filed by or against him under the bankruptcy laws or of his compounding or attempting to compromise with his creditors or of the Chief Agency agreement entered into between the Company and the debtor and dated the 30th day of September, 1957, being cancelled the Company shall be entitled to recover from the guarantor such sum or sums . . ."

On January 14, 1958, the plaintiffs terminated Mr. Howitt's appointment. At that date he owed them Shs. 82,580/81, allowance being given to him in respect of the first twelve items in the bill of sale which the plaintiffs took over by consent at their agreed valuation of Shs. 3,990/-. The debt had been further reduced as a result of commission earned by Howitt and partly as a result of premiums paid to the plaintiffs.

The plaintiffs were unable to recover anything further from Mr. Howitt who is a man of straw and recourse was had to Mrs. Howitt. This resulted in H.C.C.C. No. 355 of 1958 in which the plaintiffs' claim against her under the guarantee was dismissed by Mr. Justice Lewis who held that the bill of sale was absolutely void and that the guarantee was void for lack of consideration. Hence the present suit. It is agreed that I have to decide the question whether or not there is consideration for the guarantee de novo uninfluenced by the judgment of Mr. Justice Lewis.

It is now conceded that the bill of sale is void for non-registration in time and that it is not in proper form – not all the chattels set out in the schedule being capable of identification. Also it purported to assign the Peugeot car in futuro.

The controversy rages round the presence or absence of consideration for the guarantee. The relevant provision of the Indian Contract Act is s. 127 which provides:

> "Anything done, or any promise made, for the benefit of the principal debtor may be sufficient consideration to the surety for giving the guarantee."

Mr. Salter, for the defendants, submits that there is sufficient consideration for the guarantee in that there was inconvenience to the plaintiffs and benefit to Howitt. He relies on *Morley v. Boothby* (1), 130 E.R. 455, where at p. 457 Best, C.J., said:

> "No court of common law has ever said that there should be consideration directly between the persons giving and receiving the guaranty. It is enough if the person for whom the guarantor becomes surety has benefit, or the person to whom the guarantee is given suffers inconvenience, as an inducement to the surety to become guaranty for the principal debtor."

Here Mr. Howitt and Mrs. Howitt had agreed that the debt for which the plaintiffs could have sued could be paid by instalments. To that extent the plaintiffs were inconvenienced and Mr. Howitt was benefitted and that was the inducement to Mrs. Howitt to help him as otherwise, to use her own words at the previous trial, "I realised that my husband would be for the high jump". Mr. Salter invites me to look at the realities of the situation which were that the plaintiffs were prepared to sue Mr. Howitt for the debt but at the same time expressed their readiness to reinstate him if they had security for the payment of the debt. In the result they forebore to sue him and agreed to instalments on the strength of the guarantee given by Mrs. Howitt. The difficulty about this submission is that it seems to be letting in oral evidence of a written agreement and so to conflict with s. 91 of the Evidence Ordinance. Of course,

the fact that inadmissible evidence has crept in because no objection was taken to it at the time does not ipso facto make it admissible. Mr. Salter submits that this is additional consideration to that specified in the guarantee and so is admissible as a separate oral agreement which is not inconsistent with its terms and is admissible under proviso 2 to that section. I confess that I do not always find it easy to construe the terms of this section, and some support for Mr. Salter's argument is to be found in *Frith v. Frith* (2), [1906] A.C. 254, and *Turner v. Forwood and Another* (3), [1951] 1 All E.R. 746, but with respect, the terms of this formal guarantee seem to be reasonably clear and according to the evidence, Mr. Tron intended to treat the bill of sale as the consideration. If the consideration were more than that and included, say, the assignment of the life insurance policies, why did he not include them in the recitals to exhibit B? Also, on the cases cited, I am not sure that additional consideration and a separate oral agreement are the same thing.

If there had been a full stop after the word "instalments" in the first paragraph, there might have been no difficulty and even without it, it could be argued that the reference to the bill of sale is merely to indicate the method of payment, but the references to "such sum or sums" as might become due under the bill of sale in the second paragraph and the further reference to "such sum or sums" in the third paragraph (cl. 2) indicate clearly to my mind that the consideration for the guarantee was exclusively linked to the bill of sale. The plaintiffs could only recover for default under the bill of sale and if the bill of sale was void and so there could be no default under it then the guarantee was useless as it was limited to what should be paid under a valid bill of sale. As Mr. O'Donovan, for the plaintiffs, put it, exhibits A and B hang and, in this case, fall together. This is an additional reason for the inevitable failure of the previous suit. The bill of sale was entered into before the guarantee and when Mrs. Howitt gave the guarantee, there was no fresh consideration to support her promise to pay on default by Mr. Howitt. Despite the criticism of the illustrations to sections of the Indian Contract Act, in *Nanak Ram v. Mehin Lal* (4) (1877), 1 All. 487, illustration (*c*) to s. 127 which provides as follows:

> "A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void."

seems to be in point. The use of the word "done" in s. 127 suggests that a past benefit to the principal debtor could be good consideration for a bond of guarantee. It was so held in *Ghulam Hussain v. Faiyaz Ali* (5) (1940), 15 Luck. 656, but this decision is criticised in Pollock and Mulla on Indian Contract Act (8th Edn.), p. 517, where it is pointed out that the use of the word refers to an executed as opposed to an executory consideration. In *Ghulam's* case (5) the surety bond, though executed at a date subsequent to the principal agreement, was apparently executed in pursuance of one of the terms of that agreement. It was a condition of Mrs. Howitt's guarantee that there should be a valid and enforceable bill of sale and as there was not such a bill owing to Mr. Tron's mistake, she can avoid the guarantee and so the plaintiffs are unprotected and without recourse against her. I respectfully agree with the judgment of Mr. Justice Lewis. Mr. O'Donovan has pointed out other defects in the guarantee into which I do not find it necessary to go in detail. In short, cl. 2, as drafted, imposed no obligation on Mr. Howitt to earn any commission at all, and if the agency had been terminated, it could not have been said that there had been a refusal to earn commission and so Mrs. Howitt could not have been called upon to pay anything.

This brings me to the question of the defendant's negligence. The standard of care which can be demanded from an advocate is set out in the following passages from Charlesworth on Negligence (3rd Edn.):

> "777. Standard of Care. The standard of care and skill which can be demanded from a solicitor is that of a reasonably competent and diligent solicitor. Lord Ellenborough has said: 'An attorney is only liable for crassa negligentia'. Again, Lord Campbell in discussing the essential elements to sustain an action for negligence has said: 'What is necessary to maintain such an action? Most undoubtedly that the professional adviser should be guilty of some misconduct, some fraudulent proceeding, or should be chargeable with gross negligence or with gross ignorance. It is only upon one or other of those grounds that the client can maintain an action against the professional adviser.' This, however, does not mean that the standard of care imposed upon a solicitor is below that imposed on other professional men; it only means that it is not enough to prove that the solicitor had made an error of judgment or shown ignorance of some particular part of the law, but that it must be shown that the error or ignorance was such that an ordinarily competent solicitor would not have made or shown it. It would be extremely difficult to define the exact limit by which the skill and diligence which a solicitor undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. It is a question of degree and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed."

Again at para. 785 (p. 485):

> "785. When a solicitor is acting for a client who is lending money on security, it is his duty to see that the necessary legal steps are taken to make the security proper and sufficient in point of form . . ."

Here the security, viz. the bill of sale, was not in proper form. Mr. Tron's instructions were simple and although one can sympathise with him in that he was required to act with speed, the negligent drafting of and defects in the bill of sale and the guarantee went beyond an error of judgment and constituted professional negligence for which the defendants are liable to pay damages.

There remains only the question of damages about which I need not say much. This may be considered under three heads:

(1) It is submitted that even if the bill of sale was subsequently found to be void, the plaintiffs should have attempted to possess themselves of the Peugeot car and household goods as set out in the schedule. Mr. Riley states that he was advised that he could not seize the car which had been subject to a hire purchase agreement and that he refrained from asking Mr. Howitt about the household goods as the plaintiffs did not want to put Mrs. Howitt on the street. Although they successfully secured his consent to part with the office furniture, there was, in my view, no legal obligation on them to try and enforce a bill of sale which was patently void.

(2) There was no firm evidence that the insurance policies had any surrender value which could have gone in mitigation of damages.

(3) The ability of Mrs. Howitt to satisfy any judgment which might have been obtained against her. She admitted that a forced sale of her Kenya farm, after paying off the mortgage, might have realised £3,000. There had also been a contingent liability for £4,000 under a scheme of composition in her husband's bankruptcy but Mr. O'Donovan informed the court that this was annulled in 1959. She is a paid employee, and although she must have commitments, I am not satisfied that she would have been unable to pay, or make arrangements to pay, the hypothetical judgment debt.

In the result there will be judgment for the plaintiffs for Shs. 82,480/81 plus Shs. 8,933/15, a total of Shs. 91,413/96 with interest and costs.

Judgment for the plaintiff.

For the plaintiff:
Hunter & Greig, Kampala
Bryan O'Donovan, Q.C., and *J.F.G. Troughton*

For the defendants:
Baerlein & James, *Jinja*
Clive W. Salter, Q.C., *A.W. Tagart* and *A.I. James*

Kibibi Binti Morarji Purshottam and another v Noorallah Ali Mohamed Dewshi and others

[1960] 1 EA 998 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	14 November 1960
Case Number:	109/1958
Before:	Law J
Sourced by:	LawAfrica

[1] Res judicata-Land registration – Application for first registration – Objection – Decision by Registrar – Subsequent proceedings between same parties and others – Whether decision binding on all parties in subsequent proceedings – Estoppel – Land Registration Ordinance (*Cap.* 334), *s.* 10 *and s.* 13 (*T.*) *– Land Registry Ordinance* (*Cap.* 116), *s.* 39 (*T.*) *– Land* (*Law of Property and Conveyancing*) *Ordinance* (*Cap.* 114), *s.* 11 (*T.*).

[2] Jurisdiction – Land registration – Application for first registration – Objection – Whether decision by Registrar is judgment in rem by court of competent jurisdiction – Land Registration Ordinance (*Cap.* 334), *s.* 20, *s.* 102, *s.* 105, *s.* 106, *s.* 107 (*T.*).

Editor's Summary

The two plaintiffs, the sister and the legal representative of one, Biubwa, sought, first, declarations that at the time they purported to transfer certain freehold estate to the first defendant, they were natives within the meaning of the Land (Law of Property and Conveyancing) Ordinance and that, accordingly, the deeds which effected the transfers were inoperative for want of the Governor's approval and, secondly, consequential relief including rectification of the Register of Titles to show them as owners in place of

the first defendant or any person deriving title through him. At the trial the defendants took the preliminary point that when an application for first registration was made by the plaintiffs the Registrar of Titles ruled that the plaintiffs were not members of an African race and that this decision was binding on the plaintiffs. At the time of the application, the second defendant was the only person who had lodged a caution objecting to such registration, and this was treated as an objection under the Land Registration Ordinance and discharged. It was contended on behalf of the defendants that the decision of the Acting Registrar of Titles was a judgment in rem of a court of competent jurisdiction relating to the status and property of persons and as such conclusive against all the world. The plaintiffs submitted that the Registrar of Titles when making decisions under the Land Registration Ordinance was not a court.

Held –

(i) the Registrar's decision on an application for first registration has the effect of raising an estoppel between the parties thereto, and in subsequent civil proceedings between the applicant and any person who objected to the application, is conclusive evidence of the matters contained therein.

(ii) such a decision has no such effect in subsequent civil proceedings between the applicant and a non-objector and is only prima facie evidence of the matters contained therein.

Preliminary point decided against all defendants except the second.

Cases referred to in judgment:

(1) *Yarakalamma v. Anakala Naramma* (1864-65), 2 Mad. H.C.R. 276.

(2) *Fuller v. Fotch*, 90 E.R. 802.

(3) *Uxbridge Union v. Winchester Union* (1904), 91 L.T. 533.

Judgment

Law J: In this suit the first plaintiff is Kibibi binti Morarji Purshottam and the second plaintiff is the legal personal representative of Kibibi's deceased sister, Biubwa. The plaintiffs claim declarations that at the time the plaintiffs purported to transfer the freehold estates, the subject of this suit, to the first defendant, they were natives within the meaning of the Land (Law of Property and Conveyancing) Ordinance, Cap. 114, and that accordingly the deeds which effected the transfers are inoperative for want of the Governor's approval, and the plaintiffs claim as consequential relief removal of the copies of the deeds from the Compulsory Register of Documents and rectification of the Register of Titles so as to show the plaintiffs as owners of the freehold estates disposed of by them in place of the first defendant or any person deriving title through him and now entered in the register as owners of the said estates. Should the plaintiffs' claim to be natives fail, then the plaintiffs rely on a number of alternative claims against the first three defendants which do not, however, require to be considered at this moment. The fourth defendants are the executors of His Highness the late Aga Khan, who acquired part of the land, the subject of this suit, from the first defendant.

This judgment is concerned solely with a preliminary point raised by all four defendants which, if decided in favour of the defendants, would involve the dismissal of the plaintiffs' suit in so far as it is based on the allegation that Kibibi and Biubwa were natives, leaving only the alternative claims for decision.

The preliminary point is stated as follows in para. 8 of the first defendant's written statement of defence:

> "8. With further reference to para. 12 of the plaint this defendant says that in the applications for first registration . . . in respect of the said sixty-seven plots made by the plaintiffs to which the second defendant had objected it was decided by the Acting Registrar of Titles on June 11, 1955, that the first plaintiff and the said Biubwa are not natives. This defendant says:
>
> (*a*) that the said decision of the Acting Registrar is binding on the plaintiffs:
>
> (*b*) that the issue whether the first plaintiff and the said Biubwa are natives or non-natives having been decided by the Acting Registrar of Titles cannot be tried again by this Honourable Court."

In 1955 the first plaintiff and the administrator of the estate of her deceased sister Biubwa applied to the Registrar of Titles to be registered as owners in freehold of the estates, the subject of this suit, under s. 10 of the Land Registration Ordinance, Cap. 334. The second defendant lodged a caution objecting to such registration without notice to him, under s. 39 of the Land

Registry Ordinance, Cap. 116, which was in force when the caution was lodged. The Acting Registrar, on the enactment of Cap. 334, considered this caution as being in the nature of an objection lodged under s. 13 of Cap. 334. The second defendant's grounds of objection were that he had contracted to purchase the said estates and had made part payment of the agreed purchase price, although no conveyance had yet been executed, and he alleged that:

> "I verily believe that all persons holding a beneficial interest in the said land are the offspring or descendants of one Morarji Purshottam, a Hindu, and that they are not therefore members of an African race".

The applicants (the present plaintiffs) argued that the agreements for sale produced by the objector (the present second defendant) could not be relied upon by the objector as passing any title or interest in their land for three reasons, only the first of which material to the present judgment, and that was:

> "that the agreements have not received the consent of the Governor as required by s. 11 of the Land (Law of Property and Conveyancing) Ordinance, Cap. 114".

That section, so far as it is relevant, reads as follows:

> "11(1) A disposition of land belonging to a native in favour of a non-native or conferring on a non-native any rights over the land of a native shall not be operative unless it is in writing and unless and until it is approved by the Governor.
>
>
>
> (8) In this section, the expression 'native' means a member of an African race, and includes an Arab, Swahili and Somali".

The question whether Kibibi and Biubwa were natives was material on the application for first registration, because if they were natives the agreements for the sale of their land to the objector would have been inoperative dispositions within the meaning of s. 11 (1) of Cap. 114, and the applicants would have been entitled to unconditional registration, whereas if they were not natives the objector would be entitled to an entry being made on the register relating to his interest in the land arising out of the agreements for sale.

In a carefully reasoned decision, the Acting Registrar of Titles found that Kibibi and Biubwa were not natives. He accordingly granted their application for the first registration of the estates, the subject of this suit, subject to an injunction to remain on the register as an incumbrance for the period of one month to enable the objector to take such action as he might consider necessary to protect his interest in those estates.

This court is not for the moment concerned with the correctness or otherwise of the Acting Registrar's finding that Kibibi and Biubwa were not natives within the meaning of s. 11 (8) of Cap. 114. The points for decision now are whether Kibibi and Biubwa are bound by that finding, as against all the defendants, and whether the question of the status of Kibibi and Biubwa is the subject of res judicata so as to preclude any reconsideration of the question by this court.

Mr. Master for the first defendant, whose submissions have been adopted by all the other defendants, argued that the Acting Registrar's decision was a judgment in rem of a court of competent jurisdiction, relating to the status and property of persons, and as such conclusive against all the world. He has referred me to *Yarakalamma v. Anakala Naramma* (1) (1864-65), 2 Mad. H.C.R. 276; *Fuller v. Fotch* (2), 90 E.R. 802; and *Uxbridge Union v. Winchester Union v. Winchester Union* (3) (1904), 91 L.T. 533. Mr. Lockhart-Smith for the plaintiffs submits

that the Registrar of Titles when making decisions under Cap. 334 is not a court. The Registrar's powers are defined in Part XVII of Cap. 334. He can state a case for the opinion of the High Court (s. 104); he can order the attendance of witnesses and the production of documents, and can administer oaths (s. 105); he can take statutory declarations (s. 106) and make orders as to costs (s. 107); his decisions are subject to appeal to the High Court (s. 102) and are conclusive evidence of the matters contained therein in any subsequent civil suit, cause or matter between the applicant and any person who gave notice of objection to the application (s. 20).

In these circumstances I would feel disposed to accede to Mr. Master's submission, and hold that the decisions of the Registrar on an application for first registration are judgments in rem pronounced by a court of competent jurisdiction, were it not for the fact that I am of opinion that the matter is regulated by the express statutory provisions of s. 20 of Cap. 334, which reads as follows:

> "20. Subject to the provisions of s. 102, the decision of the Registrar allowing or dismissing any application shall, in any subsequent civil suit, cause or matter between the applicant and any person who gave notice of objection to the application, be conclusive evidence of the matters therein contained, and shall, in any subsequent civil suit, cause or matter between the applicant and any person who did not give such notice of objection, be prima facie evidence of the matters therein contained."

This appears to me to dispose of the matter. The Registrar's decision on an application for first registration has the effect of raising an estoppel between the parties thereto, and in subsequent civil proceedings between the applicant and any person who objected to the application, is conclusive evidence of the matters contained therein; whereas such a decision has no such effect in subsequent civil proceedings between the applicant and a non-objector, and is only prima facie evidence of the matters contained therein.

Mr. Master has submitted that the first defendant should be considered as having been a party to the objection made by the second defendant, as the second defendant was throughout negotiating and acting on behalf of the first defendant as well as himself. Mr. Master relies on the allegations in paras. 14, 16 and 21 of the plaint as evidence of this. But these allegations only refer to the negotiations preliminary to the execution of the deeds attached to the plaint whereby the plaintiffs' interest in the suit properties was transferred to the first defendant. They do not relate to the application for the first registration. The first defendant was not an objector to that application. The only objector was the second defendant; the agreements for sale relied upon by him in his objection were executed by him, and not by the first defendant, and there is no material before me to enable me to hold that the first defendant should be considered as a party to the objection, when in fact he was not an objector.

It follows therefore that in my opinion the preliminary point must be decided in favour of the plaintiffs, as against all the defendants except the second. The position is thus that as between the plaintiffs and the second defendant, the Acting Registrar's finding that Kibibi and Biubwa were not natives is conclusive evidence of that fact; but that as between the plaintiffs and the first, third and fourth defendants, the said finding is only prima facie evidence of that fact, which it is therefore open to the plaintiffs to seek to rebut by evidence, argument and authority.

As regards the costs incidental to this judgment, it seems clear that there will be other preliminary points for decision in this suit, such as whether the plaintiffs are estopped by deed from asserting that Kibibi and Biubwa are natives; furthermore there may also be a preliminary issue for trial if the plaintiffs seek to rebut the prima facie evidence as to their status as non-natives. I dislike making piece-meal orders as to costs if it can be avoided, and it seems

to me preferable to reserve my decision as to the costs of these proceedings until such time as all preliminary matters relative to the racial status of Kibibi and Biubwa have been disposed of, and I order accordingly.

Preliminary point decided against all defendants except second.

For the plaintiffs:
W. J. Lockhart-Smith, Dar-es-Salaam

For the first defendant:
K. A. Master, Q.C., Dar-es-Salaam

For the second defendant:
M. S. Chaddah, Dar-es-Sallam

For the third defendant:
J. B. Patel, Dar-es-Salaam

For the fourth defendant:
H. N. Houry, Dar-es-Salaam

Re an application by Fazal Kassam (Mills) Ltd
[1960] 1 EA 1002 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	25 October 1960
Case Number:	70/1960
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Certiorari – Mandamus – Jurisdiction – Application to quash decision of statutory authority – Application made for orders – Court empowered to issue writs – Power to grant orders when writs sought – Power to consider substance and reality instead of form – Whether right of appeal precludes relief by way of mandamus – Tanganyika Order-in-Council, 1920, *Art.* 17 (2) – *Administration of Justice* (*Miscellaneous Provisions*) *Act*, 1938, *s.* 7.

Editor's Summary

The appellant company applied for relief, by way of certiorari and mandamus, to the end that the rejection by the Coffee Licensing Authority of the applicants' application for a coffee exporter's licence

should be quashed and that the authority be required to hear and determine the application according to law. At the hearing of the application the authority took two main preliminary objections, namely, that the applicants, in asking for orders of certiorari and mandamus, rather than suing out and demanding the issue of prerogative writs of those descriptions, were seeking relief which the court had no jurisdiction to grant, and that, in the absence of special circumstances, the applicants were precluded from seeking relief by way of mandamus, since they had a right to appeal to the Minister against the respondents' refusal to issue them with the licence.

Held –

(i) although there is a difference in the two forms of remedy in their historical origins, the procedure by writ being ancient and that by order being modern, the distinction is not now fundamental, and involves little more than terminology; the court will always look, unless precluded by law, to substance and reality rather than form and phraseology.

(ii) although the applicants had asked for the making of orders of certiorari and mandamus the court had powers to issue writs of the same description.

(iii) the applicants were not precluded from seeking relief by way of mandamus even though they had a right of appeal to the Minister against the respondents' refusal to issue them with coffee exporter's licence and it would be a judicial exercise of the discretion vested in the court to allow the applicants to pursue their remedy by way of mandamus.

Preliminary objections overruled.

Cases referred to in judgment:

(1) *The Dar-es-Salaam Motor Transport Co., Ltd. v. The Transport Licensing Authority of Tanganyika and Another*, [1959] E.A. 403 (C.A.).

(2) *R. v. Thomas*, [1892] 1 Q.B. 426.

(3) *Taff Vale Railway Company v. Amalgamated Society of Railway Servants*, [1901] 1 K.B. 170.

(4) *Compbell v. Thompson*, [1953] 1 All E.R. 831.

Judgment

Sir Ralph Windham CJ: The applicant company has applied for relief by way of certiorari and mandamus, to the end that the rejection, by the Coffee Licensing Authority, of the applicants' application for a coffee exporter's licence, should be quashed and that the authority be required to hear and determine that application according to law. An application for leave to file the present application was granted by Law, J., on August 15, 1960.

The respondents, the Coffee Licensing Authority, have now raised more than one preliminary objection to the hearing of this application.

The first objection, which concerns both certiorari and mandamus, goes to jurisdiction. It is contended that the applicants, in asking for orders of certiorari and mandamus, rather than suing out and demanding the issue of prerogative writs of those descriptions, are seeking relief which this court has no jurisdiction to grant. Learned counsel for the respondents has rightly pointed out that, on the civil side, there being no mention of the prerogative writs in the Civil Procedure Code, the jurisdiction of the High Court of Tanganyika to grant relief by way of certiorari or mandamus derives, through the operation of Article 17 (2) of the Tanganyika Order-in-Council, 1920, from the English common law as it existed in 1920, whereunder the relief was granted by the issue of prerogative writs. He rightly points out that the Administration of Justice (Miscellaneous Provisions) Act, 1938, s. 7 of which replaces the issue of the prerogative writs of mandamus, prohibition and certiorari by the making of orders of mandamus, of prohibition and of certiorari, respectively, forms no part of the law of Tanganyika.

All this is perfectly correct; and indeed the position was recently made clear by the Court of Appeal for Eastern Africa in *The Dar-es-Salaam Motor Transport Co., Ltd. v. The Transport Licensing Authority of Tanganyika and Another* (1), [1959] E.A. 403 (C.A.), where O'CONNOR, P., at p. 404, referring to r. 4 (2) of O. 59 of the Rules of the Supreme Court in England (which deals with orders of certiorari), said:

> "It was not correct to apply O. 59. That order was only made in 1938. The English practice and procedure which was imported into Tanganyika by s. 17 (2) of the Tanganyika Order-in-Council, 1920, was the practice and procedure obtaining in England at the date of the Order-in-Council, that is to say July 22, 1920. Rule 21 and r. 30 fo the Crown Office Rules of 1906, set out in Short and Mellor: Practice of the Crown Office (2nd Edn.) at p. 50 and p. 66, were then the governing Rules. We were satisfied that there is nothing in the Civil Procedure Code of India dealing with certiorari which would oust their application."

Nevertheless, I do not think that anything which the applicants have done up to this stage, or any error in form or procedure on their part, is such as to preclude this court from granting to them the relief which it does have power to grant, that is to say, from issuing writs of certiorari and mandamus, as distinct from

that which it has no power to do, namely making orders of certiorari and mandamus. Despite the submission to the contrary by learned

counsel for the respondents, and while fully conscious of the difference between the two forms of remedy in their historical origins, the procedure by writ being ancient and that by order being modern, I consider that the distinction today is not fundamental, and is little more than one of terminology. The applicants, in their application and supporting statement, have asked for "an order of certiorari" and "an Order of mandamus". If they had asked for the respective writs instead of orders, no objection could have been raised; for the Crown Office Rules, 1906, prescribe, it would seem, no set form for applying for relief by way of prerogative writ, a departure from which could be held to disentitle an applicant from obtaining the relief sought by him. What the applicants have here asked for is the making of two orders for mandamus and for certiorari. I am satisfied that on such application this court can properly issue two writs of the same description. That is the substance of the relief sought; and this court, unless by law specifically precluded, will always look to substance and reality rather than to mere form and phraseology. Indeed, even if phraseology does fall to be considered, it is to be noted that even under the common law before 1938 an order of the court was necessary when a writ of mandamus or prohibition or certiorari was issued. Section 7 (2) of the Administration of Justice (Miscellaneous Provisions) Act, 1938, recognises the jurisdiction of the High Court before 1938 as having been a

> "jurisdiction to order the issue of a writ of mandamus . . . or a writ of prohibition . . . or a writ of certiorari . . .".

The first preliminary objection, in my view, must therefore fail.

The second objection relates to the prayer for relief by way of mandamus only. It is submitted that since the applicants had a right of appeal against the respondents' refusal to issue them with a coffee exporter's licence, and declined to avail themselves of that right, they are precluded, in the absence of special circumstances, from seeking relief by way of mandamus. The authorities in support of this proposition are cited in Halsbury's Laws of England (3rd Edn.), Vol. 11, at p. 107. In the present case such a right of appeal lay to the Minister for Natural Resources, within thirty days of the respondents' refusal, under s. 17 (4) of the Coffee Industry Ordinance (Cap. 391). In the present case, however, the respondents did not at first specify the grounds of their refusal to issue the licence. When they first refused, on April 25, 1960, they gave no grounds at all, but merely wrote that "your application for a coffee exporter's licence was rejected . . .". Later, in response to a request by the applicants to state their grounds, they wrote on or about May 21 that the application

> "could not be approved on the grounds stated in the Ordinance at s. 17 (2) (*e*)".

Section 17 (2) (*e*) of the Coffee Industry Ordinance, excluding an irrelevant proviso, allows the authority to refuse to issue a licence –

> "(*e*) where application is made for a coffee exporter's or coffee grower's export licence, if in the opinion of the authority the applicant has not sufficient knowledge or experience properly to conduct the business of exporting coffee, or coffee of the description in respect of which application is made, or has not upon the staff of such business a person with such knowledge or experience".

Since the applicants were a limited company and not an individual, and since their application was for a general coffee exporter's licence and not in respect of coffee of a particular description, there was only one ground on which their application could have been refused under s. 17 (2) (*e*), namely

that there was nobody on their staff with sufficient knowledge or experience to conduct the business of exporting coffee. The grounds for refusal were thus given specifically enough on May 21. But were they given soon enough, for the purpose of precluding the applicants from seeking redress through mandamus rather than by appealing? I think not. Their right to appeal within thirty days of the refusal expired on May 25, only four days after the respondents furnished them with the grounds for their refusal. That was insufficient time within which to expect the applicants to prepare their appeal. And I do not think it was incumbent upon them to apply for extension of time within which to lodge an appeal by reason of an error which was wholly that of the respondents. It was the duty of the respondents to give their reasons for refusing the applicants' application at the time when they refused it. In *R. v. Thomas* (2), [1892] 1 Q.B. 426, where the question was whether mandamus lay when the applicants had failed to exercise their right of appeal, Hawkins, J., said at p. 429-30:

> ". . . an application for a licence ought not to be refused, under circumstances such as these, except with a statement of the grounds of the refusal. It is not enough for the justices to say now that they decided upon certain grounds if they did not so inform the applicant when refusing the application . . . It is quite possible that there might have been good grounds for an appeal if the grounds of the decision had been announced to the applicant, and in that case a mandamus would not be granted, for there would be an adequate remedy by appeal. That rule, however, as to the grant of a mandamus is not inflexible, or applicable in cases of this kind, where a person does not know the grounds of the decision against him and how to shape his appeal. Here there were four grounds upon which the licence might have been refused, and the applicant would properly want to know upon which of those grounds the refusal was based. All that was said, in fact, was 'Licence refused'. The applicant was entitled to know the grounds of that refusal."

And Wills, J., said at p. 430:

> "I am of the same opinion. I think that the fair inference from the affidavits is that the justices decided against the applicant upon the second and fourth grounds specified in s. 8 of the Act of 1869. When justices act upon any of those grounds they must state that they do so, and they must specify upon which of them they do act. Here they have not done so, but have given their decision in an irregular manner, which is so irregular that the whole case ought to be heard again upon every point."

In any case, it is not the law that the court will always refuse mandamus when the applicant could have appealed. The matter is one of discretion, to be carefully and judicially exercised, the position being simply that, as stated in Halsbury's Laws of England (3rd Ed.), Vol. 11 at p. 107:

> "The court will, as a general rule, and in the exercise of its discretion, refuse an order of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective."

In the present case the applicants had, on two previous occasions, exercised their right of appeal to the Minister against the respondents' refusal to grant them similar licences, only to be informed briefly, by letter, on each occasion, that their appeals had been rejected, no reasons for the rejection being given. It may well be, therefore, that mandamus may prove a more effective way of investigating the appellants' grievances, and of satisfying the appellants that they have been investigated, than an appeal would be. But, be that as it may, I think that in all the circumstances of this case it would be a judicial exercise

of the discretion vested in this court to allow the applicants to pursue their remedy by way of mandamus, and, overruling the respondents' second preliminary objection, I do so allow them.

The final objection to the application, in respect both of mandamus and of certiorari, does not go to jurisdiction but only to an irregularity regarding its service upon those who ought to have been served with it. The application was in fact served only upon the Coffee Licensing Authority. Now the Coffee Licensing Authority is neither a corporation nor a firm nor an individual. Unlike the Tanganyika Coffee Board, which under s. 5 of the Coffee Industry Ordinance (Cap. 391) is made a body corporate and suable as such, the Coffee Licensing Authority, which is established by s. 15 of that Ordinance, is not. It is an unincorporate body consisting of a chairman and eight members. That being so, then its members, being as they are not inconveniently many, ought to have been served individually, as counsel for the applicants now concedes: vide *Taff Vale Railway Company v. Amalgamated Society of Railway Servants* (3), [1901] 1 K.B. 170, at p. 173; *Campbell v. Thompson* (4), [1953] 1 All E.R. 831. This point was not raised in the application before LAW, J., for leave to file the present application. But now that it has been raised, it must be conceded. Before the hearing of this application on its merits, therefore, notice must duly issue to the chairman and each member of the Coffee Licensing Authority, and the registrar is directed accordingly. The application will thereafter be heard on its merits on a date to be fixed. Learned counsel for the respondents having succeeded on one only of the preliminary objections argued by him, there will be no order for the costs attributable to the preliminary objections.

Preliminary objections overruled.

For the appellant:
Vellani & Co., Dar-es-Salaam
K. A. Master, Q.C., and *R. B. Vellani*

For the respondent:
W. J. Lockhart-Smith, Dar-es-Salaam

The Attorney-General v John s/o Nchenya and others
[1960] 1 EA 1007 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	28 September 1960
Case Number:	196/1960
Before:	Sir Ralph Windham CJ, Law and Simmons, JJ
Sourced by:	LawAfrica

[1] Criminal law – Court – Usurpation of judicial powers – Accused purporting to hold trial – Trial within the area of jurisdiction of a local court – Alleged offence unknown to law – Meaning of "exercises any judicial powers within the area of the jurisdiction of a lawfully constituted local court" – Local

Courts Ordinance (*Cap.* 299), *s.* 10, *s.* 11 *and s.* 26 (*T.*).

Editor's Summary

The accused were charged and tried on two counts with usurping judicial powers within the jurisdiction of a local court contrary to s. 26 of the Local Courts Ordinance. It was alleged that the accused had called an African before them by letter and then purported to try and sentence him for abusing a political body; and had also purported to try and sentence an Indian for alleged stealing of building stone which it was said belonged to the public. It was conceded that the African's alleged offence was unknown to the law and that by virtue of s. 10 and s. 11 of the Local Courts Ordinance the local court had no jurisdiction to try an Indian. The magistrate accepted a submission on behalf of the accused that there was no case to answer on either count on the ground that the offence under s. 26 consists of "usurping" the judicial powers of a local court, that is to say, exercising or purporting to exercise the judicial powers which are vested in the local court and that no such usurpation had been proved. The Crown appealed by way of case stated and asked for the opinion of the court firstly, on the meaning of the words "exercises any judicial powers within the area of the jurisdiction of the local court" and, secondly, whether it was incumbent on the prosecution to establish that the judicial powers exercised were judicial powers that could be exercised by the local court.

Held –

(i) the words "exercises any judicial powers" in s. 26 of the Local Courts Ordinance must be read to mean "purports to exercise any judicial powers".

(ii) any person may be said to exercise or purport to exercise judicial powers who either (*a*) issues a summons or other process or communication purporting to require anybody to attend before himself or any other person or body of persons, for the purpose of answering a criminal charge or of conducting before such person or body of persons a civil suit; or (*b*) charges or purports to charge any person with any offence for which such person is led to believe that he may be punished by the person so charging him or by any other person or body of persons, whether or not the act alleged to constitute such offence is an act punishable under the law of the Territory: or (*c*) tries or affects to try any person for any alleged offence, or tries or affects to try any civil suit between any person or persons and any other person or persons, whether or not such trial be conducted in the semblance of a trial in a court of law; or (*d*) pronounces or purports to pronounce judgment against or in favour of any person in respect of any offence, whether or not the act alleged to constitute such offence is an act punishable under the laws of the Territory, or in respect of any civil suit; or (*e*) imposes or purports to impose any fine or punishment upon any person in respect of any offence, whether recognised as such by the law or not, alleged to have been committed by such person.

(iii) there is nothing in s. 26 which lays down that the judicial power exercised by the offender must be a power vested in a law court, that is to say, a power which the court could lawfully exercise.

(iv) the words "within the area of the jurisdiction" in s. 26 relate to the geographical limit upon jurisdiction only; accordingly, if a person purports to try a case within the geographical area within which the local court is empowered to exercise its limited jurisdiction, then he commits an offence against s. 26 even if that case is not one which the local court had power to try, as under the second count in the instant case, and even if it concerns an alleged offence which is no offence against the laws of the Territory at all and which, therefore, no court in the Territory has power to try, as under the first count in the instant case.

(v) it was not incumbent on the prosecution to establish that the judicial powers exercised by the accused were judicial powers that could be exercised by the local court.

R. v. Philemon s/o Satu and Others, Tanganyika High Court Criminal Appeals Nos. 464 – 467 of 1959 (unreported) dissented from.

Per Curiam: "a marginal note may perhaps, as in the case of a long title, be used as a guide to the meaning of a section if, and only if, there is an ambiguity in the section."

Appeal allowed. Case remitted to the resident magistrate for completion.

Cases referred to in judgment:

(1) *R. v. Philemon s/o Satu and Others*, Tanganyika High Court Criminal Appeals Nos. 464 – 467 of 1959 (unreported).

(2) *Longdon-Griffiths v. Smith*, [1950] 2 All E.R. 662.

(3) *R. v. Bates and Another*, [1952] 2 All E.R. 842.

Judgment

Sir Ralph Windham CJ, read the following judgment of the court: This is a case stated under s. 333 of the Criminal Procedure Code by the district court of Mwanza, at the instance of the Crown, for the determination of two points of law arising from a ruling of the learned resident magistrate, at the close of the Crown's case, that no case to answer had been made out against any of the three accused, who were charged, on two counts, with offences against s. 26 of the Local Courts Ordinance (Cap. 299).

The particulars of the offence on the first count were as follows: –

> "The persons charged on or about the 30th day of January, 1960, in the Nassa area in the Mwanza District, East Lake Province, did jointly exercise judicial powers within the area of the jurisdiction of a lawfully constituted court, namely Nassa local court, in that they heard, passed judgment and sentence in a case against one Jacobo s/o Zebedayo."

The particulars in the second count were identical with those in the first, save that the date of the alleged offence was given as "on or about the 1st day of February, 1960", and that the person against whom judgment and sentence were alleged to have been passed was one Gopaldas s/o Kakubhai Jamandas.

Section 26 of the Local Courts Ordinance provides as follows:

“26. Any person who exercise or attempts to exercise any judicial powers within the area of the jurisdiction of a lawfully constituted local

> court, except in accordance with the provisions of any Order of His Majesty in Council or of any Ordinance, or who shall sit as a member of such court without due authority, shall be guilty of an offence and upon conviction by a district court presided over by a first- or second-class magistrate shall be liable to imprisonment for twelve months or to a fine of one thousand shillings or to both such fine and such imprisonment:
>
> "Provided, however, that nothing in this section shall be deemed to prohibit any customary arbitration or settlement by the tribal elders in any matter arising out of any minor infringement of customary law if such arbitration or settlement is conducted in the manner recognised by local customary law."

The marginal note to s. 26 is in the following words: "Usurping judicial powers".

Evidence was led by the Crown on both counts. On the first count the evidence, in brief, was that one Jacobo s/o Zebedayo received a letter requiring him to attend a meeting; that he accordingly attended the meeting, which was held within the area in which the Nassa local court exercised its jurisdiction; that the meeting, at which about forty persons were present, was presided over by the second accused, who sat at a table with the other two accused; that the second accused then told him to speak, saying: "You have been accused"; that some girls who were present then testified that he, Jacobo, had been abusing TANU (The Tanganyika African National Union) and preaching against it; that without giving him the opportunity of doing more than briefly deny the allegations the accused ordered him to surrender his TANU card, which he did, and then to "go out while they prepared judgment"; that he was presently called in again, and "judgment" was passed against him, ordering him to pay a fine of Shs. 10/-; that on his refusing to pay the fine he was told that his "case" would be taken before the TANU office; that he accordingly went to a meeting at the TANU office, where the the three accused charged him with "abusing TANU"; and that after he had again denied the charge they "considered their judgment" and then ordered him to pay a fine of Shs. 150/-, which he again refused to pay.

The evidence relating to the second count was similar in its essentials. It was to the effect that, within the same area as in the case of the first count, the three accused, at a similar meeting of TANU, purported to "charge" one Gopaldas s/o Kakubhai, an Indian, with stealing certain stones said to belong to the public, for the purpose of building a house with them; that he denied the charge; that, as in the case of Jacobo, he was thereupon sent out of the room; that upon his return, a "judgment" was read out, finding him guilty of having stolen the stones, and declaring that he should be punished and that from then onwards the house that he had built with them would belong to them (i.e. semble, to TANU).

At the close of the Crown evidence, which is epitomised above, the learned trial magistrate, upon a submission on behalf of the accused, held that there was no case to answer on either count, on the ground that the offence under s. 26 of the Local Courts Ordinance consists of "usurping" the judicial powers of a local court, that is to say, exercising or purporting to exercise judicial powers which a local court has jurisdiction to exercise, and that no such usurpation had been proved. It was conceded, both in the court below and before us, (*a*) that there is no such offence known to the law as "abusing TANU" or anything akin to it, and that accordingly the Nassa local court had no jurisdiction to try the offence which the accused purported to try, as alleged in the first count; (*b*) that, by virtue of s. 10 and s. 11 of the Local Courts Ordinance, the Nassa local court has no jurisdiction to try an Indian, which the accused purported to do when they "tried" Gopaldas, as alleged in the

second count. That being so, the learned resident magistrate ruled that no offence against s. 26 of the Local Courts Ordinance had been made out on either count, because there had been no usurpation by the accused of any powers or jurisdiction that could have lawfully been exercised by the Nassa local court, He thereupon discharged the accused under s. 205 of the Criminal Procedure Code.

In so ruling, the learned magistrate followed, as he was bound to do, a decision of this court in *R. v. Philemon s/o Satu and Others* (1), Tanganyika High Court Criminal Appeals, Nos. 464-467 of 1959 (unreported), in which Davies, C.J., allowing an appeal against a conviction under s. 26 of the Local Courts Ordinance, interpreted that section in a similar manner. The relevant passage in that judgment reads:

> "With regard to the conviction in respect of the second charge, the only point in the appeal was whether or not the appellants exercised or attempted to exercise judicial powers within the area of a lawfully constituted local court. The evidence called in support of the charge was to the effect that the appellants at a meeting attended by a large number of persons from several villages took part in imposing a fine of two goats on one Simon Nyapi for trading with a person with whom the people of the area had decided not to trade. It was submitted by counsel for the appellants that the action of Simon was not a matter in respect of which the local court had any jurisdiction and that therefore the appellants were not exercising judicial powers of a local court. There was no evidence adduced to show that the local court in the area had any jurisdiction to deal with the matter and in my view the absence of such evidence is fatal to the conviction."

The Crown contended in the court below, and have contended before us, that the decision in *R. v. Philemon s/o Satu and Others* (1), was bad in law, and have asked us not to follow it. In the case stated on behalf of the Attorney-General, the following points of law have been submitted for our opinion:

(*a*) What meaning is to be attached to the words "Exercise . . . any judicial powers within the area of the jurisdiction of a lawfully constituted local court", in s. 26 of the Local Courts Ordinance, Cap. 299 of the Revised Laws.

(*b*) Whether in the present case it was incumbent on the prosecution to establish that the judicial powers exercised by the accused were judicial powers that could be exercised by the Nassa local court.

The answer to the first of these two questions submitted to us is, in our opinion, as follows. To begin with, we would hold that the words "exercises . . . any judicial powers" in s. 26 must be read to mean "purports to exercise . . . any judicial powers". For if a person in fact exercises judicial powers, this presupposes that such powers exist and are vested in him, and that accordingly his exercising of them is lawful; and this would make an absurdity of the section, which declares that in the circumstances therein set out his exercise of such powers is an offence. We record our opinion on this point merely for the sake of completeness; for there has been no attempt to argue that the words "exercises" means other than what we construe it to mean.

Secondly, with regard to the meaning of the words "judicial powers", we consider that any person may properly be said to be exercising or purporting to exercise judicial powers who does any of the following things: (*a*) issues a summons or other process or communication purporting to require anybody to attend before himself or before any other person or body or persons, for the purpose of answering a criminal charge or of conducting before such person or

body of persons a civil suit; (*b*) charges or purports to charge any person with any offence for which such person is led to believe that he may be punished by the person so charging him or by any other person or body of persons, whether or not the act alleged to constitute such offence is an act punishable under the laws of the Territory; (*c*) tries or affects to try any person for any alleged offence, or tries or affects to try any civil suit between any person or persons and any other person or persons, whether or not such trial be conducted in the semblance of a trial in a court of law; (*d*) pronounces or purports to pronounce judgment against or in favour of any person in respect of any offence, whether or not the act alleged to constitute such offence is an act punishable under the laws of the Territory, or in respect of any civil suit; (*e*) imposes or purports to impose any punishment upon any person, whether by way of fine or imprisonment or corporal punishment or confiscation or otherwise, in respect of any offence, whether recognised as such by the law or not, alleged to have been committed by such person. The acts that we have set out above are examples of what we hold to amount to the exercise or purported exercise of judicial powers. They are not necessarily exhaustive, and there may well be other acts that could properly be held to fall within the expression.

Lastly, we turn to consider the meaning of the words: “within the area of the jurisdiction of a lawfully constituted local court”. No difficulty arises over the words “a lawfully constituted local court”; their meaning is plain on the face of them. But it is what we hold to be the equally clear meaning of the preceding words: “within the area of the jurisdiction of” which seems – and we say this with the greatest respect – to have been overlooked by the learned Chief Justice in *R. v. Philemon* (1), whose decision was followed by the learned resident magistrate in the court below. In holding as he did, he may have been misled by the marginal note to s. 26, which reads “Usurping judicial powers”. Those words certainly are misleading, for they go in a vital respect beyond the meaning of the words in the body of the section. To usurp means to take or assume that which is rightly vested in another. But there is nothing in s. 26 which lays down that the judicial power exercised by the offender must be a power vested in a local court, that is to say a power which that court could lawfully exercise. The all-important word, in the phrase “within the area of the jurisdiction of” which we are now considering, is the word “area”. There are two limits to the jurisdiction of any court or other tribunal. The one relates to the nature of the cases that may be tried; the other concerns the area within which those cases may be tried. If the words in s. 26 had been: “within the scope of the jurisdiction of”, or even simply “within the jurisdiction of”, then it might properly be argued that both kinds of limit to a local court’s jurisdiction were being referred to. In such event the judicial power which the offender purported to exercise would not only have to have been exercised within the geographical area within which the local court had jurisdiction to try such cases as it was empowered to try, but must also have been a power which the local court was empowered to exercise within that geographical area; in other words, must also, in the event of any purported trial of a case, have concerned a case which the local court could itself lawfully have tried. But the words in the section: “within the area of the jurisdiction” expressly relate, in our considered opinion, to the geographical limit upon jurisdiction only. The primary meaning of the word “area” is a spatial and physical one, and the expression “area of the jurisdiction” means, in our view, simply what it says. In the result, therefore, if a person purports to try a case within the geographical area within which a local court is empowered to exercise its limited jurisdiction, then he commits an offence against s. 26 even if that case is not one which the local court had power to try, as under the second count in the instant case, and even if it concerns an alleged offence which is no offence against the laws

of the Territory at all and which, therefore, no court in the Territory has power to try, as under the first count in the instant case. We therefore consider, with respect, that, whether or not *R. v. Philemon* (1), was decided per incuriam, it was certainly wrongly decided, and we decline to follow it.

In view of what we hold to be the clear unambiguous words of s. 26 of the Local Courts Ordinance, it is unnecessary to consider at any length the question to what extent, if at all, a marginal note may properly be taken into account in ascertaining the meaning of the section to which it relates. The most recent decisions in England are to the effect that a marginal note should not be considered at all: see *Longdon-Griffiths v. Smith* (2), [1950] 2 All E.R. 662, at the top of p. 672; and *R. v. Bates and Another* (3), [1952] 2 All E.R. 842, at p. 844. One reason given by Donovan, J., in the latter case for rejecting the marginal note is that it is

> "not the subject of debate or amendment in Parliament, and it follows that during the passage of a Bill amendments may be made to a clause which extend its effect beyond the scope of the marginal note, which, nevertheless, remains unamended".

Whether these considerations apply in Tanganyika we do not know. Marginal notes do, we are informed, accompany the text of Bills submitted to Legislative Council in this Territory. But neither here nor in the United Kingdom do they form part of the text of the enacted law; and the most that can be laid down, though in the present case it is unnecessary to lay it down and we refrain from doing so, is that a marginal note may perhaps, as in the case of a long title, be used as a guide to the meaning of a section if, and only if, there is an ambiguity in the section. Here, for reasons that we have given, we find no ambiguity in s. 26 of the Local Courts Ordinance. If, therefore, its marginal note was taken into consideration in *R. v. Philemon* (1), then we think, with respect, that it ought not to have been.

For the same reason, namely the absence of ambiguity in s. 26, we do not think it is open to us to consider, as a guide to its construction, what may have been the general intention of the legislature in enacting it. Nor do we think it relevant, for that purpose, that there is another provision of the law, s. 99 (1) of the Penal Code, under which these accused might have been charged, namely for the offence of assuming to act as judicial officers when not being judicial officers. The scope of the two sections is clearly not the same, although they may to some extent overlap.

That concludes our opinion on the first of the two questions submitted to us. The second question involves no more than the application of our interpretation of s. 26 of the Local Courts Ordinance to the present case. Our brief answer to the second question is that in the present case it was not incumbent on the prosecution to establish that the judicial powers exercised by the accused were judicial powers that could be exercised by the Nassa local court.

As a result of our determination of the above questions of law, and in pursuance of s. 337 of the Criminal Procedure Code, we hold that the learned resident magistrate in the court below erred in ruling that there was no case to answer against any of the accused on either count. We hold that the Crown did make out a case to answer against all the accused on both counts, and we accordingly order that the case be remitted to the learned resident magistrate for completion.

Appeal allowed. Case remitted to the resident magistrate for completion.

The respondents did not appear and were not represented.

For the respondent:

The Attorney-General, Tanganyika
A. M. Troup (Crown Counsel, Tanganyika)

Raphael s/o Raphael Njahiti v R
[1960] 1 EA 1013 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	28 October 1960
Case Number:	408/1960
Before:	Simmons J
Sourced by:	LawAfrica

[1] Criminal law – Jurisdiction – First-class magistrate absent – Plea taken by second-class magistrate – Trial by second-class magistrate – First-class magistrate not then absent – Sentence in excess of second-class magistrate's powers – Whether second-class magistrate retains first-class powers after taking plea – Meaning of "completing the trial" – Subordinate Courts Ordinance (*Cap.* 3), *s.* 5 (3) (*T.*) – *Subordinate Courts* (*Amendment*) *Ordinance*, 1960, *s.* 2 (*T.*) – *Magistrates' Courts Act*, 1952, *s.* 24.

Editor's Summary

A second-class magistrate, next senior administrative officer to the district commissioner and in his absence, recorded a plea on one day, and a few days later, after the district commissioner had returned, heard evidence and passed sentence of fifteen months' imprisonment. By s. 5 (3) of the Subordinate Courts Ordinance the next senior administrative officer, if a second-class magistrate, is vested in the absence of the district commissioner with the powers of a first-class magistrate and even after the return of the district commissioner retains those powers for purposes of completing a trial. On appeal

Held –

(i) for purposes of s. 5 (3) of the Subordinate Courts Ordinance the trial had not begun when the plea was recorded; accordingly the second-class magistrate did not when the district commissioner returned retain the powers of a first-class magistrate.

(ii) the trial was conducted with care but the sentence of fifteen months' imprisonment was in excess of jurisdiction.

Appeal against conviction dismissed. Sentence reduced to twelve months' imprisonment.

[**Editorial Note:** See also *Abubakar Kakyama Mayanja v. R.*, [1960] E.A. 23 (U.).]

Cases referred to in judgment:

(1) *R. v. Craske, Ex parte Commissioner of Police*, [1957] 2 All E.R. 772.

(2) *R. v. Bennett*, [1960] 1 All E.R. 335.

(3) *R. v. Mapenzi* (1954), 2 T.L.R. (R.) 64.

Judgment

Simmons J: The appellant was on a date which I cannot ascertain (the judgment not being dated) convicted of burglary and theft among several other counts and sentenced to imprisonment for fifteen months and three months concurrently.

The first complaint is an allegation against the magistrate of bias resulting from past personal relationships. The appellant (who is educated and intelligent, the son of a chief) says that he objected to being tried by Mr. Longford. There is no record of any such objection and I do not believe that any was made. If it had been it could have been considered and the trial might have been before another magistrate. It is too late to challenge Mr. Longford now.

My attention has been drawn to a letter dated October 12, 1960, from the district commissioner, Ulanga. This letter is not evidence and I ignore it for all purposes but one; a statement by the district commissioner that at the time

of the trial he was in his office at Mahenge. Mr. Longford on April 21, 1960, recorded that the district commissioner was then absent on safari. Pleas were recorded. The trial began on May 25, 1960, Mr. Longford writing: "Powers of 1st Class Magistrate retained". He must have interpreted s. 5 (3) of the Subordinate Courts Ordinance (Cap. 3) (which provides that first-class powers may be retained "for the purpose only of completing the trial") as meaning that the powers could be retained once the plea had been taken. In my opinion this interpretation is wrong. Section 5 (3) has been re-enacted by s. 2 of the Subordinate Courts (Amendment) Ordinance, 1960 (No. 7 of 1960) but the relevant wording is the same.

Section 24 of the (English) Magistrates' Courts Act, 1952, provides that

> "a magistrates' court, having begun to try an information for an indictable offence summarily, shall not thereafter proceed to inquire into the information as examining justices".

In *R. v. Craske, Ex parte Commissioner of Police* (1), [1957] 2 All E.R. 772, the divisional court by a majority (Lord Goddard, C.J., and Byrne, J.) rejected an argument that once the plea was taken the magistrate had "begun to try" the case. (Devlin, J. agreed with the conclusion of the majority but on different grounds.) Byrne, J., said at p. 775:

> "At courts where cases are tried by jury the defendant enters a plea, but he may not be tried for some time after that. His trial does not take place until he has been given in charge of the jury and until evidence is led. To say that in a magistrates' court the trial begins when an election has been made and a plea entered is straining in my view the language of the statute against the liberty of the subject, because it is to my mind of great importance that a right that any person may have to be tried by jury should be preserved, and for those reasons I agree that these motions should be dismissed."

R. v. Craske (1), was distinguished in *R. v. Bennett* (2), [1960] 1 All E.R. 335, but on grounds which do not affect the present appeal. (*R. v. Bennett* (2) seems to be a mere corollary of *R. v. Craske* (1): the divisional court declined to give an opinion as to whether a trial might be said to have begun when "merely formal evidence", if there were such a thing, had been given.)

I hold that it is impossible to "complete" a trial until the trial has begun, and that for the purposes of s. 5 (3) the trial has not begun before some evidence has been heard, even though a plea has been recorded. Unless, therefore, a district commissioner is ill or absent on the day when the hearing of evidence begins the "next senior administrative officer" is not vested with jurisdiction greater than that vested in him in his own right. If the district commissioner is ill or absent the trial magistrate must, on the day when the hearing of evidence begins, file a certificate in the form directed in *R. v. Mapenzi* (3) (1954), 2 T.L.R. (R.) 64.

The convictions were founded on evidence of possession of a watch, proved to have been stolen, which the appellant gave to a witness to sell. The magistrate rightly looked for corroboration and found it in a paper, proved to be in the appellant's handwriting, authorising the sale of an article. The watch had been removed from the complainant's locked room.

The trial was conducted and the record kept with care. I find no substance in the appeal against conviction but the magistrate had no jurisdiction to pass a sentence in excess of twelve months' imprisonment, and the sentence is reduced to that term under count 1; otherwise the appeal is dismissed.

Appeal against conviction dismissed. Sentence reduced to twelve months' imprisonment.

The appellant did not appear and was not represented.

For the respondent:
The Attorney-General, Tanganyika
R. A. Caldwell (Crown Counsel, Tanganyika)

Northern Province Labour Utilization Board v The Commissioner of Income Tax

[1960] 1 EA 1015 (HCT)

Division:	HM High Court of Tanganyika at Dar-Es-Salaam
Date of judgment:	21 December 1960
Case Number:	12/1960
Before:	Mosdell J
Sourced by:	LawAfrica

[1] Practice – Appeal – Extension of time for notice of appeal – Error of advocate – Notice to be given to the Commissioner of Income Tax – Notice erroneously given to the Registrar of High Court – Whether error is "reasonable cause" for extension – East African Income Tax (*Management*) *Act*, 1958, *s.* 111 (2), *s.* 111 (3), *s.* 112 (*f*) – *Eastern Africa Court of Appeal Rules*, 1954, *r.* 9.

[2] Income tax – Appeal – Notice of appeal – Extension of time – Notice to be given to Commissioner – Notice erroneously given to Registrar of Court – Error of advocate – Whether error is "reasonable cause" – East African Income Tax (*Management*) *Act*, 1958, *s.* 111 (2), *s.* 111 (3), *s.* 112 (*f*).

Editor's Summary

On July 8, 1960, the Moshi local committee heard six appeals by the appellant and on July 11 the appellant received notice of dismissal of his appeals in accordance with s. 112 (*f*) of the East African Income Tax (Management) Act, 1958. Under s. 111 (2) of the Act a person dissatisfied with the decision of a local committee must give notice of appeal against the decision in writing to the Commissioner of Income Tax within forty-five days after the date of service upon such person of a notice under s. 112 (*f*). On August 18, 1960, the appellants' advocates in ignorance of s. 111 (2) of the Act gave notice of appeal to the Registrar of the High Court of Tanganyika, Dar-es-Salaam, and it was not until September 13, that they were advised by the Assistant Commissioner, Moshi, that notice of appeal should have been given to the Commissioner whereupon they immediately wrote him enclosing copy of their letter of August 18 addressed to the Registrar. Subsequently the advocates applied to the court for an extension of time within which to give notice to the Commissioner. This notice was opposed by the Commissioner on the ground that the circumstances in which an extension may be granted were laid down in s. 111 (3) and that the error of an advocate had been held not to be a "reasonable cause" for an extension.

Held –

(i) since the error of an advocate had been held not to be a "sufficient reason" for granting an

extension of time under r. 9 of the Eastern Africa Court of Appeal Rules, it was well arguable that such an error could not be a "reasonable cause" under s. 111 (3) of the East African Income Tax (Management) Act, 1958.

(ii) the words "other reasonable cause" in s. 111 (3) of the Act should be construed ejusdem generis with the words "absence from the territories" and "sickness" in that sub-section; both absence and sickness connote a physical impediment preventing notice of appeal being given whereas there is no such element in the slip of an advocate.

Application dismissed.

Cases referred to in judgment:

(1) *Nagindas Motilal v. Nilaji Moroba Naik* (1924), A.I.R. Bom. 399.

(2) *Commissioner of Income Tax v. A.Q.* (Case No. 43), 2 E.A.T.C. 192.

(3) *Commissioner of Transport v. The Attorney-General of Uganda and Another*, [1959] E.A. 329 (C.A.).

Judgment

Mosdell J: The appellant has applied under s. 111 (3) of the East African Income Tax (Management) Act, 1958 (hereinafter called "the Act") for an extension of time for giving notice to the Commissioner of Income Tax of his intention to appeal against the decision of the Moshi local committee, dismissing six appeals made by the appellant against decisions of the Commissioner of Income Tax relating to income received in the years 1951 to 1956, both inclusive. The facts appear to be as follows:

The appellant was represented at the hearing of the appeals before the Moshi local committee on July 8, 1960, by Mr. Hutchison of Messrs. Reid and Edmonds, Advocates of Arusha. On July 11, 1960, the appellant received notice of the dismissal of the appeals by the Moshi local committee as required by s. 112 (*f*) of the Act, and on August 18, 1960, Messrs. Reid and Edmonds wrote to the Registrar of the High Court, Dar-es-Salaam, giving notice of the appellant's intention to appeal against the decisions of the Moshi local committee. This notice was given apparently in ignorance of the provisions of s. 111 (2) of the Act, which is in the following terms:

> "111 (2) Any person who, having appealed to a local committee, is dissatisfied with the decision of such committee may, notwithstanding such decision, again appeal against the assessment to a judge upon giving notice of appeal in writing to the Commissioner within forty-five days after the date on which a notice of such decision has been served upon him under para. (*f*) of s. 112."

In the event notice of appeal in writing was not given to the Commissioner within forty-five days after the date on which a notice of the decisions of the Moshi local committee had been served upon the appellant. On September 13, 1960, Messrs. Reid and Edmonds were advised by the Assistant Commissioner of Income Tax in Moshi that notice of intention to appeal should have been given to the Commissioner, and on that date Messrs. Reid and Edmonds sent the Assistant Commissioner of Income Tax a copy of the previous letter to the Registrar under cover of a letter in the following terms:

> "Dear Sir, 13th September, 1960.
>
> East African Income Tax (Management) Act, 1958.
>
> Northern Province Labour Utilization Board – Appellant
>
> versus
>
> The Commissioner of Income Tax – Respondent
>
> With reference to our telephone conversation today (Millsom/Hutchison), we enclose, herewith, copy of our letter H/R/1118 dated 18th ultimo, addressed to the Registrar, H.M. High Court, Dar-es-Salaam, giving notice of intention to appeal, in the above-mentioned matter. We had not understood that it was necessary to serve a copy of this notice on you, and we apologise for our default in so doing.
>
> Yours faithfully,
>
> Reid & Edmonds,
>
> (Sgd.) P. H. Hutchison."

It is to be observed that this notice was given to the Assistant Commissioner of Income Tax after the forty-five days allowed by s. 111 (2) of the Act had expired. Messrs. Reid and Edmonds have sought by application to have the

forty-five day period which expired on August 26, 1960, extended to September 30, 1960, in order to validate the notice given to the Assistant Commissioner of Income Tax by means of the letter dated September 13, 1960. The Act contains provision in s. 111 (3) for the granting in certain circumstances by a local committee or a judge of an extension of time within which notice of appeal may be given. It is in the following terms:

> "111 (3) Where a person has failed to give notice of appeal within the relevant period specified in sub-ss. (1) and (2), then he may apply to the local committee or a judge, as the case may be, for an extension of the time in which to give such notice of appeal, and the local committee or a judge, as the case may be, may grant such extension on being satisfied that owing to absence from the Territories, sickness, or other reasonable cause, he was prevented from giving notice of appeal within such relevant period and that there has been no unreasonable delay on his part, subject, however, where such application is made after the due date for the payment of the whole or part of the tax assessed, to the condition that he shall deposit with the Commissioner, if the Commissioner so requires, the whole, or such part as the Commissioner may require, of the amount of tax assessed under the assessment against which he wishes to appeal and shall pay any penalty due under s. 120."

Now Mr. Reid, for the appellant, argued that this sub-section was to be construed as meaning that a local committee or a judge could give an extension of time within which notice of appeal may be given on mere failure of a person to give notice of appeal within the required period. To support this proposition he cited s. 5 of the Indian Limitation Act, 1908, which applies in Tanganyika. Section 5, before it was amended by Act 10 of 1929, read as follows:

> "Any appeal or application for a review of judgment or for leave to appeal or any other application to which this section may be made applicable by any enactment or rule for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period."

Mr. Reid also cited in support of this proposition the case of *Nagindas Motilal v. Nilaji Moroba Naik* (1) (1924), A.I.R. Bom. 399, the relevant headnote of which reads:

> "Limitation Act, s. 5 mistake of pleader – delay was excused.
>
> "Where the applicant's application for leave to appeal to his Majesty in Council was out of time by about a fortnight owing to his local legal advisers not knowing the recent change in law curtailing the period of limitation for such applications but applicant acted in good faith and with due diligence.
>
> "**Held:** The delay should be excused."

But in this application we are concerned with the provisions of the Act, and s. 111 (3) lays down the circumstances in which an extension of time for giving notice of appeal may be granted. It is also to be noted that by the Income Tax (Appeal to the High Court) Rules, 1959, made under s. 117 of the Act, it is provided in r. 17 as follows:

> "The rules determining procedure in civil suits before the court in so far as such rules relate to recognised agents and advocates, to service, to consolidation, to admissions, to the production, impounding and return of documents, to the summoning and attendance of witnesses, to adjournments,

> to the examination of witnesses, to affidavits, to judgment and decree, to the execution of decrees, to the attachment of debts, to the death, bankruptcy and marriage of parties, to withdrawal, discontinuance and adjustment, to security for costs, to commissions, to corporations, to trustees, executors and administrators, and to the enlargement of time shall, to the extent to which such rules are not inconsistent with the Act or these Rules, apply to an appeal to a judge under the Act as if such appeal were a civil suit but, save as provided in these rules, the procedure relating to civil suits before the court shall not apply to any such appeal."

The rules as to civil procedure re enlargement of time only apply to the extent that "they are not inconsistent with the Act or these Rules". The specific provisions made in s. 111 (3) of the Act would seem to be consistent with the rules of civil procedure as to enlargement of time.

Mr. Newbold for the respondent stated that there was an admitted failure to comply with the provisions of s. 111 (2) of the Act, and that the circumstances in which the local committee or a judge may grant an extension of time for giving notice of appeal were laid down in s. 111 (3) of the Act, namely – when the local committee or a judge is satisfied that owing to absence from the Territories, sickness or other reasonable cause, the appellant was prevented from giving notice of appeal within the relevant period, namely in this case forty-five days after the date on which notice of the Moshi district committee's decision was served upon the appellant. Mr. Newbold referred me to the case of the *Commissioner of Income Tax v. A.Q.* (2) (Case No. 43), 2 E.A.T.C. 192. One of the points for decision in that case, which was a Kenya case and concerned an appeal by the Commissioner of Income Tax, was the meaning of the proviso to r. 3 (2) of the Income Tax (Appeal to Kenya Supreme Court) Rules made under the East African Income Tax (Management) Act, 1952, which reads as follows:

> ". . . Provided that when a judge is satisfied that owing to any reasonable cause the Commissioner was prevented from presenting such memorandum of appeal within such period and that there has been no unreasonable delay on his part, the judge may extend the period within which such memorandum of appeal may be presented."

In that case Mayers, J., considered the meaning of the word "prevent". He said, and with respect I agree with his observations in this regard:

> "'to prevent' is a transitive verb and is defined in the Oxford English Dictionary as to 'hinder' or to 'stop'. It seems to me that the essential connotation of the word is interference with the doing of some act by some agency extraneous to the will of the actor. A prospective appellant is not precluded by the Income Tax Appeal Rules from preferring his appeal until the last day of the period within which such appeal may be preferred. I cannot therefore see how it can be said that a prospective appellant is prevented from lodging his appeal within the prescribed time by reason of the mistaken belief of his advocate that the prescribed time is longer than it in fact is. I am therefore quite satisfied that the appellant was not prevented from any reasonable cause from filing this appeal within the prescribed time."

The proviso to r. 3 (2) of the Income Tax Appeal Rules last quoted deals with the extension of time for the presentation of the memorandum of appeal by the Commissioner of Income Tax, but mutatis mutandis the reasoning as to whether or not the Commissioner had been "prevented" from presenting the memorandum of appeal within time would be equally applicable to a consideration whether the appellant in the instant case was "prevented" from

giving notice of his appeal to the Commissioner of Income Tax within the requisite period. Mr. Newbold also referred me to the case of the *Commissioner of Transport v. The Attorney-General of Uganda and Another* (3), [1959] E.A. 329 (C.A.), where it was held that under r. 9 of the Eastern Africa Court of Appeal Rules the power conferred on the court to extend time is limited and can only be exercised for "sufficient reason", and that under the latter rules the error of an advocate was not a "sufficient reason". It is well arguable therefore that the error of an advocate is not a "reasonable cause" under s. 111 (3) of the Act, and indeed if additional support were required for this conclusion it could be found in the application of the ejusdem generis rule to the expression "absence from the Territories, sickness or other reasonable cause". Or "other reasonable cause" must be considered ejusdem generis with "absence from the Territories" and "sickness". Both "absence from the Territories" and "sickness" connote to me a physical impediment preventing the giving of notice of appeal in time. There is no element of physical impediment about the slip of an advocate to give notice of appeal in time. On this ground too, therefore, it would seem that the error of an advocate would not be a reasonable cause enabling a judge to grant an extension of time under s. 111 (3) of the Act.

I, therefore, dismiss the application with costs.

Application dismissed.

For the appellant:
Reid & Edmonds, Moshi
A. Reid

For the respondent:
The Legal Secretary. E.A. High Commission
C. D. Newbold, Q.C. (Legal Secretary E.A. High Commission) and *R. F. Johnson*

Dhana Singh s/o Hakam Singh v S L Patel and another
[1960] 1 EA 1020 (SCK)

Division:	HM Supreme Court of Kenya at Nairobi
Date of judgment:	3 October 1960
Case Number:	76/1960
Before:	Farrell J
Sourced by:	LawAfrica

[1] Execution – Costs – Decree for costs – Execution sought by sale of mortgaged property – Decree-holders and mortgagees same persons – Whether mortgaged property can be sold without suit for foreclosure or sale – Indian Transfer of Property Act, 1882, *s.* 67, *s.* 86, *s.* 88 *and s.* 99 – *Civil Procedure Ordinance* (*Cap.* 5), *s.* 2 (*K.*) – *Civil Procedure* (*Revised*) *Rules*, 1948, *O. XXI*, *r.* 6 (*K.*).

Editor's Summary

The applicant applied for an order that the respondents' application for execution of a decree for costs in an action by sale of the suit property be set aside and stayed on the ground that such a sale was contrary to s. 99 of the Indian Transfer of Property Act, 1882, which prohibits a mortgagee from bringing the property to sale except by an action for foreclosure and sale under s. 67 of the Act. It was conceded that the respondents were mortgagees of the suit property and decree-holders in respect of the costs. The respondents submitted that, since the respondents had come to the court under O. XXI, r. 6 of the Civil Procedure Rules, there had been substantial compliance with s. 99, even though a "suit" had not been instituted under s. 67 of the Act; that under s. 67 a mortgagee is entitled to an order for sale of the mortgaged property, and that s. 67 does not in terms require the institution of a suit for this purpose.

Held –

(i) s. 99 of the Indian Transfer of Property Act is clear and whatever may be the meaning of "suit" for purposes of the Civil Procedure Ordinance, a suit instituted under s. 67 of the Act as referred to in s. 99 is unquestionably a suit for foreclosure and sale.

(ii) s. 99 is mandatory and even if the court were satisfied that the objects of the section could be adequately secured in some other way, it would not be entitled to disregard the provisions of the section.

Application allowed.

Judgment

Farrell J: By this notice of motion the applicant prays for an order that the respondents' application for execution of a decree for costs in Civil Case No. 1131 of 1958 by way of sale of the suit property be set aside and stayed on the ground that such sale is contrary to the provisions of s. 99 of the Indian Transfer of Property Act. It is common ground that the respondents are mortgagees of the suit property and decree-holders in respect of the costs in question. In those circumstances it is prima facie clear that s. 99 of the Act prohibits the respondents from bringing the property to sale otherwise than by a suit instituted under s. 67 of the Act, i.e. a suit for foreclosure or sale.

It is to be noted that s. 99 of the Act was repealed in India by the Code of Civil Procedure (Act V of 1908), and a modified form of the provision was included in O. 34, r. 14 of the Civil Procedure Rules. The changes thereby made in the law of India have no effect on the law of the Colony and can therefore be ignored for the purposes of these proceedings.

It is argued for the respondents that the object of s. 99 was to ensure that any sale should be made under the sanction of the court and should be "above board". It is pointed out that the respondents have come to the court under O. XXI, r. 6, and the notice of sale clearly shows that the property is to be sold subject to the existing mortgage. Moreover, it is said that the proceedings they have taken are properly described as a suit, by reason of the definition contained in s. 2 of the Civil Procedure Ordinance. In those circumstances the respondents say that there has been substantial compliance with the requirements of s. 99, even though the "suit" has not been instituted under s. 67 of the Act. They further argue that under s. 67 a mortgagee is entitled to an order for sale of the mortgaged property, and the section does not in terms require the institution of a suit for this purpose.

I have no hestitation in rejecting the above arguments in toto. The provisions of s. 99 are clear and whatever may be the meaning of "suit" for the purposes of the Civil Procedure Ordinance, a suit instituted under s. 67 of the Act as referred to in s. 99 is unquestionably a suit for foreclosure or a suit for sale in which the respective reliefs to be granted are set out in s. 86 and s. 88. Section 99 is mandatory, and even if the court were satisfied that the objects of the section could be adequately secured in some other way, it would not be entitled to disregard the provisions of the section. The court is not, however, so satisfied, since the mischief at which the section was aimed is thus described in a case cited in Gour, Law of Transfer (5th Edn.), Vol. II, at pp. 1842-3:

> "Prior to the passing of Act No. IV of 1882 it was the constant custom of mortgagees to obtain, on other causes of action than their mortgages, decrees for money against the mortgagor, to bring the mortgaged property to sale in execution of those money-decrees, and to have it sold, reserving their rights as mortgagees. The result of that was that in such cases, the sale being notified as one in which the property to be sold was subject to a mortgage, the purchasers would not come forward to run the risk of harassing litigation with the mortgagee in future suits, and the mortgagee or his benamider was left in possession of the field, and in too many instances purchased the mortgagor's interest in the property for a mere song, and having got by such sale the mortgagor's interest for practically a trifling price, the mortgagee got the whole property into his hands. It was found from experience that the result of such a state of things was that the properties passed out of the hands of the mortgagors into the hands of the mortgagees, in many cases for far less than their value counting the mortgage-debt and the price paid at the sale under the money-decree together. It was also found that such a state of things encouraged litigation, and it was to provide a remedy and to prevent the recurrence of such a state of things that s. 99 was enacted."

For the reasons given, there will be an order for the applicant as prayed with costs.

Application allowed.

For the applicant:
G. R. Mandavia, Nairobi

For the respondent:
D. N. & R. N. Khanna, Nairobi
Clive W. Salter, Q.C., and *P. N. Khanna*

Habib Devji v P C Tarmohamed and another

[1960] 1 EA 1022 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	20 December 1960
Case Number:	111/1960
Before:	Sir Audley McKisack CJ
Sourced by:	LawAfrica

[1] Landlord and tenant – Mailo land – Governor's consent to lease necessary – Agreement to lease expressed to be subject to Governor's consent – Whether agreement unlawful and void – Land Transfer Ordinance (*Cap*. 114) (*U*.) *– Indian Contract Act*, 1872, *s*. 31 *and s*. 32.

[2] Agent – Contract – Contract made with person claiming to be agent – Ratification of contract by principal – Non-performance of contract – Whether principal liable for money received by agent under contract – Indian Contract Act, 1872, *s*. 196, *s*. 197, *s*. 198, *s*. 199 *and s*. 200.

Editor's Summary

The second defendant, the owner of Mailo land in Buganda, asked a friend to find a purchaser for land. The friend went to the first defendant, who agreed to lease this land for a premium of Shs. 5,000/-. This was reported to the second defendant, who approved the arrangement. The first defendant, claiming to be the agent of the second defendant, then went to the plaintiff and negotiated a lease to the plaintiff of the land for a premium of Shs. 8,500/- and Shs. 1,000/- negotiating commission, which the plaintiff paid to the first defendant. As the land was Mailo land, the transaction was conditional upon the Governor's consent, which was duly obtained. A lease was then drawn up and submitted to the second defendant, who then took advice and claimed the whole premium from the plaintiff. The plaintiff said he had already paid part of the premium to the first defendant, whereupon the second defendant claimed this sum from the first defendant. The plaintiff, being unable to complete the transaction, sued for the return of the money paid, alleging a total failure of consideration. The first defendant claimed that the contract between the plaintiff and the first defendant was illegal as a contravention of the Land Transfer Ordinance, and secondly, that as the contract had been ratified by the second defendant the plaintiff's remedy was against the second defendant. The defence of the second defendant was that the first defendant was not his agent and that he had not ratified the contract.

Held –

(i) the contract was not enforceable unless and until statutory consent was obtained; consequently it was a contingent contract within s. 31 and s. 32 of the Indian Contract Act.

(ii) a contract expressed to be contingent upon statutory consent being granted is not within the mischief of the Land Transfer Ordinance, and is not thereby prohibited; accordingly the contract was not void ab initio and was not illegal.

(iii) there was ample evidence that the second defendant had ratified the contract entered into between the plaintiff and the first defendant and the first defendant became an agent of the second defendant by ratification.

Judgment for the plaintiff against the first defendant for Shs. 1,000/- and against the second defendant

for Shs. 8,500/-.

Cases referred to in judgment:

(1) *Motibhai Manji v. Khursid Begum*, [1957] E.A. 101 (C.A.).

(2) *J.W. Sonko v. N.P. Danani*, Uganda High Court Civil Case No. 513 of 1957 (unreported).

Judgment

Sir Audley McKisack CJ: This suit arises out of negotiations for the lease of an area of Mailo land, the registered owner of which is the second defendant, Prince Juko. The plaintiff is an Indian businessman who claims that he entered into an oral contract with the first defendant (to whom I shall refer as Chatur), as agent for Prince Juko, to take on lease a quarter acre of Prince Juko's land, subject to the Governor's consent being obtained as provided for in the Land Transfer Ordinance (Cap. 114 of the Laws of Uganda). The plaint alleges that the plaintiff paid to Chatur the sum of Shs. 14,500/-, of which Shs. 13,500/- was the price of the lease, and Shs. 1,000/- was the commission for Chatur's part in negotiating the agreement. The plaint further states that Chatur returned to the plaintiff Shs. 5,000/-, because it was decided to reduce the area of land to be leased. The evidence, however, has shown that this part of the transaction was somewhat different from the facts stated in the plaint.

The plaint alleges that Prince Juko is unwilling to complete the deal although the Governor's consent has been obtained, and has also refused to refund the amount already paid by the plaintiff; consequently neither of the defendants has given any value for the Shs. 9,500/- (i.e. Shs. 14,500/- less the Shs. 5,000/- refunded) which the plaintiff has paid to Chatur. The prayer asks for specific performance or, alternatively, damages in the sum of Shs. 8,500/- from either or both defendants, and Shs. 1,000/- from the defendant Chatur. At the commencement of the hearing, however, the claim for specific performance was abandoned and there remains the monetary claim based on failure of consideration.

I find that the facts were as follows. Prince Juko asked a friend, Mr. Caxton (D. 2), to find a purchaser for the land which he wished to sell (a quarter-acre of Mailo land). Caxton went to Chatur and, after negotiations, Chatur agreed that he would purchase a lease of this land for forty-nine years at a premium of Shs. 5,000/-. Caxton informed Prince Juko of this, and the latter approved the arrangement. Caxton believed that it was Chatur himself who was to be the tenant. Prince Juko, to whom Chatur was unknown, does not seem to have been concerned with the name of the person who was to be tenant.

Chatur then went to the plaintiff's son (P. 2) and offered to negotiate a lease of this land by Prince Juko to the plaintiff, the premium being Shs. 12,500/-. Chatur represented himself to be Prince Juko's agent (which, of course, he was not), and also said he would require Shs. 1,000/- for himself as commission. He explained to the plaintiff's son, who was dealing with this matter on behalf of his father, that an agreement to lease could not be effective unless the Governor's consent under the Land Transfer Ordinance was obtained. The plaintiff agreed to take a lease of the land, subject to that consent being obtained, on the terms stated by Chatur. This is the contract in respect of which the plaintiff is claiming back his money on the ground that there has been a total failure of consideration.

The amount eventually received by Chatur from the plaintiff (after a rather complicated transaction which it is not necessary to particularise) was Shs. 9,500/-, being Shs. 8,500/- on account of the premium and Shs. 1,000/- for Chatur's commission.

It appears that the Governor's consent was then obtained and a lease was drawn up in which the plaintiff was named as the tenant. Prince Juko now learnt – to his surprise – that the premium he was to receive was not Shs. 5,000/-, as Mr. Caxton had told him, but Shs. 12,500/-. He says that Chatur never paid over any money to him. He took legal advice and demanded

the whole amount of the premium from the plaintiff. The plaintiff told him he had already paid part of the premium to Chatur. Prince Juko demanded from Chatur the money which the plaintiff had paid to Chatur, but failed to obtain anything from him. Prince Juko says he has not completed any lease with the plaintiff, as he was not willing to do so without having received the full amount of the premium, Shs. 12,500/-.

Chatur did not give evidence. Mr. D'Silva, who appeared for him, has two lines of defence. The first is that the contract between the plaintiff and Chatur was illegal as being a contravention of the Land Transfer Ordinance and, consequently, the plaintiff cannot claim any money paid under that contract. The other line of defence is that Prince Juko ratified the contract made between Chatur and the plaintiff and, consequently, Chatur is only an agent and the plaintiff's remedy is against the principal, Prince Juko.

Prince Juko's defence is that he is not liable to the plaintiff as Chatur was not his agent, and the contract in question was never ratified by Prince Juko.

On the question whether this contract was illegal Mr. D'Silva relies on *Motibhai Manji v. Khursid Begum* (1), [1957] E.A. 101 (C.A.), and on *J.W. Sonko v. N.P. Danani* (2), Uganda High Court Civil Case No. 513 of 1957 (unreported). The principle to be derived from those cases is that, since the Land Transfer Ordinance prohibits a contract to purchase or take on lease land of which an African is the registered proprietor if the other party is a non-African, unless the Governor has given his consent in writing, a contract of this nature which has been entered into without that consent is void ab initio, and the subsequent granting of the Governor's consent cannot convert it into an enforceable contract. In those cases, however, there was no term in the contract to the effect that the contract should not be binding unless the statutory consent was obtained. In the instant case the contract was one which would not become enforceable unless and until the statutory consent was obtained. Consequently, this contract comes within s. 31 and s. 32 of the Indian Contract Act, which are as follows:

> "31. A 'contingent contract' is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.
>
> "32. Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void."

Entering into a contract expressed to be contingent upon the statutory consent being granted is not, in my view, within the mischief of the Land Transfer Ordinance and is not prohibited thereby. Such a contract is not void ab initio, though it would, of course, become void if the statutory consent was refused. Consequently I hold that the contract on which the plaintiff relies in the instant case was not illegal.

The next question is whether Prince Juko ratified the contract which Chatur had purported to make on his behalf with the plaintiff. There is ample evidence of such ratification. Indeed, it would be surprising if he had not wished to ratify it, seeing that the amount of the premium arranged by Chatur was more than double the premium which he had expected to receive. The ratification is proved by evidence of a number of acts by Prince Juko, in particular by the demand made by him, through his lawyers, that the plaintiff should pay him the premium and the amount of the first year's rent (see the letter of March 22, 1956, exhibit A. 3). And it is clear that Prince Juko ratified the transaction with full knowledge that the plaintiff had already paid part of the premium to Chatur; the plaintiff himself had told him about this. Accordingly, s. 196, s. 197, s. 198, s. 199 and s. 200 of the Indian Contract Act are applicable, and the result is that Chatur became an agent by ratification.

The results are as follows. The plaintiff is entitled to recover Shs. 8,500/-, being the amount which he paid on account of premium, from the defendant Prince Juko. The plaintiff is further entitled to recover from the defendant Chatur the Shs. 1,000/- which he paid to him as commission, and which is separately claimed from Chatur in para. (*b*) of the prayer to the plaint. There will accordingly be judgment for plaintiff against the first defendant for Shs. 1,000/-, and against the second defendant for Shs. 8,500/-, with interest thereon at 6 per cent. from the institution of the suit, and costs.

Judgment for the plaintiff against the first defendant for Shs. 1,000/- *and against the second defendant for Shs.* 8,500/-.

For the plaintiff:
Hunter & Greig, Kampala
J.F.G. Troughton

For the first defendant:
Wilkinson & Hunt, Kampala
B.E. D'Silva

for the second defendant:
J. S. N. Mayanja, Kampala

Pushpa d/o Raojibhai M Patel v The Fleet Transport Company Ltd

[1960] 1 EA 1025 (CAM)

Division:	Court of Appeal at Mombasa
Date of judgment:	23 December 1960
Case Number:	5/1960
Before:	Sir Alastair Forbes VP, Gould JA and Crawshaw JA
Sourced by:	LawAfrica
Appeal from	H.M. Supreme Court, Kenya – Pelly Murphy, J.

[1] Pleading – Allegation that plaintiff struck by trailer attached to lorry – Evidence that plaintiff struck either by trailer or lorry – Extent to which party bound by pleadings – Whether leave to amend plaint can be given.

[2] Admission – By advocate on matter of law – Admission incorrect – Whether party bound by such admission.

Editor's Summary

The appellant claimed damages for injuries suffered by her when struck by a vehicle belonging to the respondent. It was alleged in the plaint that she was struck by the trailer attached to lorry and that the driver was negligent inter alia by driving a large lorry and trailer too close to the footpath at the left-hand side of the road and/or permitting part of the trailer attached to the lorry to encroach from the roadway over the footpath at the left-hand side of the road. The respondent denied negligence and in the alternative pleaded contributory negligence on the part of the appellant. At the trial the respondent argued that the appellant was bound by her pleadings and that having failed to prove that she had been struck by the trailer in the manner given in evidence she could not rely on evidence which indicated by inference that she might have been struck either by the trailer or the lorry. In summing up his case to the court counsel for the appellant conceded that if the front part of the trailer did not hit the appellant then the court should find for the respondent. The Supreme Court dismissed the action holding that how the accident happened was a matter of conjecture and accordingly the appellant had not proved that the injuries were due to the negligence of the respondent's driver. On appeal

Held – (Crawshaw, J.A., dissenting)

(i) the trial judge was in error in not drawing the inference that there was prima facie evidence of negligence on the part of the driver;

(ii) the refusal of the trial judge to accept the evidence of one witness did not alter the incontrovertible fact that the appellant was struck by the lorry or the trailer, or the accepted evidence which suggested that she might have been struck by some part of the side of one or the other;

(iii) the admission by the advocate for the appellant was on a matter of law and, if incorrect, was not binding on the appellant;

(iv) it is a salutary and necessary rule that a party is bound by his pleadings, but if particulars are given in undue detail and what is proved varies from them in ways which are immaterial, it remains the duty of the court to see that justice is done and leave to amend will be given at any stage; if, on the other hand, the particulars given have misled the defendant or led him to shape his case in a certain way that would be a very different matter.

Appeal allowed. Order for retrial de novo. The appellant given leave to amend her pleadings so as to include collision with the lorry as an alternative to the trailer.

Cases referred to in judgment:

(1) *Ellor v. Selfridge and Co., Ltd*. (1930), 46 T.L.R. 236.

(2) *Laurie v. Raglan Building Co., Ltd*., [1941] 3 All E.R. 332.

(3) *Martin v. North Metropolitan Tramways Co*. (1887), 3 T.L.R. 600.

(4) *Watt v. Thomas*, [1947] A.C. 491.

(5) *Benmax v. Austin Motor Co., Ltd*., [1955] A.C. 370; [1955] 1 All E.R. 326.

(6) *Caswell v. Powell Duffryn Associated Collieries Ltd*., [1940] A.C. 152; [1939] 3 All E.R. 772.

(7) *Esso Petroleum Co., Ltd. v. Southport Corporation*, [1956] A.C. 218; [1955] 3 All E.R. 864.

(8) *Daim v. Khanu* (1927), 8 Lah. 655.

(9) *Plotti v. The Acacia Co., Ltd*., [1959] E.A. 248 (C.A.).

The following judgments were read:

Judgment

Gould JA: This is an appeal from a judgment and decree of the Supreme Court of Kenya at Mombasa dismissing the appellant's claim for damages for injury suffered by her when struck by the respondent company's motor vehicle on July 29, 1958. The appellant, suing by her father as next friend, is a girl who was, at the date of the accident, aged seven years. It was not disputed that the appellant's injuries were caused by her coming into violent contact with a vehicle consisting of a lorry and trailer, driven by a servant of the respondent in the course of his duty, at about 7.30 a.m. on the date above mentioned, in Arab Road, Mombasa.

The plaint alleged that the appellant was struck by the trailer attached to the lorry and claimed that there was negligence on the part of the driver in:

"(i) driving a large lorry with trailer too close to the footpath at the left-hand side of the road;

"(ii) permitting part of the trailer attached to the motor vehicle aforesaid to encroach from the roadway over

the footpath at the left-hand side of the road;

"(iii) failing to keep a proper look-out for pedestrian traffic, and in particular failing to keep a proper look-out for the plaintiff who was walking along the footpath at the edge of the carriageway;

"(iv) driving at an excessive speed, having regard to conditions of traffic at the time and place aforesaid;

> "(v) failing to apply brakes or to take any other appropriate evasive action so as to avoid striking the plaintiff."

The respondent denied negligence and in the alternative pleaded contributory negligence on the part of the appellant.

The findings of the learned trial judge were, in essence, that the lorry at the time of the accident was travelling at ten miles per hour or less, which was not an excessive speed, and that, on his view of the evidence, how the accident happened remained a matter of conjecture, and accordingly the appellant had not proved it to have been caused by the negligence of the respondent's driver.

I will deal first with the question of speed. The learned judge in his judgment said that Miss de Souza was the most important witness and quoted her evidence that the lorry was travelling at a speed she estimated at thirty miles per hour at least,

> "faster than she would have expected a lorry to travel and as fast as a private car would go if it were being driven in a hurry".

Mr. M.M. Patel, another witness, estimated the speed at approximately twenty-five miles per hour. A third witness, Mr. M.J. Patel estimated it at thirty miles per hour –

> "more than the normal speed at which lorries are driven and certainly more than fifteen miles per hour".

Having dealt with these witnesses the learned judge said:

> "On all the evidence, including the evidence of the three witnesses for the plaintiff to whom I have already referred, I am completely satisfied that the lorry at the time of the accident was travelling at a speed of not more than ten miles per hour, and probably less."

On the face of the judgment, this is, I must say with respect, a startling finding, as no reason is anywhere given for it. Counsel for the respondent was however, able to show, by calculations based upon the recorded evidence, that it was a finding with ample justification. There are a number of ways of approaching the matter but the basic one is this. Mr. M.M. Patel was at the time of the accident in a motor car following the lorry at a distance he estimated as 150 yards. He continued to the scene of the accident (the lorry having gone straight on) stopped his car, alighted, had a short conversation with Miss de Souza, who by that time was with the appellant, re-entered his car and overtook the lorry before it reached Ziwani Road, one-third of a mile from the scene of the accident. Mr. M.M. Patel's estimate of the time he was at the scene of the accident – three minutes – can be disregarded as unrealistic, but, the time consumed, including an allowance for deceleration and re-acceleration cannot have been much less than one minute. In one minute, at twenty miles per hour, the lorry would have reached Ziwani Road. At ten miles per hour the lorry would have covered half the distance, which would make it reasonably possible for Mr. Patel to have overtaken it and to have been blowing his horn at it, some distance before Ziwani Road was reached. Other evidence as well as that of Mr.M.M. Patel, indicates that this in fact was the case. In my opinion therefore the learned judge came to a correct conclusion on this aspect of the matter.

The main ground of complaint against the judgment was that embodied in ground 2 of the memorandum of appeal which reads:

> "2. That even if the learned trial judge was justified in rejecting the opinion of the witness Gala de Souza, that at the time of the accident the respondent's lorry was being driven at a speed more than that of a private

> car which was travelling fast, such rejection did not warrant the conclusion that this witness was so unreliable that her evidence could not be accepted at all."

The road at the place in question is straight for a considerable distance in either direction. The tarmacadam surface was stated in the judgment to be twenty-nine feet wide but the evidence of the witness who prepared a plan used in evidence was that it is twenty-five feet. There is a murram verge or path on either side approximately four feet wide.

Before proceeding to the judgment I will set out certain portions of the learned judge's notes of the evidence given by Mr. M.M. Patel and Miss de Souza. First, Mr. Patel said in examination-in-chief:

> "I drove my children to school. At that time I was returning along Arab Road. I noticed a girl falling down after a trailer had passed her. Trailer drawn by a lorry. It was in front of me. A straight road. It was loaded with cement. The first I saw was the girl falling. She was on my left side of the road. When I saw the girl fall down. It is a tarmac road. Tarmac about twenty feet wide. Girl, when I reached her, was off the tarmac . . . I did not see where the girl was walking before she was struck. I don't remember seeing any traffic approaching."

In cross-examination, he said:

> "I was approximately 150 yards behind lorry and trailer. Before I saw girl fall I had had lorry under observation for about three to four minutes – following it – from time I left the school . . . There were quite a number of children about – going to school."

Miss de Souza said, in examination-in-chief:

> "I am a teacher at Bondeni Girls Primary School. At 7.30 a.m., on 29.7.58 I was walking to school along right-hand side of Arab Road facing the junction of Tononoka Road . . . I see red 'X' and 'accident spot' marked on plan. Red 'X' represents where I was . . . When I was at red 'X' I saw Pushpa in front of me walking along the murram about fifteen inches from edge of the tarmac. I am quite sure she was on the murram. Coming from opposite direction, I saw laden cement lorry going at speed. It immediately occurred to me that the lorry would strike Pushpa because it was coming over to its left side of the road giving way to another car going in opposite direction (i.e. same direction as I was going). Just at that moment Pushpa was hit by the front left corner of the trailer . . . She was then still fifteen inches from tarmac. She was thrown about a yard towards the grass. She lay where she fell . . . Lorry and trailer went on. It did not stop. I should out. It was still going at speed . . . I am certain she was at no time on the tarmac while I saw her. I had a clear view."

In cross-examination:

> "I first saw lorry when it was about ten yards from child. Lorry did come off tarmac. Child was about fifteen inches in on the murram from the tarmac. I could judge that distance from twenty yards. The whole lorry was off the tarmac. The near side wheels of lorry and trailer (front and rear) were on the murram. Lorry was going about thirty miles per hour at least – faster than I would expect a lorry to go as fast as a private car going in a hurry. I am quite sure of the speed. I am quite sure that lorry and trailer came off tarmac. Child did not move from murram towards tarmac. Lorry was going back towards tarmac and trailer still on murram (about fifteen inches on murram). The lorry missed the child by about one inch."

Neither the appellant nor the driver of the truck were called as witnesses, and the evidence for the respondent as to the events of the morning in question was confined to that of the turnboy who was on the bags of cement in the trailer. He testified that he was unaware of the accident until his attention was attracted by a car blowing its horn asking him to stop. He said the lorry was travelling at ten miles per hour and did not leave the tarmac. He was not however in a position to see very much as he was facing the barrier at the front of the trailer. The respondent also called evidence concerning experiments with the lorry and trailer which were criticized by the advocate for the appellant as having been carried out without giving the appellant an opportunity of being present. There is perhaps some justification for the criticism but the evidence is not necessarily to be disbelieved on that account. The learned judge in fact accepted it, and its purport is to be gathered from one of the passages from the judgment I am about to quote.

Following upon the passage I have quoted above, in which the learned judge expressed his finding on the question of speed, he said:

> "Having come to that conclusion, I must necessarily feel some doubt as to the reliability of Miss de Souza as a witness, not so much because of her estimate of the speed of the lorry in miles per hour, but, more important, because she states quite definitely that the lorry was being driven at a speed more than that of a private car being driven fast, which statement is clearly untrue. Further, her evidence as to a car passing the lorry (thus causing the lorry to swerve to the left) is not borne out by the evidence of the two Mr. Patels already mentioned. If there was not a car coming from the opposite direction (and Miss de Souza is the only person to speak of it) there is on the evidence before me, no apparent reason why the driver of the lorry should swerve off the tarmacadam surface onto the murram verge.
>
> "Miss de Souza was, so far as the evidence before me goes, the only person who saw how the infant plaintiff came to be knocked down.
>
> "I accept as true the evidence given on behalf of the defendant company that, when this lorry is driven on a curving course, the trailer cannot deviate outside the arc described by the lorry. Assuming that the lorry and trailer did swerve off the tarmacadam surface on to the murram verge, I am satisfied that, if the infant plaintiff was walking along that verge and did not deviate from it, she could not have been struck by the trailer. Moreover were I to accept Miss de Souza's evidence, it would entail the conclusion that the infant plaintiff clamly walked along the verge of the road and allowed the complete length of the lorry to pass within a matter of inches of her body without deviating from her course until she was hit by the trailer. That, in my opinion, is so unlikely as to be incredible.
>
> "In these circumstances I have, with considerable reluctance, decided that I must completely discount Miss de Souza's evidence about the accident. In my opinion, she did not see what happened and, although she may have seen the infant plaintiff walking along the murram verge before the lorry came on the scene, I believe that the first thing she saw of the actual accident was the infant plaintiff falling to the ground. I do not think that Miss de Souza was deliberately committing perjury but I do think that she imagined that she saw more than she actually did."

The learned judge, having referred to the evidence of the turnboy, proceeded to draw an inference adverse to the respondent, from the fact that she was not called as a witness. He then said:

> "How then, did the accident happen? It seems clear that the infant plaintiff was in fact knocked down by the lorry or the trailer; but what

> part of either vehicle struck her, how she came into contact with it, where she was at the time when it struck her, and what she was doing at that time, are matters of complete conjecture. That being so, I am of opinion that the plaintiff has not proved, on a balance of probabilities, that the accident was caused by the negligence of the defendant company's driver."

It was the first argument of the advocate for the appellant, upon this part of the judgment, that the learned judge was wrong to discredit the evidence of Miss de Souza to the extent that he did, merely because he found her evidence on the question of speed entirely unacceptable. That, however, is not a complete statement of the matters which influenced the learned judge. He said that he must necessarily feel some doubt as to her reliability as a result of her evidence as to speed, but he went on to refer to two other aspects of her evidence – firstly, that a car proceeding in the opposite direction caused the lorry to give way to an extent which took it on to the murram verge, and secondly, that it was the front left corner of the trailer that hit the appellant.

As to the first of these matters the learned judge said that Miss de Souza's evidence was not borne out by that of either of the Patels. I do not consider, myself, that Mr. M. J. Patel could have been expected to have noticed such a passing car. He, driving in the opposite direction to the lorry, passed it when Mr. M. M. Patel was following it and blowing his horn. That must place him at a substantial distance from the scene of the accident when it happened. Mr. M. M. Patel, however, was in a good position to have seen such a car, and though he might not have noticed it in the ordinary way, he would probably have done so if it were driving in such a position on the road as to cause the lorry to swerve. On tarmacadam twenty-five feet wide there ought to have been no necessity for anyone to swerve, and Mr. M. M. Patel did not give any evidence that the lorry did in fact swerve, or that its wheels left the tarmacadam. There is certainly no support for Miss de Souza's evidence on this point to be found in that of Mr. M. M. Patel, and, though his evidence was merely negative I would not say that the learned judge was wrong in finding (as he evidently did) his doubts of Miss de Souza's reliability increased.

The next aspect of the matter is the learned judge's acceptance of the evidence that the trailer could not have deviated outside the arc described by the lorry. That contradicts Miss de Souza's evidence that the appellant did not deviate from a straight line and yet was struck by the front left of the trailer. Miss de Souza must have been mistaken upon one or other of those matters and the learned judge was entitled to consider that as militating against her reliability.

It was after considering all of these matters that the learned judge said that he must completely discount Miss de Souza's evidence about the accident. In these circumstances I accept the argument of the advocate for the respondent that it is not for this court to take a different view of Miss de Souza's credibility. In my opinion the learned judge had sufficient ground for taking the attitude he did; it is peculiarly the function of a trial judge to determine how far one or more proved inaccuracies in a witness' evidence should affect his view of the credibility or his faith in the reliability of that witness in other aspects of his evidence. If a trial judge, in arriving at such an evaluation, were to base himself upon a manifestly wrong premise or fail to take into account matters which were clearly relevant, no doubt a Court of Appeal would interfere, but that is not the case here.

The advocate for the appellant next submitted that even upon such part of the evidence as was accepted by the learned trial judge the case was one of res ipsa loquitur and that the appellant was entitled to judgment. In my opinion the essential question to be answered, in considering this submission, is whether the learned judge was in error in not finding upon the accepted evidence that the appellant was on the murram path when struck by the vehicle. If that were so there was clearly a prima facie case of

negligence against the respondent’s

driver which it would be upon the respondent to rebut or explain. The case of *Ellor v. Selfridge and Co., Ltd*. (1) (1930), 46 T.L.R. 236 and *Laurie v. Raglan Building Co., Ltd*. (2), [1941] 3 All E.R. 332, which were referred to in argument, sufficiently support this proposition and in *Martin v. North Metropolitan Tramways Co*. (3) (1887), 3 T.L.R. 600 it was held that to pass unduly close to a footpath was evidence of negligence.

For the purpose of indicating the position of a Court of Appeal in approaching this particular question, it is sufficient to quote only one sentence from the speech of Lord Macmillan in *Watt v. Thomas* (4), [1947] A.C. 484 at p. 491. He said:

> "The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

I refer particularly to the words

> "failed to appreciate the weight or bearing of circumstances admitted or proved",

which indicate a distinction between findings of primary facts and the inferences to be drawn therefrom similar to that mentioned in *Benmax v. Austin Motor Co., Ltd.* (5), [1955] A.C. 370. I should add that in my opinion failure to draw an inference which ought to have been drawn is equivalent to the drawing of a mistaken inference. It remains to ascertain whether the learned judge fell into any such error in the present case, and it is first necessary to ascertain from the judgment what facts he did accept as proved.

He said, in one of the passages above quoted, that he must completely discount Miss de Souza's evidence "about the accident". I think this must be read as referring to the actual moment of impact, as he goes on to say that

> "she did not see what happened and, although she may have seen the infant plaintiff walking along the murram verge before the lorry came on the scene, I believe that the first thing she saw of the actual accident was the infant plaintiff falling to the ground".

It is plainly accepted that Miss de Souza was walking along the murram path and that she saw the appellant walking along the murram path ahead of her. The phrase "before the lorry came on the scene" must have reference to the scene of the accident, as there was a long straight road and the learned judge could hardly have meant before the lorry was visible at all. The appellant was known to Miss de Souza for she was a pupil in the school class taught by her, and there is no suggestion anywhere in the case that the appellant was walking with other children. Miss de Souza thought she was twenty yards behind the appellant but other evidence indicated that it was more like thirty-five yards. The next thing that is accepted is that Miss de Souza saw the appellant falling to the ground. Her evidence was that the appellant was thrown about a yard towards the grass and lay where she fell. Mr. M. M. Patel said that when he reached the appellant, she was off the tarmac. There was no challenge to this part of the evidence and it is unlikely that Miss de Souza would be drawing on her imagination as regards the place where the appellant was lying; she had ample opportunity of observing that.

Another item of relevant evidence was given by Mr. R.S. Springer a witness for the respondent. He said, in cross-examination, that the driver of the lorry, who, as I have mentioned, was not called as a witness, had told him that he knew nothing about the accident and he accepted that. That must be taken to be the respondent's case and it is a legitimate inference that the appellant

had not darted out on to the tarmacadam into the path of the lorry. Had she done so the driver would have seen her and she would not have fallen where she did. Further support for the fact that the appellant collided with the side of the lorry or of the trailer appears in the evidence of Mr. M. M. Patel who saw her fall "after the trailer had passed her". The lorry and trailer were forty feet long and Mr. Patel's description of what he saw is certainly inconsistent with the appellant having been struck by the front of the truck; had that indeed been the case it is most unlikely that she would have survived.

On this evidence the learned judge's view that it was pure conjecture what part of the vehicle struck her can only be correct if it is referable to the exact part of the side of the vehicle. It is to my mind incontrovertible that, if not the front corner of the trailer, it was the side either of the lorry or of the trailer with which she came in contact. We arrive then at this position. Miss de Souza's evidence on the point being discounted, there is no direct evidence of the position of the lorry with relation to the edge of the tarmacadam. There is accepted evidence that the appellant was walking along the murram path shortly before the accident. She was struck by the side of the lorry or trailer; she fell on the murram path. There appear to be only two possibilities. If the lorry was a reasonable distance from the edge of the tarmacadam (having in mind the fact that there were a number of school children going to school along the road) the appellant must have left the path of her own volition, crossed the intervening tarmacadam and been hit by the side of the vehicle. The other possibility is that the lorry was being driven with its wheels at or off the edge of the tarmacadam or so dangerously close as to cause the child in fright to fall or stumble into it.

The first of these is, as I have said, a possibility but in my judgment it is one which is so remote that it must be immediately discarded. Young children do strange things, and it is easy to visualise them running on to a road in the path of an oncoming vehicle in pursuit of a ball or in the course of some game. The evidence indicates that the appellant was not with other children, but even assuming that she may have been playing some game, it is one thing to run into the path of an oncoming vehicle unconscious of its approach but quite another to run from a path into the side of a forty foot vehicle, the front of which has passed. Laden as it was with cement, it would be making a substantial noise, and to a seven year old girl it would appear to be of frightening proportions. It could not fail, in my opinion, to penetrate the consciousness of even a child concentrating upon her own pursuits.

The second possibility presents no such difficulty. Having regard to what I have just expressed concerning the first it becomes more than a possibility and emerges as a legitimate inference from the accepted evidence and as a reasonable probability. Put baldly the facts are these – that shortly before the impact the appellant was walking along the murram path; she was struck by the side of the lorry or trailer and fell on the murram path. The fact that the front of the lorry had passed and therefore, if the vehicle was travelling in a straight line she must have made some movement in its direction, is immaterial and would not absolve the driver. The learned judge regarded it as "so unlikely as to be incredible" that the appellant.

> "calmly walked along the verge of the road and allowed the complete length of the lorry to pass within a matter of inches of her body without deviating from her course".

I agree. But he seems to have ignored the possibility that the startling effect of the passage of the vehicle might well cause the appellant to deviate towards and not away from the vehicle. Even an adult could not predict what his involuntary reaction would be when narrowly missed by an enormous vehicle. A child might well lose control of its direction, stumble or fall. The possibility

that the vehicle may have been changing direction slightly cannot have any bearing upon the question of the responsibility of the driver if, as the probability appears to be, he was driving with his nearside wheels off, or dangerously close to the edge of, the tarmacadam. What I find impossible to accept is that a child, not engaged in play with other children, should, of *her own volition*, move towards an enormous and noisy vehicle which had just narrowly missed her so as to run into the side of it.

In *Caswell v. Powell Duffryn Associated Collieries Ltd*. (6), [1940] A.C. 152 at pp. 169-170, Lord Wright said:

> "My lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

In the present case the matter is, in my opinion, not in the realm of conjecture or speculation. The facts I have enumerated, derived from evidence accepted by the learned judge or not challenged, are sufficient to support an inference amounting to reasonable probability that the nearside wheels of the lorry and trailer were either off the tarmacadam or dangerously close to the edge of it. If so there was prima facie evidence of negligence on the part of the driver. With great respect I think that the learned judge was in error in not drawing that inference, though, as I shall indicate later in this judgment, he may have refrained from such an approach because of the attitude of the advocate for the appellant towards his case.

I would refer now briefly to a submission by counsel for the appellant that the learned judge erred in drawing an inference adverse to the appellant's case from the fact that she did not give evidence. He said:

> "The infant plaintiff was not called as a witness. The medical evidence as to her injuries and as to her present condition resulting from those injuries, does not suggest that she has lost her memory or that she is in any way incapable of giving evidence. Nor does it suggest that she might be a witness whose evidence should not be relied upon. If it is the fact that she does not know what happened immediately before and at the time when she was knocked down, she should have been called as a witness to say so. I must regard the fact that she did not give evidence as adverse to her case."

I would agree that if the appellant had lost her memory it should have been proved by evidence, but there was a good deal of evidence that the appellant, who suffered a head injury, had undergone a change of personality. She had become fractious, ill-tempered and quarrelsome. Whether an adverse inference should be drawn from the fact that a particular witness has not been called is a matter which must depend upon the particular circumstances of each case. In the case of a child seven years of age when the accident occurred, the decision whether or not to call her to give evidence over a year later would not be an easy one. Her temperament had in the meantime become difficult. If such a child is put in the box she may possibly be persuaded to say almost anything cross-examining counsel puts to her and so do damage to her case. On the other hand she is unlikely to do her case much good, for her evidence, if favourable

to her case, would always be open to the comment that she could not have remembered the events of the day clearly and her memory must have been assisted by her elders. In view of the opinion on the facts which I have expressed above this question is now hardly relevant and I will content myself with the observation that I doubt very much whether in the circumstances an adverse inference of any materiality was justified.

The evidence of the turnboy, who was the only witness called by the respondent as to the events of the morning in question, did nothing to rebut the prima facie case of negligence which, in my opinion, had been established. He was unaware of the accident and not in a position to see very much – the learned judge did not rely on his evidence. The respondent's main case however, was designed to establish that the accident could not have happened in the way Miss de Souza said it did. The plaint in its original form alleged that the appellant was struck by the respondent's "motor vehicle", but it was amended to read "by a trailer attached to" the motor vehicle. Paragraph (ii) of the particulars of negligence above set out, in its original form read, "Permitting part of the motor vehicle aforesaid and/or its trailer to encroach" etc. Why such an unnecessary and limiting change was made is hard to understand. Miss de Souza's evidence was that the appellant was struck by the front left corner of the trailer. Indeed, if the close passage of the lorry caused the appellant to stumble or fall towards it, she may well have been struck by the front left corner as described by Miss de Souza. However, the refusal of the learned judge to accept her evidence in that particular does not alter the incontrovertible fact that the appellant was struck by the lorry or the trailer, or the accepted evidence which points to her having been struck by some part of the side of one or the other. It was, however, argued by the advocate for the respondent that the appellant is bound by her pleading, and that as she failed to prove that she was struck by the trailer in the manner given in evidence she cannot now rely on evidence pointing inferentially to her having been struck either by the trailer or the lorry. In his final address in the lower court the advocate for the appellant is recorded by the learned judge as conceding.

> "that if front part of trailer *did not* hit Pushpa, then I must find for the defendant".

This statement was made at a stage of the proceedings at which it could not have influenced the respondent's conduct of the case, but it may well have been this which induced the learned judge to confine his consideration to that aspect of the matter – the admission was however on a matter of law and if it was incorrect it is not binding on the appellant.

It is of course a salutary and necessary rule that a party is bound by his pleading. If, however, particulars are given in undue detail and what is proved varies from them in ways which are immaterial, it remains the duty of the court to see that justice is done and leave to amend will be given at any stage. If, on the other hand, the particulars given have misled the defendant or led to his shaping his case in a certain way that is a very different matter. The advocate for the respondent relied upon the case of *Esso Petroleum Co., Ltd. v. Southport Corporation* (7), [1956] A.C. 218 in which much of value is said as to the functions of pleadings. Lord Normand said, at pp. 238-239:

> "The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact the evidence in the case was concerned only with the negligence alleged. The result was that the master of the vessel was acquitted by Devlin, J., of the negligence alleged, and the logical consequence was that the owners were also acquitted by him.
>
> "The majority of the Court of Appeal, however, held that the onus lay

> on the owners to show that the accident which caused the damage was inevitable, and to do this it would have been necessary to show that no reasonable care which they might have taken would have avoided the damage. As the appellants had made no attempt to lead evidence to discharge this onus, the majority of the Court of Appeal found them liable in damages.
>
> "I do not wish to speculate on what might have been alleged, nor on what evidence might have been adduced by either side on other allegations, nor on how the onus might have shifted in consequence of other allegations and evidence. Confining myself to the actual allegations of negligence and to the evidence in the case, I find the conclusion inevitable that, since the master has been acquitted of the faults alleged against him, the owners must also be acquitted . . . To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

Lord Radcliffe opened his speech with the following observations, at p. 241:

> "My lords, I think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial judge, that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents – I cannot tell, since the evidence is incomplete – but I am certain that we should do worse justice to the appellants, since in my view they were entitled to conduct the case and confine their evidence in reliance upon the further and better particulars of para. 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system."

That case was however very different from the present one. It was an action against the master and owners of a ship for damage allegedly caused by the negligence of the master. Nothing else was pleaded against the owners and the plaintiff failed to establish that the master had been negligent. It was then argued that, as the steering gear of the ship had been shown to have developed a fault, the onus was thrown upon the owners to show that they had exercised proper care. That argument the House of Lords refused to sustain on the ground that there was no hint of any such case in the pleadings and the owners could not be held responsible because they did not negative a possible case which had never been alleged against them. A similar position would have arisen in the present case had the appellant sued the driver and the respondent, alleging negligence only against the driver in the way of his driving, and had subsequently sought to say that the condition of the vehicle was such as to throw upon the respondent the burden of showing that that was not the cause of the accident.

That has of course not happened here. The appellant has relied upon the negligence of the driver throughout. The particulars pleaded include that the lorry and trailer were driven too close to the footpath and that the appellant was walking along the footpath, facts which, if established are a sufficient base for the inferences I have dealt with earlier in this judgment. The particulars also state that part of the trailer was permitted to encroach over the footpath – it does not refer to any particular part of the trailer. As has been mentioned, it was alleged that the appellant was struck by the trailer – again no particular part was specified. On such pleadings certainly the respondent would have

to come to court prepared to meet a case that the appellant was struck by the side of the trailer while being driven dangerously close to the footpath; it is not easy to see how the respondent could be prejudiced by evidence showing that the appellant may have been struck by either the lorry or the trailer when it was common ground that she was in fact struck by one of them. Where the particulars of a claim are given with reasonable precision, I do not think an incorrect description of one particular fact should be fatal to the claim *Daim v. Khanu* (8) (1927), 8 Lah. 655. The core of the argument of the advocate for the respondent lies more in the way the case was developed by the evidence of Miss de Souza than in the actual pleadings. Miss de Souza's evidence was that the lorry swerved and that the appellant was struck by the front corner of the trailer. It was this case in particular that the evidence of the respondent was designed to meet, and it may not be without significance that after the evidence-in-chief of Miss de Souza was given, there was an adjournment of approximately six weeks. I do not think that because one witness gives a specific version of the facts the respondent can claim that he was not warned that there were other inferences falling within the pleadings which the evidence might sustain. However, it is the fact that in the reply the appellant alleged that the trailer swerved on to the murram footpath and the advocate for the appellant repeated this when opening his case.

It is possible therefore, that the defence may have been mislead to some extent by the way the case was presented, but the essential difference between this case and *Esso Petroleum Co., Ltd. v. Southport Corporation* (7), is that in the latter it was sought to rely upon a species of negligence which had never been pleaded, whereas in the present case one of the bases of the negligence pleaded was that the lorry and trailer had been driven too close to the footpath. The question is whether, because a particular version of the accident was relied upon at the hearing by the appellant, the respondent was prejudiced by lack of notice that another view of the facts was possible. It appeared in evidence that the reason why the respondent's driver was not called as a witness was that he could not be found – not that his evidence was not deemed necessary to meet the particular case presented by the appellant. Nevertheless it is not for me to speculate upon what evidence the respondent might have been able to rely if he had appreciated all of the possibilities which might arise upon the evidence – the point is that I think that they ought to have been appreciated in spite of the course that the trial took.

I have been in serious doubt as to the proper order to be made in this case. On the one hand the infant appellant should not be deprived of any rights she may have by an over rigid approach to the pleadings; I do not think that this case (unlike that decided by this court in *Plotti v. The Acacia Co., Ltd*. (9), [1959] E.A. 248 (C.A.)) falls within the principle of *Esso Petroleum Co., Ltd. v. Southport Corporation* (7). On the other hand, in view of the way the appellant's case was conducted, the respondent could perhaps have claimed an element of surprise had the learned judge held that it was open to him to decide it upon the lines I have indicated. The respondent has had to meet a new argument in the Court of Appeal and it cannot be said with complete certainty that, had that argument been relied upon throughout as an alternative, the course of the evidence would not have been altered. I think that in all the circumstances the appeal should be allowed, the decree in the lower court set aside and the matter remitted to the Supreme Court for re-trial de novo. If that order is the right one it follows that the appellant ought to have leave, if she so elects, to amend her pleadings so as to include collision with the lorry as an alternative to the trailer.

I would make no order for costs either of the first trial in the court below or on the appeal. The costs of the new trial would be in the discretion of the trial judge.

Sir Alastair Forbes VP: I agree. I also have been in serious doubt as to the proper order to be made, and at one stage was inclined to the view that judgment should be entered for the appellant. However, for the reasons given by the learned Justice of Appeal, I think that the justice of the case is met by an order for retrial. There will be an order accordingly, in the terms proposed by the learned Justice of Appeal.

Crawshaw JA: The appellant relied very largely on the evidence of Miss de Souza, a school teacher, who was walking along the path behind and in the same direction as the appellant at the time the appellant came into contact with the vehicle, and purported to have seen in detail exactly what happened. The learned judge, however, after reviewing her evidence in the light of the evidence as a whole felt constrained to say:

> "In these circumstances I have, with considerable reluctance, decided that I must completely discount Miss de Souza's evidence about the accident. In my opinion, she did not see what happened and, although she may have seen the infant plaintiff walking along the murram verge before the lorry came on the scene, I believe that the first thing she saw of the actual accident was the infant plaintiff falling to the ground."

Miss de Souza said that the lorry, which was pulling a trailer, both of which were filled with cement, was travelling at a speed which she estimated at thirty miles per hour and which she described as "fast as a private car would go if it were being driven in a hurry". The learned judge found as a fact that it was not travelling more than ten miles per hour and probably less, and there was evidence on which he could properly so find although, with respect, he did not bring this out very clearly in his judgment.

Miss de Souza described how the lorry, which was coming towards them, swerved from the road on to the murram path to its left, along which they were walking; she says "it was giving way to another car going in the opposite direction". Mr. M. M. Patel who was a witness for the appellant, and who was driving his car behind the lorry, said he saw no traffic approaching, and mentioned no swerve by the lorry. The learned judge did not come to a finding whether there was in fact an approaching car, but seemed to doubt Miss de Souza's evidence as to this. There was no evidence to indicate that the road was so narrow as to make it difficult for one vehicle to pass another.

Miss de Souza's description of what happened was that the lorry having swerved on to the path moved back on to the road, the trailer following in its tracks along the path, and it was whilst the trailer was on the path that the appellant was hit by the front part of the trailer. It would perhaps be surprising for Mr. M. M. Patel not to have seen the lorry swerving on to the path to avoid an oncoming car had it done so, for he says he saw the appellant actually falling after being hit.

The learned judge accepted the evidence for the respondent that when the lorry turns, the trailer's wheels tend, if anything, to pass inside the track of the lorry wheels. If the lorry missed the appellant, as Miss de Souza most emphatically said it did, although by about one inch only, the appellant could hardly therefore have been hit by the trailer, as pleaded, without moving into it. This was the conclusion to which the learned judge came and he observed,

> "Moreover were I to accept Miss de Souza's evidence, it would entail the conclusion that the infant plaintiff calmly walked along the verge of the road and allowed the complete length of the lorry to pass within a matter of inches of her body without deviating from her course until she was hit by the trailer. That, in my opinion, is so unlikely as to be incredible".

My reading of the judgment of the learned judge is that he found that Miss de Souza in fact noticed nothing of what happened which had any bearing on the accident other than that she may have noticed the appellant walking in front of her along the path before the lorry arrived, and the appellant later falling as the trailer passed her. He says,

> "I do not think that Miss de Souza was deliberately committing perjury but I do think that she imagined that she saw more than she actually did".

By this I understand him to mean that she associated the accident with the vehicle (not unnaturally), and in her imagination she conjured up how she thought it had probably happened. He had the advantage of having the witness before him, and on the evidence as a whole I do not think it can be said that he was not entitled to discount her evidence to the extent he did. What then, was the position?

At one stage the appellant was walking along the footpath, and the probability is that the lorry was travelling towards her near the footpath although how near is not known. Had it been well towards the centre of the road, one would have expected Mr. M. M. Patel to have seen the appellant crossing the intervening part of the road, and stagger back to the path before falling. Assuming then that the lorry was travelling close to the path, the only other fact on which the judge found he could place any reliance was that immediately after the trailer had passed, the appellant was seen to have fallen.

The doctrine of res ipsa loquitur was not pleaded, nor apparently argued in the court below, although it has been raised before us. I do not however think that in the circumstances it can be held to apply. The lorry, which with trailer was forty feet long, was proceeding at a very slow speed and probably well in to the left-hand side of the road. This I should have thought would have been a normal and natural position for such a vehicle, in order to avoid any unnecessary obstruction to overtaking and on-coming traffic. There is the evidence of Mr. M. M. Patel that, "There were quite a number of children about – going to school". Miss de Souza did not mention them, and Mr. Patel gave no particulars as to their numbers or their proximity to the appellant, or otherwise. The children, if on their way to the same school as Miss de Souza and the appellant, would therefore be facing the lorry as it approached. I have no doubt that in certain circumstances it might be dangerous and thus negligent to drive a vehicle close to a pavement, and indeed it was so found in *Martin v. North Metropolitan Tramway Corporation* (3). In that case the plaintiff was also a young girl, being four years of age, whereas the present appellant was seven years at the time of the accident. She was on a pavement beside which tram lines ran. At the place of the accident the lines ran so close to the pavement that the outside edge of the splinter-bar (I am not sure what part of the tram that is) came within two or three inches of the pavement. The front wheel of the tram passed over her foot, and the defendant's case was that the child must have been off the pavement at the time she was struck, and that there was no evidence to show how she got under the tram (the driver of the truck had not seen her), and that therefore she had not made out a case. The jury found for the plaintiff, however, and an appeal to the Court of Appeal was dismissed. On the appeal, the learned Master of the Rolls said that the jury were entitled to infer that the plaintiff might have been walking on the pavement but with her arm or dress projecting over the side of it, and that the splinter-bar had caught her arm or dress and thrown the child under the wheel, and that in the circumstances there was ample evidence of negligence on the part of the driver. The circumstances were however different in material respects to those in the instant case. First, it is not known how close to the pavement the lorry was being driven; nor is there any evidence that the sides of the lorry or trailer projected beyond the wheels. Further, in the *Martin* (3) case the evidence

was that there were a great number of people on the pavement, some of whom were on the edge, and that the tram was approaching the child from behind, and that the driver, who did not see them, was driving very fast and gave no signal of his approach. The learned Master of the Rolls said,

> "It was the duty of the driver under those circumstances to take the greatest care, to go as slowly as possible, and to give some warning of the approach of the car".

In the instant case the appellant was facing the approaching lorry, and, even though only seven years of age, I would say that the driver of the lorry was entitled to expect her to see it. It was a massive and probably noisy vehicle, travelling very slowly, and, the road being straight, it must have been in sight of the appellant for an appreciable time. I do not think that in the circumstances the appellant has established negligence. The precise manner in which the accident occurred is, in my view, a matter for speculation, and I do not think that the proved facts are such as to give rise to an inference of negligence. Anyway, I was not impressed by the proposition of learned counsel for the appellant that the appellant probably fell on to the side of the lorry or trailer through sudden fear caused by the proximity of the vehicle. Not only would one have expected her to have seen it coming, but it would to my mind be an equal, if not more likely explanation that, as children do, she was playing as she went along and may have slipped or been inattentive, and so hit the lorry or the trailer. Admittedly a person in charge of a dangerous thing must recognise his responsibility and behave with due care, especially when there are children about, but taking into consideration the slow speed of the vehicle, the ease with which it could be seen, and the fact that it was approaching the appellant, I do not think that the driver of the lorry can be held to be negligent merely because he was driving near to the pavement.

For these reasons I would dismiss the appeal with costs.

Appeal allowed. Order for retrial de novo. The appellant given leave to amend her pleadings so as to include collision with the lorry as an alternative to the trailer.

For the appellant:
O'Brien Kelly & Hassan, Mombasa
J. O'Brien Kelly & S.K. Anjarwalla

For the respondent:
Atkinson, Cleasby & Co., Mombasa
R. P. Cleasby

Zahor Bin Hamoud Bin Saleh El Ismaili v Aboud Bin Ali and another

[1960] 1 EA 1040 (HCZ)

Division:	HM High Court of Zanzibar at Pemba
Date of judgment:	29 October 1960
Case Number:	8/1960
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] Sale of land – Price paid – Purchaser in possession – Transfer not then given – Statutory consent not obtained – Consent obtained later – Land attached under court decree – Transfer registered – Whether land liable to attachment – Land Alienation Decree, 1939, *s.* 4 (*Z.*) *– Transfer of Property Decree* (*Cap.* 82), *s.* 54 (*Z.*).

Editor's Summary

In 1955 the first respondent by a written agreement had purported to sell a shamba to the second respondent for Shs. 500/-. The second respondent paid the price and went into occupation and possession, but the informal document recording the transaction was not registered. In July, 1959, the first respondent obtained the consent of the Land Alienation Board to the sale as required by s. 4 of the Land Alienation Decree, 1939, and in December on the application of the appellant, a decree holder, the Kadhi ordered a provisional attachment of the shamba in execution of the decree and subsequently the order for provisional attachment was confirmed by the High Court. In March, 1960, the attached shamba was transferred by registered deed to the second respondent who objected to the attachment and the Kadhi upheld the objection. On appeal it was argued that the agreement for sale of 1955 conveyed no title to the second respondent as the sale had not been approved by the Land Alienation Board and that the shamba was not legally conveyed to the second respondent until March, 1960.

Held –

(i) until the shamba was conveyed to the second respondent in March, 1960, he was not the owner of it.

(ii) in December, 1959, the owner of the shamba was the first respondent despite the second respondent being in ostensible occupation and the shamba was liable to attachment.

Appeal allowed. Kadhi's order set aside.

Judgment

Horsfall Ag CJ: This is an appeal by a plaintiff-appellant from an order of the learned Kadhi of Chake Chake upholding an objection to an attachment levied on the defendant-respondent's shamba. The Kadhi held that the objector-respondent had proved that the shamba was his property.

The relevant facts are that on March 22, 1955, the defendant-respondent purported to sell the shamba in question to the objector-respondent, who paid Shs. 500/- in full payment and went into occupation and possession. The document is an unregistered agreement in writing and goes on to relate.

> "This is proof until he has executed a registered conveyance subsequent to Land Alienation Board Permit".

(Exhibit A.) The respondent-objector continued in occupation enjoying the fruits of the economic trees on the shamba. On February 28, 1959, the respondent-defendant consented to judgment being entered against him in a suit by the plaintiff-appellant for Shs. 400/- being balance due on the lease of a clove

crop. The learned Kadhi granted the respondent-defendant five months' time in which to pay. On December 31, 1959, on the application of the plaintiff-appellant the learned Kadhi ordered provisional attachment of the shamba in question in execution of the decree. On January 29, 1960, the provisional order of attachment and sale was confirmed by the High Court. On March 8, 1960, the objector-respondent made application to the Kadhi's court to raise the attachment. On May 20, 1959, the respondent-defendant applied for the permission of the Land Alienation Board for the permanent alienation of the shamba in question to the respondent-objector. On July 18, 1959, the board granted a permit. On March 7, 1960, by the registered sale deed of that date (exhibit B) the shamba in question was transferred by the respondent-defendant to the respondent-objector. The consent of the Land Alienation Board to the permanent alienation of the land in question was endorsed under the date March 31, 1960.

The wakyl for the plaintiff-appellant, argued two grounds of appeal:

(1) that the learned Kadhi failed to appreciate that the unregistered sale deed of 1955 (exhibit A) from defendant-respondent in favour of the objector-respondent conveyed no title to the shamba as the sale was not approved by the Land Alienation Board as required by s. 4 of Decree No. 9 of 1939 as amended by Decree No. 26 of 1953; and

(2) that the shamba attached was legally conveyed to the objector-respondent on March 7, 1960, by the registered deed (exhibit B) which was after the attachment had been levied.

Counsel for the respondents referred me to s. 54 of the Transfer of Property Decree (Cap. 82):

> "A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property."

In explanation of this passage he referred me to the commentary in the Indian Transfer of Property Act by B.B. Mitra (11th Edn.) wherein connection with a similar section in the Indian Act the learned author states:

> "But if the contract of sale is followed by delivery of possession and payment of purchase money, then, though there is no registered conveyance, the transaction is more than a mere contract, and the last paragraph of s. 54 cannot apply. In such a case the vendor cannot say that the vendee has obtained no interest in the property. Nor can the property be attached as the property of the vendor, in execution of a decree against the vendor."

He argues that as the respondent-defendant got the Land Alienation Board's consent to the permanent alienation of the shamba to the respondent-objector before the application for attachment was made then the contract of 1955 (exhibit A) followed by possession and payment of the purchase price, conferred on the respondent-objector a title which the law would protect.

Unfortunately this argument neglects consideration of the relevant provisions of s. 4 of the Land Alienation Decree:

> "4(1) No disposition of land by an Arab . . . shall be of any effect unless and until consent is given thereto by the board established for the area in which the land is situated and such consent is endorsed upon the instrument effecting such transaction.
>
> "(3) Notwithstanding the provisions of s. 54, s. 59 and s. 95 of the Transfer of Property Decree (Cap. 82), every such alienation, lease, agreement for a lease and mortgage as is mentioned in sub-s. (1) shall be effected by a registered transfer."

In my opinion the effect of the law in Zanzibar is that until the shamba was conveyed to the objector-respondent on March 7, 1960, by the registered deed (exhibit B) he was not the owner of it. The ownership was in the defendant-respondent on December 31, 1959, in spite of the respondent-objector being in ostensible occupation of it and the shamba was liable to attachment by the appellant plaintiff. The order of the learned Kadhi dated July 27, 1960, is set aside and the appeal is allowed with costs both here and in the court below. The respondent-objector would appear to be entitled to a refund of the Shs. 500/- paid by him as purchase money on a consideration that has failed, but that is not a matter with which I can deal on this appeal.

Appeal allowed. Kadhi's order set aside.

For the appellant:
M. A. Tiwani, Zanzibar

For the respondents:
R. V. Joshi, Zanzibar

Fazal Kassam (Mills) Limited v Abdul Nagji Kassam and Shubanu Bai Gulamhusein

[1960] 1 EA 1042 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	8 December 1960
Case Number:	135/1959
Before:	Law J
Sourced by:	LawAfrica

[1] Land – Right of occupancy – Oral agreement to mortgage – Disposition required to be in writing – Disposition of land requiring approval of Governor – Whether agreement enforceable – Land Regulations, 1948 (*Revised Laws, Vol. II*) *reg.* 3 (*T.*).

[2] Fraud – Oral agreement to mortgage – Loan given under oral agreement – Right of occupancy – Right transferred to third party – Whether court has power to set aside the transfer – Fraudulent Conveyances Act (1584), 13 *Eliz. C.* 5.

Editor's Summary

The first defendant who was indebted to the plaintiff company in the sum of Shs. 10,000/- wished to incur further credit. He held a short term of right of occupancy over a plot of land which he was converting into a right of occupancy for thirty-three years. The first defendant orally agreed with the

plaintiff company that when he obtained the extended right of occupancy he would mortgage the same as security for the total amount owing by him from time to time. Relying upon this oral agreement the plaintiff company made further advances. When the first defendant subsequently obtained his extended right of occupancy he transferred it to his mother the second defendant, whereupon the second defendant obtained a certificate of occupancy in her own name for thirty-three years. The plaintiff prayed that the transfer and right of occupancy be set aside, that the first defendant be ordered to execute a mortgage for the sum of Shs. 28,207/92 and, alternatively, that the second defendant be ordered to pay the sum of Shs. 28,207/92 with interest. At the trial counsel for the defendants took the preliminary point that in view of reg. 3 of the Land Regulations, 1948, a disposition of a right of occupancy must have the approval of the Governor and even if there was an agreement to mortgage the right of occupancy, it was not in writing and that accordingly it was null and void and completely ineffective.

Held –

(i) the court had the power to set aside the transfer and right of occupancy and to declare the first defendant to be the owner of the land in question, should the plaintiff company be able to prove that the transfer was the result of a fraudulent conspiracy between the defendants to prevent the plaintiff company from enforcing its rights against that land as a creditor of the first defendant, whether by attachment and execution or otherwise.

(ii) the alleged agreement that the first defendant should mortgage his right of occupancy to the plaintiff company was void ab initio for want of writing and for want of the Governor's consent and the court had no power to order specific performance of that agreement; it would make no difference if fraud were proved against the first defendant.

Order accordingly and that the trial do proceed on the issue whether the transfer and right of occupancy should be set aside.

Cases referred to in judgment:

(1) *Patterson and Another v. Kanji* (1956), 23 E.A.C.A 106.

(2) *Motibhai Manji v. Khursid Begum*, [1957] E.A. 101 (C.A.).

(3) *T.H. Patel v. Lawrenson and Matzen*, [1957] E.A. 299 (T.).

(4) *Suleiman Bin Abdulla v. Azzan Bin Zahor*, [1958] E.A. 553 (Z.).

(5) *Cadogan v. Kennett* (1776), Moody 617; 98 E.R. 1171.

Judgment

Law J: This is a preliminary point raised by Mr. Lockhart-Smith on behalf of both defendants that prayers (*a*) and (*b*) in the amended plaint should be dismissed, and that judgment should be entered for the plaintiff company against the first defendant only in respect of the debt claimed in prayer (*c*), which is admitted by the first defendant. These prayers are framed as follows:

(*a*) The Transfer and Right of Occupancy bearing title No. 13640 referred to in the latter part of para. 8 of the plaint be set aside and the first defendant declared owner thereof;

(*b*) the first defendant may be ordered to execute a mortgage for the sum of Shs. 28,207/92 with interest thereon at 9 per cent. per annum payable at the end of six months or on such other terms as this honourable court may deem fit;

(*c*) failing the foregoing then in the alternative the first defendant may be ordered to pay the sum of Shs. 28,207/92 with interest thereon from the date of the suit at the rate of 9 per cent. till judgment.

Assuming for the purposes of this judgment that the facts are as stated in the amended plaint, then the history of this case is as follows:

In May, 1959, the first defendant was indebted to the plaintiff company in the sum of approximately Shs. 10,000/-. The first defendant was desirous of incurring further credit, but the plaintiff company was not agreeable in the absence of security for the whole debt. The first defendant held a short term right of occupancy over a plot of land at Matombo which he was in the course of having converted into a right of occupancy for thirty-three years. It was orally agreed between the first defendant and the plaintiff

company that when the first defendant obtained this extended right of occupancy, he would mortgage the same to the plaintiff company as security for the total amount owing by him to the plaintiff company from time to time. On the strength of this oral agreement the plaintiff company made further advances to the first defendant whereby his indebtedness increased from Shs. 10,000/- to Shs. 28,207/92. In or about October, 1959, the first defendant obtained his

extended right of occupancy, but instead of mortgaging it to the plaintiff company he transferred the right to his mother the second defendant, the said transfer being registered in the Registry of Documents on October 27, 1959. On the strength of this transfer, the second defendant obtained a certificate of occupancy in her own name on February 5, 1960, valid for thirty-three years. By para. 9 of the amended plaint:

> "The plaintiff complains that the first defendant committed breach of his said agreement to mortgage the said extended right of occupancy to the plaintiff and that the first and second defendants have in fraud of the plaintiff colluded together to deprive the plaintiff of the said security."

The second defendant denies any fraudulent collusion and pleads, in para. 3 (*a*) of her amended written statement:

> "that the first defendant was not entitled to enter into any agreement to mortgage the extended right of occupancy to the plaintiff as alleged. She further states that if the first defendant had ever entered into any such agreement to mortgage as is alleged, which is not admitted but is denied, the same is neither operative nor effectual in law and is null and void and not in any way binding of either of the defendants."

The first defendant, in para. 8 of his amended written statement, pleads as follows:

> "In the alternative and without prejudice to the above this defendant avers that if there was an agreement to give a mortgage as alleged in the plaint (which is denied) the said agreement is unenforceable, void and of no legal effect."

Mr. Lockhart-Smith's submission is based on reg. 3 of the Land Regulations, 1948 (Tanganyika Revised Laws, Vol. II), as in force at all material times. This regulation, so far as it is material, reads as follows:

> "3.(1) A disposition of a right of occupancy shall not be operative unless it is in writing and unless and until it is approved by the Governor.
>
> "(2)
>
> "(3) In this regulation, 'disposition' means a sale, conveyance, mortgage . . . and includes an agreement to make any of the above forms of disposition . . ."

Mr. Lockhart-Smith submits that even if there was an agreement to mortgage the right of occupancy, it was not in writing nor was it approved by the Governor, and that it is accordingly null and void and completely ineffective, and that the court could not, even if the right of occupancy was still held by the first defendant, order him to execute a mortgage of it in favour of the plaintiff company.

Mr. Lockhart-Smith has referred me to several authorities, including *Patterson and Another v. Kanji* (1) (1956), 23 E.A.C.A. 106, which lays down that the courts will not enforce a claim which can only be established by relying upon a transaction declared by law to be inoperative for lack of approval. The case now under consideration involves an agreement which is inoperative, not only for lack of approval, but also for lack of writing, and Mr. Lockhart-Smith accordingly submits that no court could possibly order the enforcement of that agreement. Mr. Lockhart-Smith also relies on *Motibhai Manji v. Khursid Begum* (2), [1957] E.A. 101 (C.A.) which dealt with the position arising out of a sale of Mailo land in Uganda. The consent of the Governor in writing is required to such a transaction, but it had not been obtained. It was held that as the agreement was prohibited by law and void ab initio nothing subsequently done could convert it into an enforceable contract. In the course of its judgment, the court referred with approval to *Patterson's case* (1).

Mr. Lockhart-Smith also referred to *T.H. Patel v. Lawrenson and Matzen* (3), [1957] E.A. 249 (T.) in which an agreement for the sale of a right of occupancy was held to be inoperative and unenforceable for want of the Governor's consent. Mr. Master for the plaintiff company submits that the Land Regulations and cases cited have no bearing on the facts of this case, as the plaintiff company's case is based on fraud. If fraud is proved then, says Mr. Master, the first defendant cannot shelter himself behind the protection of a statutory provision. As regards the transfer of the right of occupancy by first defendant to second defendant, Mr. Master submits that this was a fraudulent conspiracy on the part of the defendants to defeat the plaintiff company's rights as a creditor, and that it should be set aside. He relies on *Suleiman Bin Abdulla v. Azzan Bin Zahor* (4), [1958] E.A. 553 (Z.). He might also, in my view, have relied upon the Fraudulent Conveyances Act, (1584) 13 Eliz, c. 5, which, whether or not it is a statute of general application, is generally accepted as declaratory of English common law (Kerr On Fraud and Mistake (7th Edn.) at p. 300) and which is designed to be applied by the courts to any fraudulent contrivances to which the fertility of man's imagination might have resorted as a means of eluding a more precise and inflexible law. As Lord Mansfield, C.J., said in *Cadogan v. Kennett* (5) (1776), Moody 617; 98 E.R. 1171, the statute cannot receive too liberal a construction, or be too much extended in suppression of fraud. If the first defendant transferred the right of occupancy to the second defendant in the course of a fraudulent conspiracy to defeat the plaintiff company's rights as a creditor, then this court would have not only the power but the duty of setting aside that transfer and re-instating the first defendant as the registered owner, in order to protect such rights against the land which the plaintiff company may have as a creditor and potential decree-holder against the first defendant, rights which could be enforced by attachment and execution.

I now turn to the issues before me, in the light of what has been set out above. So far as prayer (*a*) in the plaint is concerned, I hold that this court has the power to set aside the Transfer and Right of Occupancy and to declare the first defendant to be the owner of the land in question, should the plaintiff company be able to prove that the transfer was the result of a fraudulent conspiracy between the defendants to prevent the plaintiff company from enforcing its rights against that land as a creditor of the first defendant's, whether by attachment and execution or otherwise.

As regards prayer (*b*), I hold that the defendants' submissions must prevail. The alleged agreement that the first defendant should mortgage his right of occupancy to the plaintiff company was void ab initio for want of writing and for want of the Governor's consent, and this court has no power to order specific performance of that agreement. In my opinion it would make no difference if fraud was proved against the first defendant. The plaintiff company must be assumed to have known the law, and to have realised that it could not rely on, or enforce, an oral agreement to mortgage a right of occupancy.

I accordingly uphold the defence submission on prayer (*b*) and declare that the first defendant is entitled to judgment on that prayer. As is conceded in the first defendant's written statement, the plaintiff company is entitled to judgment against him on prayer (*c*) as prayed. The suit will go for trial on prayer (*a*), unless the parties can come to a settlement. I reserve my decision on the first defendant's prayer to pay the decretal amount by instalments, and order that the costs of this preliminary issue be costs in the cause, the defence submission having succeeded on one point but failed on the other.

Order accordingly and that the trial do proceed on the issue whether the transfer and right of occupancy should be set aside.

For the plaintiff:

Vellani & Co., Dar-es-Salaam
K. A. Master, Q. C., and *R.B. Vellani*

For the defendants:
W.J. Lockhart-Smith, Dar-es-Salaam

Harshad Ltd v Globe Cinema Ltd and others
[1960] 1 EA 1046 (HCU)

Division:	HM High Court of Uganda at Kampala
Date of judgment:	21 December 1960
Case Number:	353/1960
Before:	Sheridan J
Sourced by:	LawAfrica

[1] Mortgage – Sureties – Sureties jointly and severally liable with mortgagor to repay loan – Default – Delay by mortgagee in exercising power of sale – Whether delay absolves sureties from liability – Indian Contract Act, 1872, *s.* 126.

[2] Mortgage – Mortgage not signed by mortgagee – Mortgage registered – Whether mortgagor and sureties can repudiate liability – Registration of Titles Ordinance (*Cap.* 123), *s.* 51, *s.* 96, *s.* 114, *s.* 115, *s.* 117, *s.* 125 *and s.* 209 (*U.*).

Editor's Summary

The plaintiff as mortgagee sued the first defendant as mortgagor and the other defendants as sureties under a mortgage for the recovery of principal and interest. The main defences were that the mortgagee had unreasonably and negligently delayed in the exercise of its powers of sale so that the property had depreciated in value, and that the purported mortgage was not a mortgage and did not create any rights or obligations between the parties as it was not signed by the mortgagee. The plaintiff submitted that the sureties although described as such were in effect principal debtors because they had covenanted jointly and severally with the mortgagor to repay the loan and accordingly the delay did not absolve them from their liability under the mortgage; that the signature of the plaintiff to the mortgage was not required as the mortgage was registered the defendants were not entitled to go behind the registration on a mere technicality.

Held –

(i) the sureties were principal debtors and none of the provisions of s. 126 to s. 147 of the Indian Contract Act, which protect the rights of the sureties was applicable; accordingly the sureties had no rights which could be said to have been impaired by the plaintiff company's delay in selling the mortgaged property.

(ii) the defendants had acted on the mortgage and although the form was statutory and not contractual

the defendants could not repudiate their liability on the ground that the plaintiff had not signed the mortgage.

Judgment for the plaintiff.

Cases referred to in judgment:

(1) *Credit Finance Corporation Ltd. v. Ali Mwakasanga*, [1959] E.A. 79 (C.A.).

(2) *Chelsea and Walham Green Building Society v. Armstrong*, [1951] 2 All E.R. 250; [1951] Ch. 853.

Judgment

Sheridan J: On May 8, 1953, the plaintiffs, a private limited company, lent Shs. 200,000/- to the first defendants, a limited company which was operating the Globe Cinema in Kampala Road, Kampala, on the security of a mortgage of the cinema premises. A copy of the mortgage is annexure "A" to the plaint. The second, third, fourth and fifth defendants – directors of the first defendant company – are described therein as sureties. The mortgage recites that they and the borrower – the first defendants – had

requested the loan and they jointly and severally convenanted with the mortgagees – the plaintiffs – to repay it, with interest at 9 per cent. per annum on the terms, covenants and conditions contained therein. On May 23, 1953, the mortgage was registered with the Registrar of Titles and also with the Registrar of Companies.

The loan was repayable by two instalments of Shs. 50,000/- and Shs. 150,000/- on May 1, 1954, and May 1, 1955, respectively. Nothing has been paid by any of the defendants. They also failed to pay the agreed interest as it became due.

On July 6, 1954, Mr. Chotabhai Patel (P.W. 1), a director of the plaintiff company, wrote to the first defendants demanding payment of the first instalment and of four months' arrears of interest within one month otherwise they would exercise their power of sale (exhibit A. 1). The mortgage provided that the statutory power of sale conferred on the mortgagee by s. 19 of the Conveyancing and Law of Property Act "shall be exercised", inter alia, if default was made in payment of the principal moneys after one month's notice requiring payment had been given or if any interest remained unpaid for fourteen days. A similar right was conferred on the plaintiffs by s. 115 of the Registration of Titles Ordinance (Cap. 123). A further letter dated November 2, 1954 (exhibit A. 2) required the first defendants to pay arrears of interest plus Shs. 5,000/- insurance premium on the mortgaged property. Under the mortgage the defendants covenanted to keep the property insured. Mr. Patel gave evidence that the plaintiffs did not persist in their threat to exercise their power of sale as Mr. Manibhai H. Patel, a director of the first defendants who is not a party to this suit – he actually operated the cinema – asked for time. The reason for this is that during 1955 the cinema had been condemned as dangerous by Mr. Evans (P.W. 2), the senior building inspector of the Kampala Municipal Council and on November 25, 1955, the cinema licence was revoked. Mr. Manibhai made several fruitless appeals to have it restored. Without the licence the building – a rather ramshackle affair if I may be excused for so describing it – was fit only for demolition and so in effect a purchaser would only acquire a vacant plot on which, under the terms of the Crown lease, offices and shops would have to be erected. On July 1, 1951, the Crown had granted a lease to the first defendants for a period of eighty-six years and six months. For the first seven years the lessees had the right to demolish the cinema and to erect shops and offices on the site. Thereafter the Governor could order them to do so. Obviously the value of the security which, up to the end of 1955 would have amply convered the loan, greatly depreciated when the licence was revoked and the premises could no longer be operated as a cinema.

On November 8, 1957, the plaintiff's advocates, in exercise of their rights under s. 115, and s. 117 of the Registration of Titles Ordinance, gave notice (exhibit A. 3) of their intention to sell the mortgage property by public auction or private treaty. Their next step was to write to Mr. Bhavsar (P.W. 5), the court bailiff and auctioneer, on November 11, 1954 (exhibit A. 4), requesting him to seize from the cinema and sell 374 chairs and two projectors which they held from the first defendants under a bill of sale dated May 15, 1953. The plaint is silent as to this bill of sale but copies of it are annexed to the written statements of defence. It was by way of collateral security for the payment of Shs. 50,000/- of the mortgage debt. A further letter dated January 30, 1958 (exhibit A. 5), instructed Mr. Bhavsar to sell the mortgage property by public auction after due advertisement (exhibit C is a copy of the advertisement). Mr. Bhavsar gave evidence that there were no bids on the day of the sale – April 20, 1958. He had previously been admitted into the premises by Mr. Manibhai and the third defendant; they held the keys. He describes the chairs as being very shabby and worth not more than Shs. 5/- each to anyone who might be interested. He saw one projector. The plaintiff's advocates had written to the first defendants (exhibits A. 7 and 8) advising them of the proposed

sale and exhorting them to assist in realizing the best possible prices. By letter dated September 30, 1959 (exhibit A. 11) the plaintiffs gave similar instructions to sell to Tulsidas Madhavji (P.W. 4), another auctioneer. He eventually sold the mortgage property for Shs. 80,000/- by public auction to the Uganda Guardian Press Co. Ltd., on November 14, 1959. The remaining witness for the plaintiffs was Mr. Kantibhai Patel (P.W. 3), the secretary of the plaintiff company since 1957. In October, 1959, he got the keys of the premises from Mr. Manibhai. Inside he found only the second-class chairs with cushions missing and broken projectors. The first-class chairs had been removed. He prepared the statement of account, a copy of which is annexed to the first defendant's written statement of defence (H.L. 1). Subject to the question of liability and allowing for a deduction of Shs. 15,031/45 wrongly charged as compound interest, its accuracy is not now disputed. In the result the plaintiffs claim Shs. 228,716/-.

The defendants elected not to call evidence. Their pleadings aver firstly that the plaintiffs have not accounted for the property which they took into their possession under the bill of sale. It appears that they were never able to take physical possession of this property which progressively deteriorated in the derelict cinema, to which Manibhai had the keys, until it became virtually worthless. Mr. Chotabhai gave that as the main reason why the plaintiffs did not refer to the bill of sale in their plaint. I find that they were within their rights in so doing. No deduction from the claim should be made on this account.

Secondly, the defendants aver that the plaintiffs have unreasonably and negligently delayed in exercising their powers under the mortgage and in selling the mortgage property with the result that it depreciated considerably in value. In this context they rely on the provision in the mortgage that the power of sale shall be exercised in the event of a default in payment. My view is that this must be construed as an enabling provision along the lines of s. 115 and s. 117 of the Registration of Titles Ordinance. Moreover it was Mr. Manubhai, on behalf of the first defendants, who asked the plaintiffs to give him time and it was for this reason that the sale was postponed. This delay does not absolve the first defendants from liability but it would probably do so as regards the other defendants if they were held to be sureties and not principal debtors, a question which emerges as the third issue. Mr. Russell, for the plaintiffs, submits that although they are referred to as sureties in the plaint and in the mortgage this is merely a matter of description and that as they jointly and severally covenanted with the first defendants to repay the plaintiffs they are all principal debtors and share an equal liability. Certainly the mortgage makes no mention of what was to happen if the first defendants – the principal debtor – defaulted and the definition of a contract of guarantee in s. 126 of the Indian Contract Act, which is applicable in Uganda, stipulates a prior default by the debtor before a surety liability can arise. Mr. M.L. Patel, for the second, third, fourth and fifth defendants, relies on the following passage from Coote on Mortgages (9th Edn.), Vol 1 at p. 103:

> "Where property is mortgaged which is not immediately realised by the mortgagee in case of default, or which does not of itself yield an immediate income to meet the payment of interest (as, for instance, in the cases of mortgages of policies of life assurance and revisionary interests), third persons are frequently made parties to the mortgage deed for the purpose of guaranteeing the payment of principal and interest, of mortgagor necessary for the maintenanc of the security.
>
> "In order to obviate the risk which the mortgagee runs in such cases of losing his remedies against the surety by reason of subsequent transactions between himself and the mortgagor, who is the principal debtor, it is the

> usual practice that the surety enter, jointly and severally with the mortgagor, into all the covenants and stipulations, the performance and observance of which the surety is intended to guarantee, and that a proviso should be inserted in the mortgage deed that, although, as between the mortgagor and the surety, the latter is only a surety, yet that, as between himself and the mortgagee, he shall be deemed a principal debtor, and shall not be released by any subsequent transaction between the mortgagor and mortgagee which would otherwise have that effect. The effect of such a proviso is materially to vary, and, indeed, to a great extent, to exclude, the operation of the rules of law which, in the absence of express contract, regulate the relations of principal and surety, as between them and the creditor."

Mr. Patel points out that there is no such proviso as is referred to in the above passage in the mortgage in this suit. I am not sure that I can reconcile this passage with the express provisions of s. 126 of the Indian Contract Act, which in the case of any conflict must prevail in Uganda. The passage seems to be referring to a drafting device, as a matter of practice to safeguard against the possibility of the interests of the mortgagee being prejudicied in case the surety should be held not to be a principal debtor. If I am right about this then none of the fasciculus of s. 126 to s. 147 of the Act, which protect the rights of sureties, apply to these defendants and they have no ri, which protect the rights of sureties, apply to these defendants and they have no rights which can be said to have been impaired by the plaintiff's delay, with the connivance of the first defendants, in selling the mortgage property. They are in no better position than the first defendants.

Finally, with Mr. Russell's consent, I allowed the defendants to amend their written statements of defence by adding paragraph in these terms:

> "Annexure A to the plaint is not a mortgage and is not a completed document and as such cannot create any rights or obligations between the parties."

This issue arises from the fact that the mortgage is signed by the defendants only and not by both the mortgagor and mortgagee in accordance with the form of mortgage set out in the Eleventh Schedule to the Registration of Titles Ordinance. Section 114 provides that the proprietor of any land under the operation of the Ordinance may mortgage the same by signing a mortgage thereof in the form set out in the Eleventh Schedule. Section 209 provides that any variation in the forms contained in the schedule, not being matters of substance, shall not affect their validity or regularity. For myself I would be inclined to regard this form merely as a guide and as not being on a par with the imperative form required for a bill of sale.

Mr. Russell submits that as the plaintiffs advanced all the money at once and were not under any obligation to make future advances, there was no binding covenant on them which would need their signature. Normally the Registrar of Titles would require both signatures as set out in the form but once the mortgage is registered then surely the rights which are conferred by s. 51, s. 96 and s. 125 proceed to flow. It would defeat the whole purpose of the Ordinance if, in the absence of fraud, a litigant could go behind the fact of registration on a technically such as this. Here the defendants have acted on the mortgage and although the form is statutory and not contractual I am unable to agree that they can now repudiate their liability on the ground that the plaintiffs did not sign the mortgage.

In *Credit Finance Corporation Ltd. v. Ali Mwakasanga* (1), [1959] E.A. 79 (C.A.) it was held that where there had been part performance of a hire-purchase agreement the hirer could not plead that the agreement was invalid for want of execution on the ground that no one had signed it no behalf of the finance

corporation. Also the decision of *Chelsea and Walham Green Building Society v. Armstrong* (2), [1951] Ch. 853 shows that the courts will be astute to defeat such unmeritorious submissions.

The headnote reads as follows:

> "A registered transfer of land, contained a covenant by the transferee with a building society for the repayment to them of money due under a mortgage to which the land was subject. The transfer was executed by the transferor and transferee, but not by the building society.
>
> "On an application made by the society by procedure summons in an action brought by the society against the transferee to have determined whether the society were entitled to the benefit of the covenant:
>
> "**Held:** that the registered trensfer was a deed but not a deed inter partes, and as at common law a covenant in an indenture not inter partes expressed to be made with a person not a party to the indenture could be sued upon by the covenantee as if the indenture were a deed poll, the society, though not a party to the deed, could sue upon the covenant."

For these reasons I give judgement for the plaintiffs against all the defendants for Shs. 228,716/- with interest and costs.

Judgment for the plaintiff.

For the plaintiff:
Patel & Dave, Kampala
R. E. G. Russell and *R.S. Dave*

For the defendant:
M. P. Vyas, Kampala

For the second, third and fourth defendants:
Manubhai Patel & Son, Kampala
M. L. Patel

The Wakf Commissioners and Another v Ame Bin Kombo and others

[1960] 1 EA 1051 (HCZ)

Division:	HM High Court of Zanzibar at Pemba
Date of judgment:	29 October 1960
Case Number:	4/1960
Before:	Horsfall Ag CJ
Sourced by:	LawAfrica

[1] Res judicata – Wakf – Proceedings for declaration of title – Proceedings in court of Kadhi – Declaration of ownership – Property later vested in Wakf Commissioners by court order – Action by

Wakf Commissioners against family declared to be owners by Kadhi – Whether res judicata – Civil Procedure Decree (*Cap*. 4), *s*. 6 (*Z*.).

Editor's Summary

About sixty years ago a land owner dedicated as wakf his shamba for the benefit of his freed slaves and the poor of his tribe. In 1942 the father of the present respondents filed a suit in the Kadhi's court against the beneficiaries including the last surviving beneficiary of the wakf for a declaration of title when it was held that the shamba did not form part of the wakf. The last surviving beneficiary managed the shamba until his death and after his death the shamba was in 1952 by order of the High Court vested into the Wakf Commissioners. In 1958 the Wakf Commissioners filed an action against the respondents and the magistrate then found that the shamba in dispute was the same as was in dispute in the Kadhi's court and accordingly dismissed the action on the ground that the matter was res judicata. On appeal it was argued that in the action in the Kadhi's court the beneficiaries were sued in their personal capacities as trespassers and not in a representative capacity on behalf of all the beneficiaries of the wakf; and that the Wakf Commissioners were not parties to the action in Kadhi's court nor were they litigating in the case before the magistrate under the title of any of the persons who were parties in the action in the Kadhi's court.

Held – so long as the last beneficiary lived and managed the property, he was in effect representing the title of the wakf and the effect of the order of the High Court in 1952 was to place the Wakf Commissioners in the shoes of the last beneficiary; consequently the last beneficiary and the Wakf Commissioners had represented the title of the wakf at different times; therefore the decree of the Kadhi's court against the last beneficiary and other beneficiaries was binding to the successors in title, the Wakf Commissioners.

Appeal dismissed.

Judgment

Horsfall Ag CJ: The learned resident magistrate, Pemba, found that the shamba in dispute in resident magistrate's Civil Case No. 142 of 1958 out of which this appeal arises, was the same shamba as was in dispute in Kadhi's Civil Case, Chake Chake, No. 441 of 1942. The question for decision in this appeal is whether he was right in dismissing Civil Case No. 142 of 1958 with costs to the defendant on the ground of res judicata.

A reference to the pleadings in Civil Case No. 142 of 1958 can best illustrate the facts that are necessary to be understood for a decision of this appeal. About sixty years before 1958 one Khamis bin Said el-Siyabi dedicated as wakf his shamba situate at Mtomkuu, Fufuni, Mkoani, for the benefit of his

freed slaves and ultimately for the benefit of the poor of his Siyabi tribe. To quote paras. 3 and 4 of the plaint dated April 22, 1958:

> "3. That one Hassan Uleid Muhiyao now dead was his last surviving beneficiary (being his freed slave) of the said Wakf shamba and was managing the said Wakf shamba until his death which took place in or about 1952.
>
> "4. That by the order of the High Court in District Registry of High Court Civil Case No. 12 of 1953 the said Wakf shamba was vested into Wakf Commissioners by vesting order dated July 14, 1954, and the said shamba is now being managed by the Wakf Commissioners."

The written statement states:

> "5. They (the defendants) say that in the year 1942, their late father Kombo bin Haji filed suit in Kadhi's Court at Chake Chake, being C.C. No. 441/1942 against Hassan Uledi and two others, for a declaration of title in respect of the aforesaid shamba, as the said Hassan Uledi alleged that the said shamba was part of Wakf. It was held in the said case that the aforesaid shamba did not form part of the Wakf and defendant's father Kombo bin Haji obtained judgment against the said defendants as prayed by him.
>
> "6. The defendants therefore submit that because of the judgment in the said Civil Case No. 441 of 1942 of the Kadhi's Court, Chake Chake, the present case is res judicata."

It is not disputed that the nine defendants in resident magistrate's Civil Case No. 142 of 1958 are the sons of Kombo bin Haji, the plaintiff in Kadhi's Civil Case No. 441/42 and, founding their claim through him, are his successors in title. But Mr. Patel for the appellants, the Wakf Commissioners, contends that Hassan Uledi and the other two defendants were sued in Kadhi's Civil Case No. 441/42 in their personal capacities as trespassers. They were not sued in a representative capacity on behalf of all the beneficiaries of the wakf. He further contends that the Wakf Commissioners were not parties to Kadhi's Civil Case No. 441 of 1942, nor are they litigating in resident magistrate's Civil Case No. 142/58 under the title of any of the persons who were parties in Kadhi's Civil Case No. 441 of 1942. He elaborated this ground of appeal in argument by saying that in resident magistrate's Civil Case No. 142 of 1958 the Wakf Commissioners were suing in a representative character on behalf of the beneficiaries of the wakf. Mr. Patel in support of his argument that it was not res judicata referred to s. 6 of the Civil Procedure Decree (Cap. 4):

> "6. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

I cannot find that the plaint or claim in Kadhi's Civil Case No. 441 of 1942 was ever before the learned magistrate who tried Civil Case No. 142 of 1958. Exhibit 1 contained only a certified copy of the Kadhi's judgment but that judgment makes it clear that the suit was headed: Kombo bin Haji Shirazi of Michanjani, Mkoani, Pemba, plaintiff, versus (1) Hassan bin Uledi, (2) Juma Mabruki, (3) Khamis bin Salim Shirazis, all of Tasini Fufuni, Mkoani, Pemba. Although the Kadhi in his judgment refers to a claim by the plaintiff against the defendants that they had trespassed into his shamba I agree with the learned resident magistrate when he stated in his judgment that the Kadhi's judgment in effect

> "make a declaration of ownership of the disputed shamba in favour of the plaintiff in that suit (Kombo bin Haji) the father of the defendants, under whom they claim".

The further passage in the Kadhi's judgment:

> "The defendants say that they seized this shamba on account that it had been dedicated as a wakf for their benefit,"

shows that they themselves raised the issue of title before the Kadhi, which then became an issue.

In the record of the file of resident magistrate's Civil Case No. 142/58 under date May 25, 1959, it is recorded that by consent the record in High Court Civil Case No. 12 of 1953 was treated as part of the record in Civil Case No. 142/58. The judgment of SIR George Robinson, C.J., in that case states:

> "I believe the defence witnesses. I believe this shamba 'Mtumkuu' is the subject of a wakf deed which has never been registered. The evidence as to dates is meagre, but it appears that the deed is at least fifty years old and might be seventy years. I am confirmed in that belief by the fact that the shamba has always been in the possession of the freed slaves and that it was not included among the other properties of Nassor and reported on his death. There is no beneficiary deed in respect of it."
>
> The Chief Justice also in his judgment refers to
>
> "administering the estate of Juma Mabuki, the last but one of the freed slaves to die"

and again "Hassan Uledi did have a right to lease as being the last surviving beneficiary".

I quote these facts in support of the contention that in 1942 Hassan Uledi and the other two defendants were the last surviving free slaves of the dedicator of the wakf and the last surviving beneficiaries. As their defence to a claim of trespass they raised the issue of title. The wakf being informal there existed no formally appointed Mutawali to manage the wakf or to represent them in this and together as the last surviving beneficiaries they put forward the claim that the land on which they had trespassed was wakf. In my opinion they were putting forward the issue not in their personal capacities only but also as the only persons then existing to manage and represent the wakf. In course of time the other two died until at the time of his own death in 1952 only Hassan Uledi was left to manage the wakf as last survivor of the freed slaves. On the death of Hassan Uledi there was no one left to manage the wakf and there were no living immediate beneficiaries other than the unascertained persons described as the poor of the Siyabi tribe. To preserve the property it became imperative to vest it in some person or body capable of doing so. Hence the High Court order dated July 14, 1954. It seems to me that Hassan Uledi, while he lived and managed the property, was in effect representing the title of the wakf for the time being. I think that the effect of the High Court order is to place the Wakf Commissioners in the shoes of Hassan Uledi as manager, he being dead. It gave legal form to duties which he was presumably doing while he lived. The result is that both Hassan Uledi and the Wakf Commissioners have represented the title of the wakf at different times. Therefore the decree of the Kadhi against Hassan Uledi and the other defendants will bind his successors in title, the Wakf Commissioners. I consider that the learned magistrate was right in his decision. The appeal is dismissed with costs.

Before leaving this matter I will briefly deal with Mr. Patel's contention that the strictures of the Chief Justice in his judgment describing Hassan Uledi as dishonest and fraudulent should have led the learned magistrate into considering

that Hassan Uledi had not conducted the suit bona fide on behalf of all the parties interested and that the present suit is not res judicata. In the first place the Chief Justice makes it clear that his strictures refer to Hassan Uledi having leased crops of the shamba in question twice over with the result that

> "Nemesis overtook him and he found himself convicted of obtaining money by false pretences and sentenced to eighteen months' imprisonment with hard labour. He died in prison".

This obviously does not refer to the conduct of the litigation in any of the suits on which the plea of res judicata is based. It is also observed that the Kadhi in his judgment (exhibit 1) expressly rejected the evidence of Hassan Uledi. I therefore reject Mr. Patel's contention on the ground that Hassan Uledi's bad character was irrelevant in the suit in which he was concerned.

Appeal dismissed.

For the appellants:
J. C. Patel, Zanzibar

For the respondents:
D. R. Joshi, Zanzibar

Shamsudin Jiwan Mitha v Abdulaziz Ali Ladak
[1960] 1 EA 1054 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	25 October 1960
Case Number:	27/1960
Before:	Simmons J
Sourced by:	LawAfrica

[1] Practice – Appearance – Defendant – Trial – Defendant appearing by counsel – Application for adjournment granted on terms – Terms not complied with – Ex parte decree – Setting aside – Meaning of "prevented by sufficient cause from appearing" – Whether merits of decree can be considered – Civil Procedure Code, O. 9, r. 13.

Editor's Summary

The defendant in a suit who had given a power of attorney to his brother appeared at the trial by his advocate A. on March 15, but by his attorney withdrew A's instructions and applied for an adjournment to March 16 when he appeared by another advocate T. T. applied for and was granted a postponement of trial on condition that the defendant paid Shs. 2,000/- into court by March 17 failing which the trial was to take place on March 19. The condition was not complied with, the attorney withdrew instructions from

T. and on March 19 again asked for a postponement; this was refused and the attorney took no further part in the day's proceedings, which resulted in an ex-parte decree in favour of the plaintiff. The defendant by another advocate R. later applied to another magistrate for the decree to be set aside under O. 9, r. 13, which provides that an ex-parte decree may be set aside on the application of a defendant if he satisfies the court that he was prevented by sufficient cause from appearing when the suit was called on for hearing. When the second magistrate refused to set aside the decree the defendant appealed.

Held –

(i) that to succeed under the rule a defendant had to show that he did not appear (when the suit was called on) and that he was prevented from appearing and was so prevented by sufficient cause.

(ii) the defendant had appeared in that his attorney asked for an adjournment.

(iii) the defendant had not shown that he was "prevented" from appearing.

(iv) even if so prevented the defendant was not so prevented by "sufficient cause" but by circumstances of his own making, namely, withdrawing instructions and failing to comply with the condition upon which a postponement had been granted.

(v) that on an application to set aside under O. 9, r. 13, it was not competent for the court to consider whether the decree was correct on the merits.

Appeal dismissed.

Cases referred to in judgment:

(1) *Woopendra v. Nobin* (1869), 17 W.R. 370.

(2) *Land Officer v. Abdulrasul Jivraj* (1947), 1 T.L.R. (R.) 410.

(3) *Din Mohamed v. Lalji Visram* (1937), 4 E.A.C.A. 1.

Judgment

Simmons J: This is an appeal from an order, by the learned resident magistrate (Mr. Methven) dismissing an application to set aside an ex-parte decree, granted by another magistrate (Mr. Davies) on May 26, 1960, giving to the respondent possession of certain premises on plot No. 3, block 27, Kichwele Street, Dar-es-Salaam, together with sums amounting to Shs. 5,800/- in respect of rent, mesne profits and/or damages, with interest and costs.

The application was supported by an affidavit, affirmed by the defendant's brother, from which it appears that the suit had come up for trial on March 15. The brother, who holds a power of attorney from the defendant, rejected advice by his advocate to accept an offered settlement. The advocate withdrew. The learned resident magistrate granted an adjournment to the following day, when the applicant was accompanied by a new advocate, Mr. Thornton, who asked for a further adjournment. This was allowed on condition that the defendant pay Shs. 2,000/- into court on or before March 17; otherwise the trial would take place on the 19th. The defendant did not comply with the condition but the brother tendered the sum to the court clerk on the 18th. On March 19 the brother again asked for the adjournment, this time to engage another lawyer. The magistrate refused any further delay; the evidence of the plaintiff was heard and judgment was reserved.

There was a counter-affidavit from the plaintiff's advocate which stated that the defendant was in arrear with nineteen months' rent. Mr. Thornton was, it is said, on March 16 fully prepared to go to trial but applied for two months' adjournment, to which the plaintiff agreed on the condition to which I have referred. The defendant afterwards withdrew instructions from Mr. Thornton. The defendant's father, in the presence of the brother, stated to the deponent that the withdrawal of instructions from the advocates was merely to gain time. On the same day a settlement was arrived at but on the following day repudiated on behalf of the defendant (appellant).

An affidavit in reply was filed by the brother on July 18, 1960, denying that Mr. Thornton was ready to go on with the case. He did not, however, challenge the averment that the withdrawal of instructions

was to gain adjournments and did not tender any affidavit by Mr. Thornton.

The learned resident magistrate from whose order this appeal is brought (Mr. Methven) refers to O. 9, r. 13, under which the application to him was made:

> "In any case in which a decree is passed ex parte against a defendant, he may apply to the court by which the decree was passed for an order to set it aside; and if he satisfies the court that the summons was not duly

> served, or that he was prevented by any sufficient cause from appearing when he suit was called on for hearing, the court shall make an order setting aside the decree as against him upon such terms as to costs, payment into court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:
>
> "Provided that where the decree is of such a nature that it cannot be set aside as against such defendants only it may be set aside as against all or any of the other defendants also."

He points out that although the court record states that the defendant was absent the affidavit filed on the defendant's own behalf showed that he appeared by his brother, his lawful attorney. Mr. Methven held that the defendant was therefore not within the terms of O. 9, r. 13, and the application was dismissed.

The memorandum of appeal is as follows:

> "1. The learned magistrate erred in holding that the appellant had no remedy under O. 9, r. 13.
>
> "2. The learned magistrate erred in not applying his mind to the question of law whether the appellant had shown sufficient cause for the ex parte judgment to be set aside.
>
> "3. In the alternative the learned magistrate erred in holding that the appellant failed to show sufficient cause.
>
> "4. The learned magistrate erred as in arriving at his decision took matters extraneous to the application.
>
> "5. The judgment and decree passed against the appellant are contrary to law in that the court had no jurisdiction to pass the same as the contractual tenancy was not terminated until September 30, 1959."

The proceedings before Mr. Methven were, unfortunately, not copied for this appeal. The first point sought to be taken on appeal was an objection to the admissibility of the affidavit of Mr. Sayani, the respondent's advocate. This objection was not taken before Mr. Methven nor in the memorandum of appeal. I gave no leave under O. 41, r. 2, and am not willing to entertain the ground now, though I will add that having heard all that the learned advocate wished to say I do not think there is any substance in it. If Mr. Rattansey, for the appellant, had wished to cross-examine Mr. Sayani on his affidavit certain consequences might have flowed, but he did not so wish.

The first paragraph of the memorandum raises the question whether the appellant had any remedy under O. 9, r. 13, that is to say whether "he was prevented by any sufficient cause from appearing" (there being no dispute that "the summons was duly served"). It will be observed that the question is not solely whether the appellant did appear (although if he did appear he has no remedy under the rule but only by way of appeal or review); he must show also that he was prevented from appearing, and so prevented by "sufficient cause".

This appellant has failed to satisfy me on any of the three elements necessary to bring him within the rule. First, I find that he did appear. There is a case referred to by Mulla, Code of Civil Procedure (10th Edn.), in the notes on p. 589, *Woopendra v. Nobin* (1) (1869), 17 W.R. 370, the report of which is said not to be available; but I rely on the notes and from them I take it, and hold, that if a defendant comes and asks for an adjournment to give him time to prepare the case, he has appeared and has no remedy under the rule. Even an agent who may have no right of audience can appear for the purposes of O. 9: *Land Officer v. Abdulrasul Jivraj* (2) (1947), 1 T.L.R. (R.) 410. It is true that in the district court record is to be found the entry "defendant called, absent". For some purposes that would be conclusive but the appellant's

attorney's counter-affidavit itself stated that the deponent was present and asked for a further adjournment. No doubt after this was refused the defendant's name was called before beginning the hearing of evidence and most probably the attorney made no reply, either because he did not wish to do so or because he had left the room; none the less he had already appeared; the reasoning in *Din Mohamed v. Lalji Visram* (3) (1937), 4 E.A.C.A. 1, is applicable.

Even if it were held that this did not amount to an appearance, the defendant was not "prevented" from appearing. Mr. Tahir Ali had already appeared for him but his instructions had been withdrawn (counter-affidavit, para. 2, unchallenged in the affidavit in reply). Moreover Mr. Thornton appeared for him on the next day. No reason appears why either of these gentlemen should not have been further retained. If a party deliberately withdraws instructions from his advocate he is not "prevented" from appearing, he prevents himself; however, if he is regarded as being prevented I hold that he is not in these circumstances prevented by "sufficient cause". The cause was of his own making and not sufficient to give him the benefit of O. 9, r. 13. I disagree with his advocate when he submits that the defendant was "let down". On the evidence I believe that his actions have been deliberately dilatory and an abuse of the process of the court: see para. 6 of the counter-affidavit, unchallenged in the affidavit in reply. As a final stage he instructed his present advocate to apply to me for an adjournment of his own appeal, an application which I refused without calling on the respondent.

Paragraphs 2 and 3 of the memorandum of appeal, and much of the argument, show a misconception of the scope of the rule. "Sufficient cause for the ex parte judgment to be set aside" can only mean "Sufficient cause for the defendant's non-appearance". Under the rule it was not open to Mr. Methven to consider, nor for the appellant to argue, the merits of the suit. Paragraph 5 asks me to set the decree aside because of what is said to be lack of jurisdiction. Even supposing that that could be done under O. 9, r. 13 (as to which I express no opinion), no lack of jurisdiction has been shown. The argument was really that Mr. Davies had not found the true facts or that he had applied the law to the facts incorrectly, but that is not a question of jurisdiction; if it were, every dispute would be as to jurisdiction, because it amounts to saying that no court has jurisdiction to come to a wrong determination, which is not so; a determination may be wrong but none the less within the jurisdiction, that is to say within the power of the court. Even if I can do so under O. 9, I decline to consider the correctness or otherwise of the amount of rent or mesne profits awarded, for it was within the jurisdiction of the district court.

I do not really understand para. 4 of the memorandum of appeal but whether or not the learned magistrate had improper regard to extraneous matters – and I see no reason to think that he did – I have had no such regard.

There is another approach which may be made to this case and which leads to the same result. As I have said, Mr. Thornton, for the appellant, on March 16 applied for the adjournment which the appellant now complains that he applied for and did not get on March 18. That adjournment was actually granted by Mr. Davies but subject to a condition: payment-in of a sum of money by noon on March 17. The appellant did not refuse or object to that condition and it has not been criticised, but he did not comply with it. Had he done so the trial would have been adjourned as he wished. The non-adjournment is therefore the responsibility of the appellant in that he did not comply with the condition (and has shown no reason for not complying with it).

The order of Mr. Methven is affirmed and the appeal dismissed.

Appeal dismissed.

For the appellant:
Mahmud N. Rattansey & Co, Dar-es-Salaam
M. N. Rattansey

For the respondent:
Sayani & Co, Dar-es-Salaam
N. R. D. Sayani

R v Saidi Ibrahim
[1960] 1 EA 1058 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	14 October 1960
Case Number:	205/1960
Before:	Sir Ralph Windham CJ
Sourced by:	LawAfrica

[1] Contempt of court – Criminal case stayed – Reconciliation on terms – Terms not observed – Whether failure to observe terms is contempt – Meaning of "offence of a personal or private nature" – Penal Code, s. 114(1), *s.* 302 (*T.*) *– Criminal Procedure Code, s.* 134 (*T.*) *– Indian Code of Criminal Procedure*, 1898, *s.* 345.

Editor's Summary

The mother of the accused, who was his trustee in respect of a house, borrowed money from the complainant to pay for the defence of the accused, who was about to be charged with manslaughter arising out of a motor accident. She falsely represented to the complainant that she had power to sell him the house which he was interested to purchase. The accused, his mother and another person, were all charged with obtaining from the complainant money by false pretences, but no evidence was offered except against the mother, who pleaded guilty to the charges, and the magistrate, after considering the circumstances, decided not to sentence the mother, but to proceed, under s. 134 of the Criminal Procedure Code, to effect a reconciliation. He, therefore, stayed the proceedings on terms agreed by counsel, which provided for the accused to guarantee repayment of the money borrowed by his mother, and to enter into all documents necessary to effect the terms of the reconciliation within seven days. The accused failed to comply with the magistrate's order, whereupon the magistrate convicted the accused of contempt of court and sentenced him to imprisonment. On an application for revision, it was submitted that the magistrate had no power to proceed under s. 134 of the Criminal Procedure Code as the offence with which the accused, his mother and a third person were charged was not an offence "of a personal or private nature".

Held – the magistrate had power to resort to s. 134 of the Criminal Procedure Code and the failure of the

accused to comply with his undertaking recorded in the order for a stay of proceedings constituted contempt of court.

Application dismissed.

Judgment

Sir Ralph Windham CJ: This is an application to set aside, by way of revision, the conviction of the applicant in the resident magistrate's court on a charge of contempt of court contrary to s. 114 (1) (*i*) of the Penal Code. Section 114 (1) makes any person guilty of a misdemeanour, punishable with imprisonment for six months or a fine not exceeding Shs. 500/-, who commits any of the acts specified in paras. (*a*) to (*h*) thereof, or who, under para. (*i*),

> "commits any other act of intentional disrespect to any judicial proceeding, or to any person before whom such proceeding is being had or taken".

The particulars of the applicant's offence, as set out in the charge sheet, were that he –

> "on July 4, 1960, at the resident magistrate's court, Dar-es-Salaam, within the municipality of Dar-es-Salaam in Criminal Case No. 1867/60, having undertaken within seven days from that day to enter into a guarantee for the sum of Shs. 8,300/- and to enter into all necessary documents to effect such guarantee, failed to comply with the said undertaking, thereby committing an act of intentional disrespect to the judicial proceeding aforesaid".

The applicant pleaded to the above charge in words which were entered by the learned trial magistrate as constituting a plea of guilty; and he was thereupon convicted, and sentenced to imprisonment for three months. Learned counsel for the applicant, abandoning one of the grounds on which he had earlier sought to have the conviction set aside, has rightly conceded that the words used by his client in answering the charge did constitute an unequivocal plea of guilty to it. But what he contends is that the facts that led to the appellant entering into the undertaking set out in the particulars to the charge were such that his failure to comply with that undertaking constituted no offence, and in particular constituted no contempt of court under the charging section. The charge, he would accordingly urge, was a nullity.

In order to examine this contention more specifically, it is necessary to set out the facts that led to the framing of the charge of contempt under s. 114 (1) (*i*) of the Penal Code. They were briefly as follows.

The appellant and two others had previously been charged, before the same magistrate, on (inter alia) four counts, under s. 302 of the Penal Code, of obtaining various sums of money, amounting to Shs. 2,450/- in all, from one Mwalim Vumbi by false pretences, in Criminal Case No. 1867 of 1960. All three pleaded not guilty to all four counts. The Crown then proceeded to lead evidence which implicated only one of the three accused, an old lady of over sixty called Hadija d/o Mwalim. The Crown offered no evidence against the other two (who included the present applicant) and they were acquitted under s. 205 of the Criminal Procedure Code. The four charges under s. 302 of the Penal Code were then read over again to Hadija, and she unequivocally pleaded guilty to them all. The learned trial magistrate thereupon, in considering how to sentence her, or whether to do so at all, recorded carefully the facts of the case as established by the Crown evidence that had been led. These facts, briefly, were that Hadija, who was the mother of the present applicant, was a trustee for him in respect of a certain house. On learning that he had been involved in a road accident and was to be charged with manslaughter, she decided in desperation to help him to pay for his defence by obtaining, which she thereupon did, money from the complainant Mwalim towards the purchase price of the said house which he, Mwalim, wished to buy, by falsely representing that she had power to sell it to him. This money, Shs. 8,300/- in all, included the Shs. 2,450/- to which the four counts related, with which we are now concerned. She never intended permanently to deprive Mwalim of the money, but meant to let him have it back when she could. Moreover, to begin with she did not realise that she was not entitled to act in the way she did.

On these facts the learned trial magistrate, after hearing counsel on both sides, decided not to sentence Hadija, but to deal with the matter under s. 134 of the Criminal Procedure Code by effecting a reconciliation between her and Mwalim and her son the applicant as provided in that section. His decision to take this course, and the agreed terms of reconciliation, are recorded by him in the following words. References to "the accused" are to Hadija. References to "the second accused" are to the present applicant:

> "I consider, after some reflection and after hearing counsel for both sides that the case is best dealt with under s. 134 C.P.C.

> "She has no previous convictions and the offence is not a felony. I admit that s. 134 C.P.C. is being used in the broadest manner but a reconciliation does not to my mind seem ridiculous in the circumstances. I do not think the public as a whole has been outraged and the offence can be regarded though perhaps with a benevolent eye as one of a personal nature.
>
> "Accordingly I stay these proceedings on the terms agreed to by both counsel, namely –
>
> "That the accused do pay Mwalim Vumbi the sum of Shs. 8,300/- (with interest thereon at 6 per cent. from today's date) on or before November 5, 1960, which payment is guaranteed by her son the second accused in this case and his heirs in consideration of Mwalim Vumbi allowing Hadija four months to pay the debt. It is agreed between the first and second accused and the complainant that the second accused will not transfer, alienate, mortgage or otherwise deal with the property whatsoever before such debt is paid. Further the second accused undertakes to enter into all documents necessary to effect such agreement within seven days from today."

Section 134 of the Criminal Procedure Code (Cap. 20), under which the above reconciliation was made and recorded, provides as follows:

> "134. In the case of proceedings for common assault or for any other offence of a personal or private nature not amounting to felony the court may, if of opinion that the public interest does not demand the infliction of a penalty, promote reconciliation, and encourage and facilitate the settlement, in an amicable way, of the proceedings on terms of payment of compensation or other terms approved by the court, and may thereupon order the proceedings to be stayed."

The main point urged in the present application is that the learned trial magistrate had no power to resort to s. 134 and to record a reconciliation thereunder; that the reconciliation so recorded was therefore a nullity, or perhaps even an illegal act on the magistrate's part; that the applicant's wilful failure to carry out his undertaking to the court as therein recorded was therefore no contempt of court, since he was under no obligation to comply with that which was a nullity or was illegal; and that therefore the charge against him under s. 114 (1) (*i*) of the Penal Code, in respect of such wilful failure, disclosed no offence, and the charge, and his plea of guilty thereto, were accordingly a nullity.

This submission is based on the contention that the misdemeanour of obtaining money by false pretences, contrary to s. 302 of the Penal Code, does not fall within the words – "any other offence of a personal or private nature" in s. 134 of the Criminal Procedure Code, and that for this reason that section had no application. The point for decision, therefore, is whether those words can be held to cover the offence of obtaining money by false pretences which was committed by Hadija.

There appears to be no decided authority directly on this point. In one sense, of course, no crime is merely of a "personal or private nature", since all crimes are the concern of the Crown, as representing the interest of the general community in the maintenance of peace and good order. But that, clearly, is not the meaning of the words as used in this section; for the words "for common assault or for any other offence of a personal or private nature" contemplate not only that a crime (i.e. an offence) can be of a personal or private nature in some sense, but also that common assault, in particular, is an offence of a personal or private nature. Those words must therefore be interpreted so as to include some crimes other than common assault. Certain offences

would clearly be excluded by the wording of the section. All felonies are expressly excluded. And from the express inclusion of common assault, it would seem that other kinds of assault constituting only misdemeanours, as for instance assault causing actual bodily harm, are excluded by implication. Again, crimes such as treason and riot, neither of which are "felonies" would clearly be excluded, since they are manifestly not of a personal or private nature in any sense of those words. What misdemeanours, then, other than common assault, could be described as being of a personal or private nature? Without finding it necessary or desirable to set out any comprehensive or specific list of them, it seems to me that a misdemeanour would qualify for inclusion if it were such that it directly affected only a very small number of particular individuals, and in a manner that constituted no danger to the general community. Such an offence, in my view, was the obtaining of money by false pretences committed by Hadija in the present case. A three-cornered agreement between her and Mwalim and her son the present applicant, for securing the repayment by her to Mwalim of the moneys that she had obtained from him, would concern nobody but the three of them. Under the section, it is sufficient if the offence is either personal or private. In my view Hadija's offence was both.

Although there is, as I have said, apparently no direct authority on the meaning of the words "personal and private" in the context of such a provision as s. 134, some guidance may perhaps be derived from a reference to the Indian Code of Criminal Procedure, 1898, and the Indian Penal Code. Section 345 of the former provides for the compounding of certain specified offences. Included among these offences is the crime of cheating, and the section provides that this may be compounded by the person cheated. Cheating is defined in s. 415 of the Indian Penal Code in terms which are wider than, but which would include, the offence of obtaining money by false pretences, which offence is not made a specific offence under the Indian Penal Code. "Cheating" is defined by s. 415 thus:

> "Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.
>
> "Explanation – A dishonest concealment of facts is a deception within the meaning of this section."

From the above, it is clear that the kind of cheating which in England and in Tanganyika is known as obtaining money by false pretences, is an offence which under the Indian law is compoundable. I see no good reason why the offence should not be similarly compoundable in Tanganyika, in the manner contemplated by s. 134 of the Criminal Procedure Code, provided that the court has satisfied itself (as it did in the present case) that "the public interest does not demand the infliction of a penalty".

For these reasons I hold that the learned magistrate did have power to resort to s. 134 in the present case and to record, in the order that he made thereunder, the applicant's undertaking to enter into a guarantee; and that the applicant's act in wilfully failing to comply with that undertaking did constitute a contempt of court, for which offence he was properly charged and to which he unequivocally pleaded guilty.

The only other point urged in this application for revision is that the case against the applicant on the charge of contempt of court under s. 114 (1) (*i*) of the Penal Code ought to have been heard by another magistrate, and not (as it was) by the same magistrate who had recorded the reconciliation under

s. 134 of the Criminal Procedure Code, including the applicant's undertaking the breach of which constituted the contempt of court. I can see no merit in this contention. It is not alleged that the learned magistrate was biased. Nor is there anything wrong in principle with a magistrate trying an accused, under s. 114 (1) of the Penal Code, for an act of contempt committed against a court over which he himself was presiding. Sub-section (2) of the same section expressly provides, indeed, for the summary punishment of an act of contempt, in certain circumstances, by the same court (i.e. the same magistrate) against whom the act of contempt was committed; and there is no reason to hold that, if the act is not tried summarily under sub-s. (2), but is made the subject of a charge under sub-s. (1), the magistrate must be a different one.

For all these reasons, I find no ground for interfering with the conviction or sentence of the applicant in the present case; and this application must be dismissed.

Application dismissed.

For the Crown:
The Attorney-General, Tanganyika
D. M. MacDonaugh (Crown Counsel, Tanganyika)

For the accused:
Sayani & Co., Dar-es-Salaam
N. R. D. Sayani

Mohamed s/o Mohamedi v Athmani Shamte
[1960] 1 EA 1062 (HCT)

Division:	HM High Court of Tanganyika at Dar-es-Salaam
Date of judgment:	5 October 1960
Case Number:	26/1960
Before:	Mosdell J
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[1] Practice – Interest – Discretion of court to award agreement for interest at 84 *per cent. per annum – Interest at* 6 *per cent. awarded for period from filing of suit to judgment – Whether court can award interest at less than agreed rate – Subordinate Courts Civil Procedure Summons and Pleadings Rules,* 1955, *r.* 14 (*T.*) *– Tanganyika Order-in-Council,* 1920, *art.* 17 (*2*) (*T.*) *– Civil Proceedings* (*Interest on Judgment Debts*) *Rules,* 1956 (*T.*) *– Indian Acts* (*Application*) *Ordinance* (*Cap.* 2), *s.* 9 (1) (*b*) (*T.*) *– Civil Procedure Code, 1908, s.* 34 *– English Moneylenders' Acts,* 1909 *and* 1911.

Editor's Summary

The appellant obtained judgment against the respondent for Shs. 1,000/- with interest thereon amounting to Shs. 1,190/- to the date of filing proceedings and further interest on the principal sum at the rate of 6 per cent. per annum from the date of filing proceedings to the date of final payment. Before judgment which was given ex parte under r. 14 of the Subordinate Courts Civil Procedure Summons and Pleadings Rules, 1955, the advocate for the appellant by leave submitted that as the rate of interest under the loan agreement was 84 per cent. per annum the appellant should be allowed interest at this rate for the period between the date of filing of the suit to the date of judgment. The trial magistrate regarded 84 per cent. per annum as harsh and unconscionable and awarded interest at the rate of 6 per cent. not only from the date of judgment to the date of payment as is mandatory but also from the date of filing the suit to the date of judgment. The appellant now appealed against the magistrate's order for interest between the date of filing proceedings and the date of judgment on the grounds that the trial magistrate erred (*a*) in not allowing the contractual rate of interest, (*b*) in exercising his discretion

regarding interest without asking the appellant to adduce evidence in support of his claim and (*c*) in not requiring evidence that the contractual rate of interest was unconscionable.

Held –

(i) the court may or may not at its discretion award the contractual rate of interest between the date of the institution of the suit and judgment; whether it does so or not depends upon whether the rate is reasonable.

(ii) when the rate of interest exceeds 48 per cent. per annum, the court may assume, unless the contrary is proved, that the interest is excessive, and counsel for the appellant appeared to have assumed in the lower court that the burden of proving that 84 per cent. per annum was not a harsh and unconscionable rate of interest was his but did not discharge it.

(iii) whilst in a defended case the fact that the rate of interest is harsh and unconscionable should be pleaded, the court could not accept the proposition that in an undefended suit the court must approve a harsh and unconscionable but contractual rate of interest; the court has an inherent equitable jurisdiction to re-open unconscionable bargains even when suits are undefended for one reason or another.

(iv) it could not be said that the trial magistrate had exercised his discretion unjudicially.

Appeal dismissed.

Cases referred to in judgment:

(1) *Overseas Motor Transport Ltd. v. Lake Motors Ltd.*, Tanganyika High Court Civil Case No. 64 of 1958 (unreported).

(2) *Dalip Singh and Another v. Iqbal Nath* (1930), A.I.R. Lah. 733.

(3) *J. S. Joban Putra v. G. M. Jaffer*, Tanganyika High Court Civil Revision No. 2 of 1960 (unreported).

(4) *Hooda Ltd. v. G. M. Gulamali*, Tanganyika High Court Civil Revision No. 4 of 1960 (unreported).

(5) *Hooda Ltd. v. L. B. Barot*, Tanganyika High Court Civil Revision No. 16 of 1960 (unreported).

(6) *Sohan Singh v. Ahmed Khan Omar Khan*, Tanganyika High Court Civil Revision No. 3 of 1960 (unreported).

(7) *C. B. Lobo v. Baganda Butchers Ltd. and Others* (1947), 14 E.A.C.A. 12.

(8) *Singh v. Doshi* (1919), A.I.R. All 1.

Judgment

Mosdell J: On July 16, 1960, in the district court of Dar-es-Salaam at Dar-es-Salaam, the appellant was given judgment against the respondent in the sum of Shs. 1,000/- with interest thereon amounting to Shs. 1,190/- up to the date of filing the suit and further interest on the principal sum at the rate of 6 per cent. per annum from the date of filing the suit to the date of final payment. Judgment was given under r. 14 of the Subordinate Courts Civil Procedure Summons and Pleadings Rules, 1955, but before it was given Mr. Chaddah, the appellant's advocate asked for an opportunity to address the court, which was duly granted. The respondent was also ordered to pay the plaintiff's

costs in the suit excluding the costs of Mr. Chaddah's appearance before the court.

The learned resident magistrate reached his decision in the above mentioned terms in a full and considered judgment, but the plaintiff was not satisfied with the rate of interest awarded between the date of filing the suit and the date of judgment. The claim was in respect of a loan by the appellant to the respondent of Shs. 1,000/- with interest at the agreed rate of Shs. 70/- per month from August 8, 1958, to May 25, 1960, amounting to Shs. 1,190/- the

loan having been made on August 8, 1958. The learned resident magistrate regarded the interest at the rate of Shs. 70/- per month (84 per cent. per annum) as harsh and unconscionable and awarded the appellant interest at the rate of 6 per cent. not only from the date of judgment to the date of payment as is mandatory but also from the date of filing the suit to the date of judgment. It is against this latter order that the appellant has appealed.

I do not propose to give a history of the evolution of the common law and equity nor is it necessary for me to decide whether or not the Moneylenders' Acts, 1909 and 1911 apply in Tanganyika, though it is well arguable under art. 17 (2) of the Tanganyika Order-in-Council, 1920, that these Acts do apply, at any rate in part. Quite apart from local legislative provisions on the subject, it is clear that this court has an inherent power to re-open a harsh and unconscionable bargain between two parties and in particular in relation to the rate of interest agreed to be paid on a loan, but there is local legislative provision in the matter, namely s. 9 (1) (*b*) of the Indian Acts (Application) Ordinance (Cap. 2) which substituted a new section for s. 34 of the Indian Civil Procedure Code, 1908. This was effected by s. 2 of Indian Acts (Application) (Amendment) Ordinance of 1956. Prior to the coming into effect of this amending Ordinance, s. 34 of the 1908 Civil Procedure Code of India applied to Tanganyika. This section so far as is relevant reads as follows:

> "(1) Where in so far as the decree is for the payment of money, *the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree*, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

For the latter section there was by s. 2 of Ordinance No. 33 of 1956 substituted the following:

> "The High Court may make rules prescribing the rate of interest which shall be carried by judgment debts and without prejudice to the power of the court to order interest to be paid up to the date of judgment at such rates as it may deem reasonable, every judgment debt shall carry interest at the rate prescribed from the date of the delivery of judgment until the same shall be satisfied."

The rate prescribed from the date of the delivery of judgment is 6 per cent. as laid down in the Civil Proceedings (Interest on Judgment Debts) Rules, 1956. But the interest rate between the date of the filing of the suit and the date of judgment is left to the discretion of the court. In the instant case the learned resident magistrate reached the conclusion that although a contractual rate of interest might be deemed reasonable by the court, it was not bound to award such a rate of interest, if it considered it harsh and unconscionable. In the event the learned resident magistrate so far from granting the contractual rate of 84 per cent. per annum in fact allowed merely 6 per cent. per annum interest from the date of filing the suit until judgment.

There are three grounds of appeal in the memorandum of appeal, namely:

(1) that the learned resident magistrate erred in not allowing the rate of interest as agreed between the parties from the date of filing until judgment;

(2) that the learned resident magistrate erred in exercising discretion with regard to the rate of interest from the date of filing the plaint until

judgment without asking the appellant to adduce evidence in support of his claim;

(3) that the learned magistrate should have called evidence to establish the fact that the rate of interest in the particular case which is agreed is unconsionable.

Mr. Chaddah firstly argued that the rate of interest which should have been awarded by the resident magistrate for the period between the filing of the plaint and the date of judgment was the contractual rate agreed upon by the parties, namely Shs. 70/- a month. I should not have thought that there would have been much doubt concerning the interpretation to be placed on s. 9 (1) (*b*) of the Indian Acts Application Ordinance (Cap. 2) in so far as the rate of interest between the date of the suit and date of the judgment is concerned, but if doubt there be, it appears to have been dispelled by the commentaries on s. 34 of the Indian Code of Civil Procedure. The commentary thereon in Chitaley and Rao (2nd Edn.), at p. 323 and in Mulla (10th Edn.), at p. 138 and p. 139, were referred to by the learned resident magistrate in his judgment, and it is quite clear from them that the discretion of the court is not displaced by an agreement to pay a certain rate of interest. The court may or may not award the contractual rate of interest between the date of the institution of the suit and judgment in the exercise of its discretion. Whether it does so or not depends upon whether or not such rate is reasonable. This principle is also reinforced by the case law on the subject.

The second burden of Mr. Chaddah's argument was that the appellant should have been afforded an opportunity to show that the contractual rate was not harsh and unconscionable. The suit was undefended and judgment was given ex parte, but before judgment was given, Mr. Chaddah was given an opportunity, of which he took advantage to address the court, but it appears that his argument on that occasion was not directed to showing that the contractual rate, namely 84 per cent. per annum was not harsh and unconscionable, but rather that his client should have been awarded the contractual rate. It would seem, therefore, that there was an opportunity for the plaintiff to discharge the burden of proving that the rate of interest agreed was not harsh and unconscionable. He did not avail himself of it. The learned resident magistrate adopted the yardstick of unconscionability laid down in s. 10 of the Moneylenders' Act, 1927, namely that when the interest rate exceeds 48 per cent. per annum the court shall, unless the contrary is proved, presume that the interest charged is excessive. This seems a reasonable yardstick in the absence of any local yardstick. If it be argued that the respondent should have proved the contractual rate was excessive rather than the appellant that it was not, Mr. Chaddah appearing before the lower court to argue for the contractual rate, appears to have assumed the burden of proving that 84 per cent. per annum was not a harsh and unconscionable rate of interest, but not to have discharged it. However, if the burden be regarded as being on the respondent, in an undefended suit the court would be compelled to award the contractual rate however excessive. This view of the position would oust the court's discretion given by s. 9 (1) (*b*) of Cap. 2 and could not have been the intention of the legislature. In my view, from the commentaries on s. 34 of the Civil Procedure Code to which I have referred and from the terms of s. 9 (1) (*b*) of the Indian Acts (Application) Ordinance when in an undefended suit the rate of interest is prima facie excessive, as in the instant case, the burden of proving that it is not lies squarely on the claimant.

The third burden of Mr. Chaddah's argument was that the fact that the rate of interest was alleged to be harsh and unconscionable should have been pleaded. In a defended suit, of course, that is abundantly true, but the instant case was undefended. Such an eventuality would not oust the court's jurisdiction

to re-open an unconscionable bargain if it so thought fit. Mr. Chaddah's argument amounts in effect to the suggestion that in an undefended suit the court must approve a harsh and unconscionable but contractual rate of interest. This could not be so. In my opinion, the court has an inherent equitable jurisdiction to re-open unconscionable bargains even when suits are undefended for one reason or another. One of the cases to which Mr. Chaddah referred me was that of *Overseas Motor Transport Ltd. v. Lake Motors Ltd*. (1), Tanganyika High Court Civil Case No. 64 of 1958 (unreported), in support of his argument that a court should allow the contractual rate of interest between the filing of the suit and judgment, but as was pointed out by the learned resident magistrate, this case does not support Mr. Chaddah's submissions. It merely decided that if there was an express agreement to pay interest on a debt, the plaintiff might be entitled to it up to the date of judgment and if there were no express agreement, the court would consider whether such agreement could be implied by trade usage or otherwise. The case of *Dalip Singh and Another v. Iqbal Nath* (2) (1930), A.I.R. Lah. 733, cited to me by Mr. Chaddah, does not advance his submissions one jot or title. In it two points were decided under the Usury Laws Repeal Act, 1855, of India, which does not apply to Tanganyika, and a third point which was relevant, as it related to s. 34 of the Indian Code of Civil Procedure, decided that it was competent for a court to award interest at the contractual rate between the date of the suit and the decree. A court has the power as I have stated, but is not compelled to award a contractual rate of interest. Mr. Chaddah also referred to s. 16 of the Indian Contract Act, 1872. I can see no relevance here, as there is no question of fraud or undue influence in the instant case. It appears to me, therefore, that the learned resident magistrate had a discretion as to what rate of interest he should award the appellant on the principal amount from the date of filing the suit until judgment. He awarded interest at the rate of 6 per cent. per annum during that period and it seems to me that the only ground on which such order can be impugned would be that he did not exercise his discretion judicially. Mr. Chaddah referred me to three Tanganyika High Court Civil Review cases, presumably with the intention of showing that there were decisions of the High Court of Tanganyika where a rate of interest considerably in excess of 6 per cent. per annum was approved for the period between the date of the institution of the suit and judgment therein. The first one was *J. S. Joban Putra v. G. M. Jaffer* (3), Tanganyika High Court Civil Revision No. 2 of 1960 (unreported). In that case Murphy, J., approved a rate of 2 1/2 per cent. per month interest from the date of filing the plaint to judgment. The next was *Hooda Ltd. v. G. M. Gulamali* (4), Tanganyika High Court Civil Revision No. 4 of 1960 (unreported). In that case Biron, Ag. J., similarly countenanced an interest rate during the same period of 2 1/2 per cent. per month. Again in *Hooda Ltd. v. L. B. Barot* (5), Tanganyika High Court Civil Revision No. 16 of 1960 (unreported), LAW, J., approved an interest rate of 30 per cent. per annum over the same period. On the other hand in the case mentioned in the judgment of the learned resident magistrate, *Sohan Singh v. Ahmed Khan Omar Khan* (6), Tanganyika High Court Civil Revision No. 3 of 1960 (unreported), Murphy, J., restricted the interest on the principal sum, during the same period, to 6 per cent. per annum.

No hard and fast rule can be laid down as to the rate of interest to be awarded by a court during this period. Each case depends upon its own facts. There is the case of *C. B. Lobo v. Baganda Butchers Ltd. and Others* (7) (1947), 14 E.A.C.A. 12, in which the rate of interest on the principal sum due under a promissory note executed in Uganda between the date of suit and judgment was approved by the Court of Appeal for Eastern Africa at 24 per cent. per annum, and in that case the Court of Appeal reduced the interest rate from the

excessive contractual figure to 24 per cent. per annum as from the date on which it was incurred.

The only ground, as I have stated, on which this court would be justified in upsetting the finding of the learned resident magistrate that the rate of interest on the principal sum due between the date of filing the suit and the date of judgment should be 6 per cent. per annum, would be that if he came to that conclusion by exercising his discretion in a non-judicial manner. In reaching his decision to award the appellant 6 per cent. per annum only during the relevant period, the learned resident magistrate said:

> "I have therefore to consider whether the rate of interest claimed by Mr. Chaddah is reasonable. It will be observed that the rate was 84 per cent. per annum. I do not say that a rate considerably in excess of the court rate of 6 per cent. would necessarily be considered unreasonable. If the plaintiff had loaned money on a very poor security he would no doubt be justified in asking a high rate of interest, but I think one may use the provision of the English Moneylenders' Act, 1900, as a yardstick. There any rate over 48 per cent. is deemed to be unreasonable unless the contrary is proved whilst even a rate less than 48 per cent. can be shown to be unreasonable in the circumstances of the present case. In High Court Revision No. 3 of 1960, Mr. Justice Murphy said that a rate of 80 per cent. per annum was 'emphatically not reasonable'. It would appear therefore that 84 per cent. would on the face of it certainly be unreasonable. Moreover the original debt was only Shs. 1,000/-. Interest claimed up to the date of filing the suit already amounts to Shs. 1,190/-. That is considerably more than the principal itself, and the remarks of the court in *Singh v. Doshi* (8) (1919), A.I.R. All. 1, to which I have already referred, show that the court should not allow interest to continue at an unconscionable rate where so much interest has already accrued due before filing the suit. For all these reasons I am satisfied I should not allow interest at the rate claimed after filing the suit."

The learned resident magistrate then awarded the rate of 6 per cent. per annum between the date of filing the suit and the date of final payment. The decision in the case cited, *Singh v. Doshi* (8), reinforces the view that the award of interest after the institution of the suit is within the discretion of the court and it was held in that case that where throughout the whole period of dealings between the parties compound interest had been charged and exceeded one-third of the amount of the claim, a court would be justified in refusing future interest. In the instant case I cannot say that the learned resident magistrate exercised his discretion unjudicially. I therefore dismiss the appeal with costs.

Appeal dismissed.

For the appellant:
M. S. Chaddah, Dar-es-Salaam
The respondent did not appear and was not represented